SCC File No.: 39559

IN THE SUPREME COURT OF COURT

(On Appeal from the Court of Appeal for British Columbia)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

-and-

WILLIAM VICTOR SCHNEIDER

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

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TABLE OF CONTENTS

PAGE

PART I: OVERVIEW AND STATEMENT OF FACTS

Overview

1. The respondent William Schneider was convicted on October 19, 2018, by a judge and jury of the second degree murder of Natsumi Kogawa, contrary to s. 245(1) of the *Criminal Code*. He pleaded guilty at the end of the Crown's case to indecent interference to her deceased body, contrary to s. 182(b) of the *Code*. This appeal as of right, pursuant to s. 693(1)(a) of the *Code* is based on Justice DeWitt-Van Oosten's dissent from the majority of the Court of Appeal for British Columbia on the following question of law: did the trial judge err in admitting statements made by William Schneider [the respondent] during a phone conversation, overheard by the respondent's brother, Warren Schneider Jr? *R. v. Schneider, 2021 BCCA 41, ("BCCA"), AR, Vol. 1, Tab 1B, p. 6*

2. The appellant Crown submits that the majority of the Court of Appeal erred in concluding that the trial judge should not have admitted this evidence. Specifically, the trial judge correctly found the evidence to be logically relevant. Both the trial judge and DeWitt-Van Oosten J.A. in dissent correctly identified that the respondent's statement was capable of interpretation by the trier of fact, and therefore properly before the jury. Relevance sets a low threshold for admissibility and reflects the inclusionary nature of evidentiary rules. Although Warren Schneider Jr. only heard one side of the conversation and could not remember much of it or describe the exact words his brother used, he was able to describe the gist of what his brother said. In other words, in potentially ascribing meaning to the words, the jury would not be engaged in mere conjecture.

3. Assessing logical relevance of an overheard utterance is a case-specific enquiry, informed by the extent to which the circumstances surrounding those utterances (otherwise described as "context") offer an evidential foundation that has the capacity to support the ascertainment of their meaning. The context in this case was provided by the respondent's relationship with the witness, the unusual nature of the respondent's statements to his brother about Ms. Kogawa contemporaneous to the phone call to his wife, and the reference to her at the beginning of the call, and the manner in which Warren Schneider Jr. described what he heard and how he testified. The trial judge also found that the evidence was legally relevant as the probative value was not outweighed by prejudicial effect. The Crown's position is that the trial

judge properly left the meaning of the impugned words and their weight with the jury with sufficient cautions to the jury on its frailties and use. *Judge's Ruling, AR, Vol. I, Tab 1A, p. 1*

4. Ms. Kogawa was a Japanese student visiting Vancouver at the time of her death. She was last seen alive on September 8, 2016, in the presence of the respondent. A Missing Person's Bulletin with a photograph of her and the respondent was issued by the RCMP on September 27, 2016. Her body was found September 28, 2016, in a suitcase hidden in some bushes at a construction site in Vancouver. It was located because earlier that day the respondent told his brother Warren Schneider Jr. where her body could be found (and Warren Schneider Jr. then reported this information to the police). The pathologist was unable to determine the cause of death primarily due to the decomposition of the body, uncertainty about the toxicological findings and the lack of visible signs of injury.

5. The respondent did not testify. By the end of the Crown's case, the defence theory was that the respondent acknowledged being with Ms. Kogawa when she died but did not cause her death. The Crown theory, that he committed an unlawful act intending to kill her was based primarily on the respondent having been with her when she died, his post-offence conduct in obtaining a suitcase and then moving the body in the suitcase and hiding it, and his suicide attempt. Also, he made a number of statements in addition to the one that is the subject of this appeal. He never said her death was an accident, unintentional or that he was not responsible. Rather, he made a number of incriminatory statements to a number of people, as follows:

- **To the police** – "this isn't a premeditated thing"; "suddenly got very, very heated and, then went wrong"; "she's definitely a victim. It shouldn't have happened"; he didn't know if "her heart went or if it was her breath" – while making a hand gesture, putting his thumb and index finger to his nose and cupping his mouth with his hand; he wasn't "actually certain that she passed when sh-, at the moment she did"; he said he would send a "full confession" to her family; that "it's my fault".

- **To his father** – was sent a letter weeks after his arrest and told "please believe me that none of it was premeditated";

- **To his brother, Warren Schneider Jr.** – he told his brother he "did something bad" on September 21; on the evening of September 27, when confronted with the Missing Person Bulletin he told his brother they had three dates, they had internet talk about having sex

in a tent, and on the last date they "took some medication", he appeared "remorsefully sad. Glad to get it off his chest *per se*"; the next morning, September 28, they purchased alcohol and heroin and went to a park as the respondent intended to overdose and kill himself.

6. **To his wife in Japan, on the phone** – It is the admissibility of this evidence that is the issue on appeal. The respondent told his brother that the body was in a suitcase in a location in downtown Vancouver, and the police could be told after he was dead. The suicide attempt failed. The respondent then asked to borrow his brother's phone to call his estranged wife in Japan. Warren Schneider Jr. stayed nearby during this call. Warren Schneider Jr. was 10 feet away, "within earshot" and close enough to hear what the respondent said during that approximately 13 minute phone call and testified before the jury as follows.

7. In **direct examination at trial**, Warren Schneider Jr. said that at the beginning of the call he heard the respondent explicitly reference the "missing Japanese woman, student". "More was said… Near halfway through the conversation he said he did it, he killed her". He could not say these were his brother's exact words. He was asked if that was the "gist of the conversation" and answered "perhaps"… "he could only hear one side of the conversation". He could not remember anything else that was said. His brother was in a "relaxed mode", the tone of voice was calm, "similar to when a couple doesn't really get along, the – the tone of the conversation changes". *Testimony of Warren Schneider Jr., Appellant's Record ("AR"), Vol. II, Tab 5, p. 97-192*

8. In **cross-examination at trial**, he agreed the conversation was "pretty even" back and forth, "60/40, William speaking more". He agreed he did not know what was said before or after those words, that he "didn't hear any other –". When asked about "whatever the phrase was", whether it was the middle, start or end of a sentence, he agreed he did not know. He agreed he was "trying not to listen" and that his brother was calling his wife for the last time, and "that's true, and also it's a lot of stress from the night before for me and to absorb every little detail, which I wasn't doing".

9. To be logically relevant and admissible, the Crown was required to show that the words were capable of interpretation – that it was possible to interpret them. The trial judge found there was *some* evidence from which a properly instructed jury, acting reasonably, could find

that the utterances "I did it" or "I killed her", this being the "gist" of what Warren Schneider Jr. heard his brother say, amounted to an acknowledgement of the respondent's involvement in Ms. Kogawa's death.

10. The majority of the Court of Appeal for British Columbia concluded that as a matter of law a jury could not give meaning to these words as there was no "surrounding context". Warren Schneider Jr. could only hear one side of the phone conversation, he did not hear it completely, and was unable to recollect the exact words his brother used. According to the majority, in these circumstances it was not possible for meaning to be ascribed to these words, and therefore the evidence was logically irrelevant and inadmissible, and a new trial was required.

11. The appellant's position is that the majority was wrong in finding there was no logical relevance to this evidence. The "gist" of the conversation that Warren Schneider Jr. heard did not need to be verbatim, or a complete account of the one-side of the conversation. As the trial judge noted, although Warren Schneider Jr. was not actively trying to listen, he was present for the whole conversation and described some of it (albeit he was not particularly forthcoming about the content or details). The phone call started with reference to the missing Japanese woman. In other words, there was adequate "micro-context" (parts of something spoken that immediately precede or follow a passage) - meaning was possible from this evidence.

12. Furthermore, his evidence as to what he heard and remembered of the conversation, was in the context of what he and the respondent had earlier been discussing - the missing Japanese woman and the respondent telling him where her body was. He knew his brother wanted to kill himself because of what happened to Ms. Kogawa, or his likely imminent identification by the police due to what happened to her. The majority erred in concluding that this "macro-context" (the circumstances that form the setting for an event, statement or idea), the conduct and statements of the respondent up to the phone call, did not assist Warren Schneider Jr.'s in understanding the "gist" of the conversation or utterances he overheard, or were of no use to the jury in its ability to assess what, if anything, the respondent meant. The utterances Warren Schneider Jr. heard did not stand alone but were almost contemporaneous and proximate to other information provided by the respondent regarding the deceased.

13. This appeal should be allowed essentially for the reasons articulated in dissent by Justice DeWitt-Van Oosten. She correctly concluded that the trial judge was correct in her conclusion that there was evidence upon which the jury could give meaning to what Warren Schneider Jr. testified he heard the respondent say and it was therefore logically relevant. Likewise, she was correct in showing significant deference to the trial judge's conclusion that the probative value of the evidence outweighed the possible prejudice of improper use. The possible prejudicial effect was ameliorated by a strong caution to the judge about what use could be made of the evidence. The possibility of incompleteness is a matter of weight for the jury.

14. Counsel in final submissions provided thorough arguments to the jury regarding the weight or meaning to be given the overheard utterances considering the evidentiary record. The trial judge gave fair instructions to the jury on how to assess the evidence of the overheard utterances:

> [79] You heard testimony from Warren Schneider Jr. about a telephone conversation he overheard between Mr. Schneider and his wife. Warren Schneider Junior could not hear the other side of the conversation. He testified he only heard parts of the conversation and was trying not to eavesdrop. He did not hear what was said before or after the words he overheard and could not remember the exact words spoken by Mr. Schneider. This is something you need to bear in mind when you consider what, if any, weight can be given to Warren Schneider's evidence about the overheard conversation.
>
> [80] As well, Warren Schneider Jr. testified that at the time Mr. Schneider phoned his wife he had drunk a mickey of vodka and had taken some heroin. You should consider whether Mr. Schneider's drug and alcohol use may have affected what he said. It is up to you to decide whether you believe Warren Schneider Junior about what Mr. Schneider said and what Mr. Schneider meant by the overheard words. If you are in doubt about any of that, you should ignore the evidence.
>
> [81] Unless you decide that Mr. Schneider made a particular remark or statement, you must not use it against him in deciding the case. *Written Instructions: AR, Vol. IV, Tab 30; Transcript Charge to the Jury: AR, Vol. I, Tab 1D, p. 90(34)-91(12)*

15. In reviewing the facts of the case, and not contained within her written instructions, the judge said:

> Warren Schneider Junior gave evidence about overhearing a conversation between Mr. Schneider and his wife in which he said "I did it" or "I killed her." Warren

> Schneider Junior could not remember the exact words or hear the other side of the conversation. As well, he testified he only heard parts of the conversation and was trying not to eavesdrop. Warren Schneider Junior agreed in cross-examination that Mr. Schneider may have said "I did it," and he did not know if the comment was related to the missing woman. This is something you need to bear in mind when considering what weight, if any, can be given to Warren Schneider Junior's evidence about the overheard conversation.
>
> The Crown says the overheard conversation amounts to a confession on the part of Mr. Schneider that he caused Ms. Kogawa's death. The defence says his evidence is ambiguous, untrustworthy, and should be given no weight. As I indicated earlier, it is up to you to decide whether you believe Warren Schneider Junior about what he overheard Mr. Schneider say and what Mr. Schneider meant by his words. If you are in any doubt about any of that, you should ignore the evidence. *AR, Vol. I, Tab 1D, p. 99(37)-100(15); see also p. 98(19)-99(36)*

16. The trial judge's responsibility as "gatekeeper" was to determine if the jury had sufficient tools to consider the evidence, and the appellant's position is they did. The instructions the judge gave the jury about the overheard utterances (along with the closing submissions of counsel) ensured the jurors were aware of the frailties of this evidence; equipped them with the tools required to assess its weight; and accurately explained the use that could be made of the evidence. The jury was told to ignore the evidence if they had any doubt about what the respondent said or meant.[1] This Court should be satisfied that the trial judge identified and applied the appropriate legal test for admission of the phone conversation, considered the frailties of the evidence, and reasonably left it to the jury to determine its weight.

17. The dissenting justice in paragraph [78] of the reasons properly identified the context or circumstances that could inform Warren Schneider Jr.'s evidence about what the respondent said to his wife during the telephone call, a call that was intended to be the respondent's "last call" as it was his stated intention to try and kill himself again. Warren Schneider Jr. was familiar with his brother's personal circumstances. The brothers were together for less than 24 hours, in what the appellant characterizes as intense and unusual circumstances. During this short period, when asked about the RCMP Missing Person Bulletin, the respondent told his brother that "it was true". He told his brother he knew Ms. Kogawa, had been with her, and that on their last date they had "taken medication". After the respondent said these things, he appeared to his brother to be "…remorsefully sad. Glad to get it off his chest *per se*".

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[1] AR, Vol. I, Tab 1D, p. 91(5-9); p. 100(10-15)

18. The next morning the respondent told his brother he wanted to commit suicide. He told his brother that the body was at a construction site in downtown Vancouver. He said her body was in a suitcase - *by necessary implication deceased*. The respondent never told his brother that Ms. Kogawa's death was an accident, or that he did not know how she died. Through his words and conduct that day the respondent was demonstrating culpability for a wrongful act that caused the missing woman's death. As the Crown argued at the trial, the jury could readily infer that the respondent was reluctant to fully explain his actions to his brother, his father, or his wife, but was implicitly willing to take responsibility for them.

19. The respondent made the phone call minutes after an unsuccessful suicide attempt and having revealed his knowledge of where the body lay. Warren Schneider Jr. could not provide the exact words spoken, but he was able to provide reliable evidence of the essence of these words, the "gist" of that part of the conversation, spoken during a phone call which started with reference to the missing Japanese student. He was nearby and heard the respondent's side of the conversation, albeit he did not remember anything else that was said. The jury could accept some, none or all of Warren Schneider Jr.'s evidence. He was able to describe his brother's demeanour, words and conduct that day. The overheard utterances came before any police involvement with the respondent or formal allegations of wrongdoing against him. The overheard utterances therefore were, when considered in context, capable of interpretation.

20. The appellant respectfully requests that this Honourable Court allow the appeal and reinstate the conviction for second degree murder, for as the dissenting justice recognized the trial judge correctly determined that the overheard utterances were capable of interpretation considering the surrounding evidentiary context. There was *some evidence* from which a properly instructed jury, acting reasonably, could find the gist of the conversation amounted to an acknowledgement of the respondent's involvement in Ms. Kogawa's death. In ascribing meaning to the words, the jury would not be engaging in mere conjecture: *BCCA at [92], dissent*. No prejudice arose from the consideration of this evidence in the context of the case, and in particular the instructions provided to the jury remedied any concerns in this regard. On this basis, the appeal should be allowed and the conviction for second degree murder restored.

Statement of Facts

21. The following is the evidence relevant to the Crown's case as a whole. The *voir dire* and trial evidence, submissions of counsel, and jury instructions relating to the testimony of Warren Schneider Jr. is dealt with in a separate heading, below. Natsumi Kogawa was a 30 year old Japanese woman (5 feet, 112 pounds) who came to Canada on a student visa in May, 2016. She studied English in a Vancouver school and appeared happy to her friends. In September she was looking for a job to get a working visa to extend her stay in Canada. A friend offered to take her to a Japanese restaurant in Vancouver to pick up an application form. They agreed to meet on **September 8th** near her Burnaby residence at 5:30 p.m. She never kept the appointment.

22. After receiving a Missing Persons Report on September 12, police tracked Ms. Kogawa's last credit card transactions (September 8, 2016, 1-1:45 p.m.). They retrieved CCTV videos of areas with images of Ms. Kogawa and an unidentified male. On **September 27th** the RCMP issued a News Release with photos of a "Person of Interest Seen With Missing Student".[2] On **September 28th**, the respondent's brother, Warren Schneider Jr., told Vernon RCMP that his brother had told him the location of Ms. Kogawa's body. Her body was found that same day, at that location, stuffed in a suitcase, hidden in the bushes of a restaurant property that was under construction, in downtown Vancouver. Branches, twigs, leafy plants and moss were stuck to her body.

23. **Dr. Lee, the pathologist**, was unable to determine the cause of death due to the decomposition of her body, toxicological findings and the lack of specific visible signs / injuries.[3] Death may have been caused by asphyxiation. Dr. Lee said, "Asphyxia cases oftentimes are not associated with specific visible findings at autopsy".[4] Based on her review of animal studies, death by suffocation is within three to six minutes. Dr. Lee could not rule out an overdose of drugs.

24. Traces (of two prescription medications for sleeping (Zopiclone) and anti-anxiety (Lorazepam) were detected in the liver. Kimberly Young, the **toxicologist**, could not determine

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[2] Admissions (Ex. "A"), Ex. 6 at Trial, AR, Vol. IV, Tab 11, p. 7
[3] AR, Vol. III, Tab 7, p. 126(16-47); p. 132(27-47).
[4] AR, Vol. III, Tab 7, p. 132 (27-43).

the concentration of these medications at the time of death.[5] Dr. Lee said cardiac arrest is a phenomenon when a person is suffocated.[6] It can also occur during physical exertion, including sexual relations. Ms. Kogawa never had a prescription or purchased zopiclone or lorazepam while in Canada. The respondent had been prescribed it on 8 occasions in July to September, 2016.[7]

25. **Statements to Police** – In an interview with the police on October 18, 2016 the respondent talked about first meeting Ms. Kogawa mid-August and their dates. The transcript is in the Appellant's Record, Vol. 4, Tab 21, p. 73 and the audio has also been provided, Tab 22. He said "…**this isn't a premeditated thing**" (Statement, p. 4 of 76, lines 20-21, p. 5 of 76(12)). On their last date (September 8), they were going to have "really good sex" that they had talked about. He bought a tent for $20. He thought they had arranged to meet at 11 a.m. but she was late. He knew she had another appointment later that day. They had trouble setting up the tent, it was "really rushed"; they each drank three beers.

26. At one point he said, "…**suddenly got very, very heated and, then went wrong**". When asked to clarify he said, "I think it was time….the amount of time we'd given each other on that day" (Statement, p. 5 of 76, lines 18-24, p. 50 of 75, lines 14-16). At another point he said, "…**she's definitely a victim. It shouldn't have happened**" (Statement, p. 47 of 76, lines 9-11).

27. When asked "How did she die?", the respondent said he didn't know "if **her heart went or if it was her breath…**" (Statement, p. 57 of 76, line 8-17). At that point he made a brief hand gesture, putting his fingers to his nose and cupping his mouth with his hand. **(**Det. Woodcock – AR, Vol. III, Tab 8, p. 183(8-35); Det. Smith – AR, Vol. III, Tab 7, p. 52(31)-p. 53(44))

28. The hand gestures made by the respondent were:

> ... he was quite engaged making eye contact with us throughout the -- the interview process. When we asked him question[s], as he's explaining this, he paused, brought his hand to -- towards his mouth, covered his palm over his mouth and put his index finger and

[5] AR, Vol. III, Tab 7, p. 23(26)-24(23) p. 158(15)-159(12)
[6] AR, Vol. III, Tab 7, p. 136(9-27), p. 150 (19-43)
[7] Admissions, paras. 21-25, Ex. 6 at Trial, AR, Vol. IV, pp. 5-6

> his thumb to his nose like this, and he looked down and was in concentration as if, in my mind, recalling a memory...
> He had his hand in his -- over his nose like this for about two or three seconds as he was talking through this ..., he was -- he brought his hand up, so he didn't press hard, obviously you can hear he's not talking like this. He'd bring his hand up and he was talking as he's doing this with his hand -- palm over his mouth. *AR, Vol. III, Tab 7, p. 52(37)-53(7)*
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> ... he brought his hand again to his mouth and bring index finger and thumb back to his nose, put it up and then put it down again. ... *AR, Vol. III, Tab 7, p. 53(34-39)*
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> ... He used his finger and first finger -- or, sorry, thumb and first finger, cupped it to his nose, placed it to his nose, and then cupped the hand around the mouth like so as he -- whoops, sorry, as he spoke. *AR, Vol. III, Tab 8, p. 183(9-13)*
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> ...
>
> When Mr. Schneider demonstrated that gesture to us, he was talking as he did so. ... He talked to me and continued talking ... held his thumb and his finger to put to his nose, and his mouth he cupped -- cuffed -- sorry, cuffed around his mouth. ... He placed his thumb and his finger to his nose, and he cuffed his hand around his mouth *AR, Vol. III, Tab 8, p. 187(45)-188(19)*

29. He told the interviewing officers that he wasn't "**actually certain that she passed when sh-, at the moment she did**". He stepped out of the tent for a smoke and "didn't think she was at that time". He asked the police if it was her heart or her breath. The respondent made a similar hand gesture shortly thereafter (Statement, p. 57 of 76, lines 10-19), p. 60 of 76, lines 8-9). See sketch of interview room: *AR, Vol. IV, Tabs 25, 26 (Exs. 35, 39)*.

30. He told police he would send a letter with a "**full confession**" to Ms. Kogawa's family. At the end of the interview, in response to a police comment that he has been showing remorse from day one, the respondent said "But it is, it's my fault" (Statement, p. 66 of 76, lines 26-29, p. 75 of 75, line 31).

31. **Letter to his father** - In a November 4, 2016 letter to his father, the respondent wrote "And, just like court proceedings that await me, please believe me that NONE of it was premediated": AR, Vol. IV, Tab 24, p. 159.

32. **Statements to his brother** - The statements the respondent made to his brother will be discussed in detail below, under the heading "Evidence of Warren Schneider Jr.".

33. **The respondent's movements** – In addition to the RCMP Bulletin showing Ms. Kogawa and the respondent (carrying a tent) walking together on the afternoon of September 8, 2016, video clips also captured them in three locations purchasing items and walking around downtown Vancouver between 1:00 and 1:45 p.m. Closed-circuit cameras at the Cambie Street Catholic Hostel for Men, where the respondent was living, captured his entry and exit on three days. The clips show him: (i) leaving the hostel in the early morning of **September 8** carrying a tent and shoulder bag (ii) returning that evening to the hostel just before 10 p.m. without the tent, (iii) leaving the hostel on **September 9** around 7:28 a.m., (iv) returning that evening after 8 p.m. carrying a large, unweighted suitcase, (v) leaving the hostel in the morning of **September 10** carrying the suitcase, and (vi) returning after 4 p.m. without the suitcase and wearing different clothes. *Ex. 18, AR, Vol. IV, Tab 18, p. 53*

34. **Evidence from witnesses who knew Ms. Kogawa** – The Crown led evidence from a friend of Ms. Kogawa, as well as her boyfriend. Ms. Kogawa's friend, **Derek Manhas**, testified as to Ms. Kogawa's positive frame of mind and the fact that she had been planning for the future by seeking employment.[8] Text and email communications between Mr. Manhas and Ms. Kogawa were admitted into evidence, which established that they had planned to meet in the late afternoon on September 8, 2016, as Mr. Manhas was going to help Ms. Kogawa find work.[9] However, his text messages to her that day of 4:32 p.m. and following remained unread and she did not show up at their appointed meeting place.[10]

35. Ms. Kogawa's boyfriend, **Juanito Vergara**, also testified. He said that she had been planning for the future, seeking employment, and had been learning to play a new musical instrument. She did not take prescription medication.[11] Ms. Kogawa and Mr. Vergara had planned to see each other the weekend of September 10, 2016. However, when Mr. Vergara sent her a text message on the Saturday asking if she would be coming over that day or the next day,

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[8] AR, Vol. II, Tab 4, p. 55 (35) – 57 (4)
[9] AR, Vol. IV, Tab 12, 13, pp. 18-28
[10] AR, Vol. II, Tab 4, pp. 66 (35) – 70 (27)
[11] AR, Vol. II, Tab 4, p. 81 (18-44)

she did not respond and his message remained unread. Over the course of that evening and the following day, Mr. Vergara became increasingly concerned about his inability to contact her and was ultimately involved in reporting her to the police as a missing person.[12]

36. **Evidence from witnesses who worked at the shelter the respondent was living in** - The Crown led evidence from two people who worked at the Catholic Charities Men's Hostel, an emergency shelter for transient or homeless men, where the respondent was staying at the relevant time. The first, **Naoko Ebata**, testified that shortly after Labour Day in 2016 the respondent told her he had met a Japanese woman and that he had gone hiking with her. He said he hoped to go camping with this woman and that it would probably be good to get a tent. He seemed happy and excited. Ms. Ebata understood that it was a romantic relationship. A few days later, however, the respondent told Ms. Ebata that it was not going to "work out" with the Japanese woman and he seemed a little bit sad. He told her the woman's name was Natsumi. *AR, Vol. II, Tab 6, p. 224(28)-226(11), p. 229 (3-11)*

37. **Trevor Travis**, another hostel employee, testified that he had been present when the appellant first told Ms. Ebata about a Japanese girl he had met. He remembered the respondent saying that he and the Japanese girl had been getting to know each other, had gone hiking together and that they were thinking of going camping. Mr. Travis also testified that the respondent left the hostel around September 20 or 21, 2016, without telling Mr. Travis. This was unusual because on previous stays the respondent had told Mr. Travis when he was checking out: *AR, Vol. III, Tab 7, pp. 5 (42) – 6 (46), p. 7 (5-20)*. (The appellant notes that the appellant travelled to his father's home in Vernon on September 20th, and that it was apparent from the respondent's financial records that he did not have the funds to purchase a ticket prior to that date.)

38. **Crown Theory** – The Crown's final submissions are found in the Appellant's Record, Vol. III, Tab 10, p. 256 (the trial judge's summary for the jury in AR, Vol. 1, Tab 1D, p. 110(23)-111(24)). At trial, the Crown's theory was that the appellant and Ms. Kogawa were on a date on September 8, 2016. He became angry because Ms. Kogawa had to leave for another appointment. "[I]n the heat of the moment", the appellant killed her by "smothering or

[12] AR, Vol. II, Tab 4, pp. 84(44) – 87 (41)

asphyxiating" her, using his hand and fingers to cover or block her mouth and nose. He intended to kill her or knew she would die (s. 229(a) *Code*). In Crown counsel's words: "[W]hen someone cuts off another's ability to breathe, they will undoubtedly die. Even a small child knows that." *AR, Vol. III, p. 272(31-32)* She did not die accidently, from a heart attack or die by suicide, with the respondent simply being present but not responsible. The pathologist's evidence was that the cause was "undetermined" due to the condition of the body by the time of the autopsy. However, it was not inconsistent with causing death through suffocation or asphyxiation.

39. The Crown further argued that after the death, the appellant "took steps to cover his tracks so there wouldn't be a trail of evidence that not only would lead the police to him, but also hamper their ability to gather evidence which would implicate him in the death ...". This included abandoning the tent that he had just purchased, buying a suitcase and then concealing Ms. Kogawa's body in it, moving her body, and then concealing the suitcase. This conduct is inconsistent with her dying from natural causes. He left Vancouver and travelled to Vernon as soon as he had the financial means to do so. His providing the location of Ms. Kogawa's body on the basis that he would be dead (by suicide) by the time the police found her is consistent with him having caused her death. The suicide attempt is significant in evidencing the respondent's state of mind with respect to what he had done. *AR, Vol. III, Tab 10, p. 284(34-37)*

40. The Crown relied on what the respondent said to prove that he committed the unlawful act, this being (1) his conversations with his brother, (2) what he said to his wife (3) what he wrote to his father on November 4th – "please believe me that none of it was premeditated" and (4) what he said to the police along with his gestures. These statements are a description of, or consistent with the respondent admitting that he had committed an unlawful act that he knew would cause Ms. Kogawa to die. *AR, Vol. III, Tab 10, p. 286(25-31)*

41. **Defence Theory** - At the close of the Crown's case on October 10, 2018, defence counsel said he would be calling no evidence. On October 12th, defence counsel announced the respondent would plead guilty to count 2 on the Indictment – improperly interfering with a dead human body, contrary to s. 182 (b) of the *Criminal Code*. On October 15th a formal plea was entered first before the trial judge and then before the jury, just before the Crown commenced final submissions: *AR, Vol. III, Tab 10, p. 254-256*.

42. Defence counsel outlined the defence in his final submissions which are found in the Appellant's Record, Vol. III, Tab 10, p. 288 (the trial judge's summary for the jury in AR, Vol. 1, Tab 1D, p. 111(23)-112(41)). He said the respondent admitted being present when Ms. Kogawa died but did not know why she died. The respondent also admitted putting her body in a suitcase. There was no evidence the respondent was motivated to harm her in any way. The cause of death could not be determined. The pathologist could not rule out a drug overdose, cardiac arrhythmia or seizure. The lack of physical injuries on her body was inconsistent with death by suffocation. Statements to the police did not prove his guilt for murder. Defence counsel questioned the value of the police testimony about the respondent's hand gestures without a video taped interview.

43. **The instructions to the jury** - The trial judge discussed the instructions to the jury several times. (1) **October 10:** AR, Vol. III, Tab 9, p. 207-212 (2) **October 11:** AR, Vol. III, Tab 9, p. 213-221 (Instruction re Warren Schneider Jr., pages 216-217) The parties were provided a draft charge on October 11th (not filed). (3) On **October 12th** the parties made submissions regarding this draft: AR, Vol. III, Tab 9, p. 222-250 (Instruction re Warren Schneider Jr., p. 229(20)-231(39); pp. 235(35)-237(23); p. 245(12-39) Crown counsel provided a 4-page list of suggested changes: Ex. J2, AR, Vol. IV, Tab 28, p. 170. (4) On **October 15th** the judge provided an amended charge relating primarily to the respondent's guilty plea to Count 2, following which the respondent pled guilty: Ex. J3, AR, Vol. IV, Tab 29, p. 175; Transcript: Oct. 15, AR, Vol. III, Tab 10, p. 251-255. The review of the instructions continued after closing submissions of counsel: **October 15th:** AR, Vol. III, Tab 10, p. 320-325. The next morning counsel confirmed they were content with the form of the instructions right before the judge gave her written instructions to the jury: **October 16th**: AR, Vol. I, Tab 1D, p. 78, Written Instructions: Ex. J4, AR, Vol. IV, Tab 30, p. 179.

Warren Schneider Jr.'s Evidence and Ruling re Telephone Call

44. The Crown told the jury in its opening address the testimony anticipated from Warren Schneider Jr. on the understanding the respondent was not challenging its admissibility: *September 24, 2018, AR, Vol. II, Tab 3, p. 42(4-8)*. It had been led at the preliminary inquiry. It was not until the early morning of September 27, 2018, when Mr. Schneider Jr. was scheduled to testify, that defence counsel said he wished to challenge this evidence. This despite defence

counsel pursuing other evidentiary rulings in advance of the trial and having heard the evidence at the preliminary inquiry.[13] It is noteworthy that experienced defence counsel with conduct of a serious high profile murder case did not earlier consider the overheard utterance to be inadmissible, as implicit in this conduct was that he considered this evidence to be capable of discernible meaning.

45. Warren Schneider Jr. (49 years old, less than a year older than his brother) testified that the respondent took a trip to Japan in the summer of 2016 to visit his wife and son to try to bring them back to Canada. His trip wasn't successful. When the respondent returned in July, he was "sad and lost": *AR, Vol. II, Tab 5, p. 105(26)*.

46. Warren Schneider Jr. testified that on **September 21, 2016** his brother was living with their father, in Vernon, but they visited in Kelowna. They met in a park for under an hour. Just before the respondent left, he said he "did something bad" and walked off: *AR, Vol. II, Tab 5, p. 106-108*. On **September 27th,** Warren Schneider Jr. called the respondent and told him about the Missing Person RCMP Bulletin. The respondent hung up the phone: *AR, Vol. II, p. 112(19-25)*. Warren Schneider Jr. travelled to Vernon to see his brother that evening, arriving around 10:30 p.m.

47. The walked to the beer store, ten-12 minutes away. On the way back the respondent "brought it up" and said "that it's true". The respondent shared some details about the relationship with Natsumi. He said they had three dates. She was late for each. On the third date "there was medication taken" by both of them: *AR, Vol. II, Tab 6, p. 113(1)-116(16)*. They had internet conversation about having sex in a tent in Stanley Park. She wanted to go to Stanley Park, but the respondent told her there was another place. She told the respondent she had another appointment. After the respondent said these things, he appeared to his brother to be "…remorsefully sad. Glad to get it off his chest *per se*": *AR, Vol. II, Tab 6, p. 121(13-46)*.

48. The next morning the respondent told his brother he wanted to commit suicide, with his brother by his side. He purchased a mickey of vodka and some heroin. They went to nearby Polson Park, around 10 or 11 a.m. The respondent drank the vodka. He told his brother that the

[13] Other voir dire rulings: Oral Ruling on statement to the police and his brother, 2018 BCSC 2507; Oral Ruling admissibility of photograph of suitcase: 2018 BCSC 2500; Oral Ruling Admissibility of Autopsy Photos: 2018 BCSC 2501, not included in the Appellant's Record

body was at a construction site or restaurant at Nicola and Davie in downtown Vancouver. He told him "where she was laying", and that after he kills himself to tell the police. He said her body was in a suitcase. He injected the heroin but didn't die. *AR, Vol. II, Tab 6, p. 122-130*

49. **Voir Dire Testimony of Warren Schneider Jr. and Ruling** - Mr. Schneider Jr.'s testimony was then interrupted to conduct a *voir dire* into the admissibility of the overheard statements. In direct examination, Warren Schneider Jr. was asked about the telephone call: *AR., Vol. II, p. 135- (T. 3, p. 879 (3-8))*. At the beginning of the call to the respondent's wife in Japan he heard the respondent say, "Did you see the news of the missing Japanese woman, student?" "And then he said 'I did it'", "'I killed her'", about halfway through the conversation. He was near his brother during the call, he was 10 feet away. He could only hear one side of the conversation, "he was speaking more than she was." He could hear the conversation; he was not eavesdropping. *AR, Vol. II, Tab 5, p. 135-137*

50. In cross-examination, (*AR, Vol. II, p. 138(35)*) Warren Schneider Jr. said that the length of the call as being 13 minutes sounded "about right". He agreed he could not hear what the respondent's wife was saying. Then:

Q And I'm going to suggest to you you also don't know what exact words were spoken by him. You don't recall that, do you?
A Not the full conversation, no.
Q I'm sorry?
A Not the full conversation.
Q Well, sir, you don't even know that he said "I did it," do you?
A Yes.
Q And I'll –
A He –
Q Sorry, go ahead?
A Yes, he said that. *AR, Vol. II, Tab 5, p. 138(37)-139(2)*

51. He was questioned about his testimony at the preliminary inquiry:

A Well, he said the, "Did you hear the news," or whatever, "on the missing Japanese student," and the conversation went on for apparently 13 minutes, but I wasn't -- like I said, I wasn't eavesdropping, but he said he did it.
Q Okay. Well, we'll go on.
A That he killed her. *AR, Vol. II, Tab 5, p. 140(40-46)*

Q And you didn't say [at the preliminary inquiry] he said both "I did it" and "I killed her," you said "I did it" or "I killed her," correct?
A Yes.
Q Well, which is it?
A I guess I'll have to go back to the page, but that's exactly -- I mean, that's what I said there, "I did it" or "I killed her," but meaning that he's responsible for her death. *AR, Vol. II, Tab 5, p. 141(20-32)*

52. He then adopted as true his preliminary inquiry evidence where he had testified that he did not hear the words "exactly", or "word-for-word" but he heard the respondent saying there's a missing woman and he's responsible for it, "that was the conversation", "along those lines". It was the "message he got" and agreed it was his "feeling about it". "It seemed like he was admitting to the missing Japanese student's death". "It was his impression". He was asked if it was the "impression" he got. He answered, "Yeah. Yes." *AR, Vol. II, Tab 5, p. 143(13-40); p. 145(13-34)*

53. Crown and defence counsel made brief submissions on the admissibility of the overheard statements: *AR, Vol. II, Tab 5, p. 146-168(10)*. The trial judge reserved her decision until the following morning. On September 28, 2018 the trial judge **ruled the evidence admissible**: *R. v. Schneider*, 2018 BCSC 2546; AR, Vol. II, Tab 5, p. 169(18-20), with reasons to follow. The reasons state that (i) the overheard statements had probative value and (ii) the probative value of the evidence outweighed the prejudicial effect that it might be used improperly. The trial judge (i) outlined the background (paras. 5-10), (ii) the legal parameters (paras. 11-14) from the decisions counsel discussed (*R. v. Ferris*, 1994 ABCA 20; affd. [1994] 3 S.C.R. 756; *R. v. O'Reilly*, 2017 BCSC 276; *R. v. Bennight*, 2012 BCCA 190) and (iii) applied the law to the facts (paras. 15-22). She noted that the respondent's wife did not testify as she lived in Japan and was not a compellable witness (para.10).

54. In the ruling, the judge acknowledged that the Warren Schneider Jr. could not hear the other side of the conversation, could not remember the exact words [the respondent] used, and could not remember any other parts of the [telephone] conversation: Ruling at [8], [9]. However, she was satisfied there was sufficient "context" surrounding the conversation that the evidence could be left with the jury:

> [17] Warren Schneider Jr. testified he did not hear what Mr. Schneider's wife was saying on the other end of the phone but that the gist of the conversation was that Mr. Schneider was taking responsibility for Ms. Kogawa's death.
>
> [18] Although Warren Schneider Jr. was not actively trying to listen, he was present for [the] whole conversation and is able to give evidence about the context of the conversation. The context of the conversation was that he and Mr. Schneider had been discussing the missing Japanese woman. Prior to the conversation, Mr. Schneider had told Warren Schneider Jr. where Ms. Kogawa's body was located.
>
> [19] As set out in [*R. v. Ferris*, *[1994] 3 S.C.R. 756*], the trial judge must be satisfied there is some evidence upon which a jury could conclude the meaning of the uttered words. As noted in *R. v. Bennight*, [*2012 BCCA 190*], the possibility of incompleteness is a matter of weight for the jury.
>
> [20] In my opinion, it is apparent from Warren Schneider Jr.'s evidence on the *voir dire* that there is some evidence on which a jury could conclude the meaning of the uttered words. While he was unable to recall the exact words, Warren Schneider Jr. testified about the context of the conversation and that the gist of the conversation was that Mr. Schneider was taking responsibility for Ms. Kogawa's death.
>
> [21] In my view, the probative value of the evidence outweighs the prejudicial effect that it might be used improperly. The prejudicial effect can be ameliorated by a strong caution to the jury about what use can be made of the evidence.

55. **Trial testimony of Warren Schneider Jr.** – He was then recalled and testified in front of the jury regarding the phone call and the overheard utterances. He said that the respondent asked to use his phone after the heroin didn't kill him, in order to call his wife in Japan. He was present while the respondent was using the phone. He was approximately 10 feet away, within "earshot" and was close enough to hear what the respondent said. He did not hear the other half of the conversation, "he only heard the one-way conversation". *AR, Vol. II, Tab 5, p. 169(47).* In his **direct examination**, he said he heard the respondent say to his wife, "Did you hear the news about the missing Japanese student?" And was then asked:

> Q What else did he say, if anything?
> A More was said, but the conversation goes for up to 13 minutes. Near halfway through the conversation was he said he did it, he killed her. Well, "I did it. I killed her" is... *AR, Vol. II, Tab 5, p. 170(40-44), appellant's emphasis*

* * *

Q And at this point I want to be clear with respect to that. Were -- can you say whether they were his exact words or not?
A No.
Q Are you able to say that that was the gist of the conversation?
A Perhaps.
Q I'm sorry?
A Perhaps.
Q What do you mean by perhaps?
A Well, I only heard one side of the conversation.
Q Okay. I'll rephrase that. That was the gist of the conversation you heard from your brother?
A Yes.
Q Can you remember anything else of --
A No.
Q -- what was said at the time?
A No. *AR, Vol. II, Tab 5, p. 171(1-18), appellant's emphasis*

Q Okay. And what, if anything, can say about your brother's demeanour when he was on the phone?
A Well, he just gave himself a dose of heroin, so he was in a relaxed mode.
Q What can you say, if anything, about his tone of voice?
A It was calm, but I guess similar to when a couple doesn't really get along, the -- the tone of the conversation changes.
Q Can you -- I'm afraid I don't -- how did the tone of the conversation change, if at all?
A It wasn't angry, but it wasn't a mild, loving conversation.
AR, Vol. II, Tab 5, p. 171(21-33)

56. In **cross-examination**, Warren Schneider Jr. agreed that the phone call lasted 13 minutes and he had no knowledge of what the respondent's wife said during the call. He also agreed that he was trying not to hear what his brother was saying. *AR, Vol. II, Tab 5, p. 188(9-12)*. He said he was certain the respondent asked his wife whether she had "heard the news about the missing Japanese student" and that this question was posed at the start of the conversation.

57. In cross-examination, he also said:

Q And during this call, did it seem to be sort of -- was your brother talking more or did the ex-wife seem to be talking more or -- or what?
A Almost 50/50. I'd say 60/40, William speaking more.
Q But a pretty even conversation back and forth?
A Yes.
Q And I'm guessing, you can't hear what she's saying, but you can tell when he's not talking, correct?
A Correct. *AR, Vol. II, Tab 5, p. 188(32-42)*

Q I assume you're thinking when he's not talking, he must be listening?
A True. Yes. *AR, Vol. II, Tab 5, p. 188(43-44)*

***

Q And whatever he did say, do you know what he did before and after he said those words or do you not because you weren't listening -- you were trying not to listen?
A Yeah, I don't -- I didn't hear any other --
Q So you don't know if that -- if it was, "I did it" or whatever it was, whatever the phrase was, you don't know whether that was in the middle of a sentence or the start of a sentence or the end of a sentence, do you?
A No.
Q Because you weren't trying -- you were trying not to listen, correct?
A Correct.
Q Okay. And I'm suggesting you're trying not to listen because you know what he's planning on doing and you know he's calling his ex-wife for the last time, correct?
A That, too, that's true, and also it's a lot of stress from the night before for me and to absorb every little detail, which I wasn't doing.
Q It's not just saying good-bye to his ex-wife, he's saying good-bye to his -- effectively getting her to say good-bye or whatever to his son, correct?
A Yes.
Q Because that was the last phone call he was going to make before he killed himself, wasn't it? That -- that's what you thought at that time, correct?
A Yeah. Yes. *AR, Vol. II, Tab 5, p. 190(19-47)*

58. Warren Schneider Jr. then testified that after the phone conversation, he and the respondent went back to the beer store and purchased more alcohol. The respondent said he wanted to buy more heroin, because the heroin hadn't killed him, but did not do so. They took some pictures on Warren Schneider Jr.'s phone (selfies). *Ex. 16, AR, Vol. IV, Tab 16*. They "hugged as if it would be [their] last hugs together". They cried. Warren Schneider Jr. left his brother and met their sister near the police station. They went to the police station. Warren Schneider Jr. then told police about the location of Ms. Kogawa's body. The respondent was arrested soon thereafter, at the park, heavily intoxicated.

59. **Crown and defence counsel's final submissions** regarding the evidence of Warren Schneider Jr. and the overheard phone call are as follows: Crown: *AR, Vol. III, Tab 10, p. 266(20)-267(34)*.

> The most important aspect of Warren Schneider Junior's evidence however is his evidence of the telephone call the accused placed to Hurori Kamiji [phonetic]. That is evidence in Exhibit 17, page 4 of 29, at 10:51, the accused is -- the phone of Warren Schneider Junior is used for 14 minutes to call the number of Hurori Kamiji.

> Defence counsel I anticipate will argue that there is insufficient context to make sense of what the accused was talking about or meant by the words, "I did it," or, "I killed her." My submission is this. The -- the argument that there was -- that there was no context in my submission reflects the perspective of a legally trained mind. Legally trained people expect and desire a great deal of detail. I myself expect a great deal of detail.
>
> In my submission, lay people can accept what I call the big picture to provide context. Context is provided by a number of items I point to, in fact, all of the events of the accused since his arrival in Kelowna on the 21st of September. By that I mean, "I did something bad." By that I mean that he hung up in response to queries with respect to Exhibit 1 [the RCMP Bulletin]. Travelling to Vernon with his brother, half brother Kevin in order to speak to the accused. Getting some details regarding Natsumi Kogawa and the date in Stanley Park.
> Hearing the accused's intention to kill himself. Hearing where the body was. The point is, is this. When the call was placed, the preceding 12 to 18 hours gives context. It's quite clear this is an emotional and difficult time for Warren Schneider Junior. The accused told his wife, "I did it," or, "I killed her." I say this; he's not referring to hiding her body on the grounds of a construction site. He's not saying to his wife, "It was an accident," or, "I didn't intend to kill her." It's true, they are not his exact words either.
> *AR, Vol. III, Tab 10, p. 285(9)-286(1)*
>
> So my submission is that you can accept he did in fact say these words to his wife but accept them for the fact that he did in fact kill Natsumi Kogawa.

60. With respect to Warren Schneider Jr.'s demeanour as a witness, the Crown noted that he was "terse", "hesitant". His demeanor was "not impressive":

> He was clearly, in my submission, conflicted between one, testifying, and the way he was asking frequently to refer to prior statements. You saw that. Request to, 'was it written', or, 'did I say it', or words to that effect . And also you must consider that he's testifying for the Crown in a second degree murder prosecution against his brother. *AR, Vol. III, Tab 10, p. 283 (25-34)*

61. The Crown submitted the jury could infer from what the respondent said to his wife, brother, and father that he was reluctant to fully explain what he did but was willing to implicitly take responsibility for her death. *AR, Vol. III, p. 286(25-31)and p. 287(20-22)*

62. Defence counsel made lengthy closing submissions regarding Warren Schneider Jr.'s testimony:

> My friend places great emphasis on the words that Mr. Schneider Junior says, "I killed her," or, "I did it." And I'll point out the obvious from his testimony before you. His – his testimony was, right after that, "Can you say, were they his exact words?" …

> "This is almost the first thing you hear at the start of the conversation?" "Yes." "The conversation is 13 minutes long?" "Yes." The next thing you heard in direct, "He said, 'I killed,' -- he killed her or, 'I did it. I killed her.'" "That was halfway through the conversation?" "Yes." "And you don't know if he was being asked a question by his wife?" "I have no idea." "You don't know if she was saying, "What will they think you did?" "Correct."
> That's the problem with only hearing one side of a conversation. He's telling her about the missing Japanese student. Hurori, you have no evidence from her. The other person on this call, you've not heard from. Was she saying, "What will they think you did?" And he said, "I," -- even if he said, "I killed," -- that, "I killed her," or, "I did it." And with respect, you can't even be satisfied he said that, because Mr. Warren Schneider Junior himself can't tell you what words were said. "I killed her," and, "I did it," in the context of this case, are very different things potentially. "I did it. I put the body in the suitcase"? Or, "I did it," as my friend would have you believe, "I killed her"? Or were the words, "I killed her"? Well, we don't know because Mr. Schneider Junior can't tell us what was said.
>
> …with no idea whether it's the start of a sentence, the end of the sentence or the middle of the sentence. No idea if he's responding to a question. It may -- it probably has something to do with why he's calling but who knows.
>
> -- what I say to you is this is a very, very undependable bit of conversation that is taken completely out of context and we have no context because you don't have the person on the other end of the phone. And what we do have, we don't even know if that was what it was actually said because he doesn't know the exact words. With -- in my submission it leaves you with virtually nothing at the end of the day. It's contextually out of place and you can't affix any value to it, even if you did know what he overheard, and he doesn't know what you overheard -- what he overheard, so he can't -- you can't be convinced what he overheard. *AR, VIII, Tab 10, p. 308(6)-310(29); see also p. 319(41-44)*

63. **Instructions to the jury** - The judge reminded the jury that Warren Schneider Jr. (i) only heard parts of the conversation and could not hear the other side, (ii) could not remember the exact words, (iii) did not know if the words "I did it" related to the missing woman and (iv) testified the respondent had drunk a mickey of vodka and taken some heroin before the call, which might have affected what he said. In two passages she told the jury it was up to them to decide if they believed his testimony about what he heard from this conversation and what the appellant meant by those words and to ignore this evidence if they were in doubt about whether it was said or what it meant. She reminded them of the positions of both parties with respect to these overheard statements – Crown: it amounted to a confession by the appellant that he caused Ms. Kogawa's death; Defence: the evidence was "ambiguous, untrustworthy and should be given no weight.": *AR, Vol. I, Tab 4, p. 89(35)-91(12), op. 98(19)-100(15)*.

64. **The Court of Appeal** (*2021 BCCA 41*) - The respondent appealed his conviction on three grounds. This is an appeal as of right only with respect to one ground, as all three justices agreed that there was no error in the trial judge's answer to the jury's question regarding the meaning of bodily harm and no requirement for a "concurrence instruction" relating to the *mens rea* for second degree murder.

PART II: STATEMENT OF QUESTION IN ISSUE

65. This appeal as of right is based on Justice DeWitt-Van Oosten's dissent on the following question of law: did the trial judge err in admitting statements made by William Schneider [the respondent] during a phone conversation, overheard by the respondent's brother, Warren Schneider Jr? The appellant Crown submits that the majority of the Court of Appeal erred in concluding that the trial judge should not have admitted this evidence. Specifically, the trial judge correctly found the evidence to be logically relevant. The judge also properly exercised her discretion in finding the evidence legally relevant. Her cautionary instructions to the jury on this evidence were appropriate.

PART III: STATEMENT OF ARGUMENT

Overview of the legal framework and factual context in this case

66. There was no dispute between the majority and dissent regarding the applicable legal principles to apply in assessing the admissibility of the evidence from Warren Schneider Jr. of the utterances he overheard the respondent make during the phone call with his wife. Both agreed the decision in *R. v. Ferris*, 1994 ABCA 20, aff'd [1994] 3 S.C.R. 756, was the "jurisprudential starting point for the admissibility analysis": *BCCA at [51], [162]*. *Ferris* and the jurisprudence since it, discussed later, establishes that an overheard one-sided conversation will be admissible if it is:

> (Stage 1) relevant to an issue - logical relevance, reviewable on a standard of correctness; and
>
> (Stage 2) its probative value is not outweighed by its prejudicial effect - legal relevance, to which significant deference is accorded when challenged on appeal.

67. The central dispute in this case relates to Stage 1, and a disagreement regarding the logical relevance of what Warren Schneider Jr. heard his brother say during the telephone call. Indeed, the majority did not even consider the respondent's alternative submission regarding Stage 2, that the trial judge erred in not excluding it on the basis that its prejudicial effect outweighed its probative value: *BCCA at [207]*.

68. Both the majority and minority agreed there is no "class-based inadmissibility principle" or exclusionary rule that precludes the admission of overheard, one-sided utterances: *BCCA at [59], [162]*. This conclusion is well supported in the authorities.[14] As these decisions recognize, there is no basis to create an automatic exclusionary rule for evidence simply because a witness only heard one-side of a conversation, or because a witness only heard parts of one-side of a conversation. Such a firm rule would assume that partial conversations are devoid of probative value, which as a matter of jurisprudential analysis and common sense cannot be the case. An automatic exclusionary rule would be inconsistent with this Court's reluctance to fetter trial judges with rigid legal rules about how to handle conflicting evidence, and hard to reconcile with the long-standing basic rule that questions of fact are for the jury. It is for the trier of fact to interpret evidence, and decide what, if any, weight should be given it.

69. The majority and dissent recognized that the question of logical relevance identified in *Ferris* is a case-specific enquiry, informed by the extent to which the circumstances surrounding those utterances (otherwise described as "context") offer an evidential foundation that has the capacity to support the ascertainment of their meaning. This typically involves consideration of *what* was overheard, *who* overheard it and *how* – this being the circumstances in which the statements were being made.

70. In the end, the fundamental disagreement between the majority and dissent relates to the answer to the question identified in *Ferris*: Was the trial judge correct that there was "some evidence upon which a jury could conclude the meaning of the overheard utterances the Crown

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[14] *Charron c. R*, 2020 QCCA 1599 at [83], *R. v. Alcantara*, 2015 ABCA 259 at [140]-[146], leave to appeal ref'd [2016] S.C.C.A. No. 14; *R. v. Foerster*, 2017 BCCA 105 at [74]; *R. v. Bennight*, 2012 BCCA 190 at [91]; *R. v. Reierson,* 2010 BCCA 381 at [39]; *R. v. Mooring; R. v. Woods*, 1999 BCCA 418 at [20]-[30]; *R. v. Hummel*, 2002 YKCA 6 at [29]-[32]

sought to lead"? In particular, the disagreement related to the scope of the circumstances which can properly be considered as "context", and whether there was enough "context" in this case.

71. The appellant's position is that there was some evidence upon which the jury could interpret what the respondent was saying to his wife on that telephone call. The evidence was capable of interpretation, and therefore the jury was properly permitted to hear it, essentially for the reasons identified by Justice DeWitt-Van Oosten in dissent: *BCCA at [78]*. A summary of the evidence before the jury which provided the context which made the overheard utterances capable of meaning, is as follows:

Circumstances relating to the dynamics leading up to the telephone call and informing its context (what the majority refers to as "macro-context").

a. The witness who overheard the utterances was the respondent's brother. They had a pre-existing relationship, and he was familiar with the respondent's personal circumstances and the relationship between the respondent and his wife. Warren Schneider Jr. knew that the couple had been separated for many years, and that the respondent's last trip to Japan was not successful.

b. Warren Schneider Jr. had met with the respondent at a park in Rutland about a week before. During that visit, the respondent became upset, gathered his things and left, saying he "did something bad" – and walked off.

c. On September 27, Warren Schneider Jr. contacted the respondent by phone and told him about the news article circulating with a picture of him and a missing Japanese student. In response, the respondent hung up the phone.

d. Warren Schneider Jr. traveled to Vernon that same evening and spoke with the respondent. The respondent told his brother "it's true". The respondent told his brother he had three dates with Ms. Kogawa. The third date was their last one. "There was medication taken" by both of them. They had had an internet conversation about having sex in a tent in Stanley Park. Warren Schneider Jr. was told that Ms. Kogawa had been late for each of the three dates; she had another engagement or appointment on the day in question. Warren Schneider Jr. told the respondent he didn't want to hear anymore; they

would talk about it the next day. The respondent's demeanour during this conversation as "very sad", "remorsefully sad". He seemed "glad to get it off his chest". They drank beer, chatted, reminisced but "avoided" the topic of the missing Japanese student.

e. The next morning, the respondent told his brother that he wanted to kill himself, and he followed through on that intention with his brother at his side. He purchased alcohol and heroin, and injected the heroin hoping to die of an overdose;

f. Before injecting the heroin, he told his brother the location of Ms. Kogawa's body, that it was in a suitcase in a construction site in downtown Vancouver. He asked his brother to relay that information to the police *after* he was dead;

Details of the telephone call (what the majority refers to as "micro-context").

g. The heroin was not strong enough and the respondent survived. The respondent asked to use his brother's phone to call his wife in Japan. Warren Schneider Jr. was present while the respondent was using the phone. He was approximately 10 feet away, within "earshot" and was close enough to hear what the respondent said. He did not hear the other half of the conversation, he "only heard the one-way conversation".

h. Near the start of the respondent's phone call with his wife, he heard the respondent ask his wife "Did you hear the news about the missing Japanese student?" He testified that more was said…. "near halfway through the conversation the respondent said "I did it, I killed her". The brother could not say whether these were the respondent's exact words. He was asked if this was the "gist" of the conversation and he said "perhaps" as he "only heard one side of the conversation". He could not remember anything else that was said at the time. The respondent's demeanour was that he was in a relaxed mode, having consumed heroin. His tone of voice on the call was "calm" and he described it as "similar to when a couple don't really get alone, the – the tone of the conversation changes"… "It wasn't angry, but it wasn't mild, loving conversation".

i. In cross-examination the brother agreed that the phone call lasted 13 minutes, and he had no knowledge of what the respondent's wife said during the call. He also agreed that he was purposefully trying not to eavesdrop. He said he was certain the respondent asked his

wife whether she had "heard the news about the missing Japanese student" and that this question was posed at the start of the conversation. Warren Schneider Jr. confirmed he did not know the exact words spoken by the respondent, or if the respondent was being asked a question about Ms. Kogawa or something else when he was overheard to say "I did it". He agreed that portions of the conversation could have been completely unrelated to Ms. Kogawa. He did not know if the words "I did it" were said in the middle of a sentence, at the start of a sentence, or at the end. He said that during the conversation they were talking about “60/40”, the respondent talking 60 percent of the time, silent for 40 percent, apparently listening.

72. Meaning could be ascertained in this context. As the dissenting justice concluded:

> [80] The statements "I did it" or "I killed her" formed part of a telephone conversation that was said to explicitly reference the "missing Japanese woman, student", thereby connecting the conversation to the subject matter of the offence. The impugned words came after the appellant had already acknowledged to WS that Ms. Kogawa was missing, that he knew her, and that he had been with her. They also came after the appellant told WS he was aware of the location of her body and, by necessary implication, the fact that she was deceased. Up to this point, the appellant had not interacted with police about the matter, from whom he might have gleaned those details. The appellant had direct and peculiar knowledge of Ms. Kogawa's circumstances when she was reported missing…
>
> [81] The appellant displayed a remorseful demeanour during his conversations with WS. He expressed an intention to kill himself, after which WS was free to tell police the location of the body. This evidence is consistent with an awareness of culpability for a wrongful act that was grave in nature. The appellant followed through on the intention to take his own life, although he did not succeed. WS provided evidence on the gist or essence of the words spoken [the conversation] during the phone call… This impression formed after the appellant had already spoken directly with WS about Ms. Kogawa's disappearance and his knowledge of her whereabouts. As noted, the impugned words came before any police involvement with the appellant or allegations of wrongdoing against him.

Stage 1: Logical Relevance

73. As a general proposition, overheard conversations between an accused person and another may be admitted at trial so long as there is sufficient information about the utterances and their circumstances for the trier of fact to understand the context of the

utterances. Single utterances, with no context, are not useful to the trier of fact and require them to speculate as to the true meaning.

74. The trial judge was required to assess the logical relevance of the evidence in order to assess its admissibility. The trial judge did not have to be satisfied (let alone beyond a reasonable doubt) that the overheard statements were an admission (or confession) before admitting the evidence. The question for the judge was whether there was some evidence upon which the jury could conclude the meaning of the uttered words.[15] As referenced in the dissent in paragraph [71], logical relevance was explained by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624, leave to appeal ref'd [2010] S.C.C.A No. 125, as requiring:

> [82] ... that the evidence have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence .... Given this meaning, relevance sets a low threshold for admissibility and reflects the inclusionary bias of our evidentiary rules ... [Internal references omitted and emphasis added by the BCCA]

75. As noted in paragraph [71], in *R. v. Arp*, [1998] 3 S.C.R. 339, this Court made clear that to be logically relevant, "an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to 'increase or diminish the probability of the existence of a fact in issue'. ... As a consequence, there is no minimum probative value required for evidence to be relevant"[16]

76. One of the reasons for not imposing a higher threshold for relevance is to ensure that a trial judge does not encroach on the role of the trier of fact to weigh the evidence. The quality or reliability of the evidence is a question of weight rather than admissibility and questions of weight are for the jury, not the trial judge. The trier of fact will be best situated to assess the question of weight at the end of the case against the backdrop of all the evidence. This sort of assessment is either not possible or prohibitively insufficient in the context of an inquiry into admissibility. If the evidence is weak, the trier of fact will see that and disregard it. If it is not, the trier of fact can properly consider it.

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[15] *Alcantara* at [138]-[139]
[16] See also *R. v. Blackman*, 2008 SCC 37 at [29]-[30]

77. Consequently, the fact that the evidence may be equivocal does not mean that it is not logically relevant or inadmissible. Again, before a statement can be admitted, it must be presented with sufficient context to give it real meaning, in the sense that it must be *possible* for the trier of fact to determine what was actually being communicated by the accused when he made the statement in question. At least it must be possible based on the evidence for the trier of fact to undertake a reasonable determination as between competing interpretations. As noted in *R. v. Underwood*, 2002 ABCA 310:

> [25] It is possible to interpret the other statements as equivocal. But facts are not irrelevant just because they can be interpreted in more than one way, or because more than one inference can be drawn from them. It need only be shown that one possible interpretation of the facts is relevant to an issue at trial; the strength or weight of the evidence is a matter for the trier of fact. In *R. v. White*, [1998] 2 S.C.R. 72, [1998] S.C.J. No. 57 (S.C.C.), Major J. observed with respect to competing interpretations on the issue of flight at para. 21:
>
> > Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.

Who heard what was said?

78. The appellant submits that the dissenting justice was correct in finding that this case was "qualitatively different from *Ferris*" (and from *R. v. Hunter,* (2001), 155 C.C.C. (3d) 225 (Ont.C.A.): *BCCA at [77], [89]*. In this case there was far greater context to inform the meaning of the overheard utterances, despite Warren Schneider Jr. not being able to provide the exact words, or what was said exactly before or after. *Ferris* had an *absence* of context, as no one could testify to the fact that the "essence of the accused's words were an admission" and as a result the "gist of [the] statement was unknown" and "unascertainable".[17] *Critically*, the evidence of Warren Schneider Jr. connected the overheard phone conversation to the subject matter of the charged offence, as the respondent introduced the call with that topic: *BCCA at [85], dissent*.

79. This case was different than *Ferris*, in which the utterances stood alone, without any capacity to inform their meaning by reference to other information directly and

[17] *Ferris* at [25], BCCA at [77], [86]

contemporaneously received from the accused in relation to the deceased, or about events proximate to that individual's death: *BCCA at [89], dissent*. The main interaction between the respondent and his brother before the suicide attempt and phone call surrounded the topic of the missing Japanese student, that they shared drugs, and that her body could now be found in a suitcase. Two people are having a conversation or engaging about a topic, and one of them interrupts or stops it in order to make a phone call in ear shot of the other; and then starts the phone call with the same topic. The witness in this situation should be permitted to provide the gist of what he overheard, understood with what he had already heard.

80. Again, the starting point for the scope and adequacy of the circumstances or context in assessing the admissibility of an overheard utterance is *Ferris*. This Court held that:

> In our opinion, with respect to the evidence that the respondent was overheard to say "I killed David", if it had any relevance, by reason of the circumstances fully outlined by Conrad J.A., its meaning was so speculative and its probative value so tenuous that the trial judge ought to have excluded it on the ground its prejudicial effect overbore its probative value.

81. The circumstances outlined by Conrad J.A. were that:

- Mr. Ferris had been arrested for murder;
- he was on the phone while in police custody;
- the words "I killed David" were part of an utterance only;
- other words passed both before and after those words;
- words could have come at the beginning of a sentence or at the end of a sentence;
- the officer could not testify as to the gist of Ferris' utterance: *[26]*.

82. *Ferris* was applied in very similar circumstances in *R. v. Hunter*, where again only a few words were overheard by a stranger to the accused. Mr. Hunter was charged with attempted murder for allegedly trying to shoot a police officer. During a break in his preliminary inquiry, a lawyer purportedly overheard a conversation between Mr. Hunter and his defence lawyer in an open part of the courthouse in which Mr. Hunter uttered "I had a gun, but I didn't point it". The lawyer acknowledged that he had just overheard part of the conversation and that there could have been words spoken before and after the utterance. The trial judge admitted the statement. The Court of Appeal overturned that decision on the basis that the trier of fact would have to guess at the words that came before and after to fix on a meaning, the verbal context for the utterance was *unknown*.

83. In each of those cases a stranger to the accused heard a snippet of a statement. In each case it was apparent that the words that were overheard were preceded and followed by other words that had not been overheard, and without which it was apparent the true meaning of the accused's utterance could not be determined. These purported admissions were isolated words.

84. Warren Schneider Jr.'s evidence was not as stark or literal as the evidence in *Ferris* and *Hunter*. In contrast, the witness in this case was not a stranger to the speaker, or the topic, and the words did not stand alone. Warren Schneider Jr. was not parroting back or repeating a few words he overheard a stranger say. He heard his brother introduce the topic with his wife - "Did you see the news of the missing Japanese woman, student?". He then described the *essence* or "gist" of what he heard his brother <u>*to be*</u> *saying* – not simply words that he heard. Warren Schneider Jr. provided the trier of fact context regarding what the respondent was talking about on the phone as he had conversations with his brother *before* the phone call on the same topic.

85. It was for the trier of fact to assess exactly what Warren Schneider Jr. heard the respondent say, as his testimony was open to interpretation by the trier of fact. Not because it was incapable of discernible meaning, but because the trier of fact could accept some, none or all of it. On the *voir dire*, his evidence was:

- the respondent said "I did it. I killed her";
- he was near his brother, he was speaking more than she was, he could only hear one side of the conversation, he was not eavesdropping;
- he could not recall the "full conversation" but what the respondent said was that he was "responsible for her death";
- that was the message he got, his feeling or impression.

86. At the trial, his evidence was:

- he was within earshot;
- the heard the respondent say "did you hear the news about the missing Japanese student";
- more was said… near halfway through the conversation was he said he did it, he killed her;
- he could not say that these were his exact words, it was "perhaps" the gist of the conversation, but he "only heard one side of the conversation";
- he could not remember anything else that was said at the time;

- he was trying not to hear what his brother was saying.
- his brother was talking more than his wife "60/40", it was a "pretty even conversation back and forth"
- he "didn't hear any other…"
- he agreed he didn't know if "I did it" was in the middle, start or end of a sentence".
- He was trying not to listen, "that's true, and also it's a lot of stress from the night before for me and to absorb every little detail, which I wasn't doing."

87. His understanding was a result of other information received directly and contemporaneously from his brother in relation to the deceased, and about events proximate to her death: *BCCA at [89], dissent*. Warren Schneider Jr. heard what his brother said as part of an ongoing interaction and dialogue between them. He provided the context for what the respondent said. Yes, he may have been wrong about what his brother was saying to his wife. That was the very issue the jury had to resolve. It does not mean the jury should not have heard it.

The "gist" of the conversation

88. The majority erred in concluding that this case "is more problematic than *Ferris* because, in this case, the witness did not recall the exact words the accused is alleged to have spoken": *BCCA at [177]*. The appellant's position is that this case is significantly *less* problematic than *Ferris*, as the witness knew the speaker, and had been speaking with him about the very topic of the missing Japanese student prior to the telephone call, and the respondent introduced the call with that topic. The utterances "formed part of an ongoing interaction and dialogue between Warren Schneider Jr. and his brother": *BCCA at [89]*, dissent.

89. Warren Schneider Jr. testified on the *voir dire* about his "impression", but at trial, the jury heard that this was the *gist* of what he heard, implicitly formed from what he heard the respondent say on the phone and *had* heard from the respondent himself. Again, his evidence was not that he happened to overhear a few words spoken as part of the conversation; rather, this was the detail that he remembered from hearing the entire conversation, albeit while trying not to listen (assuming that this evidence was accepted). This context is what made his testimony regarding the "gist of the conversation" capable of meaning and logically relevant.

90. Warren Schneider Jr. was describing the gist of what he heard, as it was another statement in a series of statements from his brother about the missing Japanese student. As noted in *Bennight*:

> [92] In the instant case, by contrast, the witness could testify to both the "gist" of the statement and the context in which it was made. The fact that Special Constable Cardinal-Mitchell was unable to recall the exact words spoken does not in and of itself render the statement inadmissible; the possibility of incompleteness was a matter of weight for the jury (*R. v. Kennealy* (1972), 1972 CanLII 1287 (BC CA), 6 C.C.C. (2d) 390 (B.C.C.A.) at 394-95; *R. v. Richards* (1997), 1997 CanLII 12470 (BC CA), 87 B.C.A.C. 21, 6 C.R. (5th) 154 (C.A.) at para. 31). The trial judge's instructions to the jury on this evidence, excerpted below, put the matter beyond question:
>
> > THE COURT: … Ms. Cardinal-Mitchell could not remember the exact words. She testified that the accused "said something along the lines of. . .", and that was in her statement too. She could not remember the exact words, and this is something you do need to bear in mind when considering what if any weight should be given to her statement.
> >
> > The Crown says that this amounts in essence to a confession by the accused that it was he who hurt Ms. Fabbro. The defence says that the evidence is ambiguous, untrustworthy, and should be given no weight. It is up to you whether you believe this witness about what Mr. Bennight said to her and when and what he meant. If you are in doubt about any of that, you should ignore the evidence.

91. There are many cases, in addition to the cases cited in the above excerpt from *Bennight* which provide authority for the proposition that accuracy, authenticity, the precise content and completeness of the words attributed to the accused are not issues of admissibility in assessing voluntariness, but are matters of weight for the trier of fact: *R. v. Morgan*, 1997 CarswellOnt 5468 (Ont. Gen. Div.) at para. 72-75; *R. v. Tehrankari*, 2007 CarswellOnt 9788 (Ont. S.C.J.) at [15]; *R. v. Lapointe*, (1983), 9 C.C.C. (3d) 366 (Ont.C.A.) 1983 CarswellOnt 1212 (Ont. C.A.) at [39]-[42]; *R. v. Park* (1981), 59 C.C.C. (2d) 385 (S.C.C.), at 394-5, *R. v. Legere* (1988), 43 C.C.C. (3d) 502 (N.B.C.A.); *R. v. Richards*, 1997 CarswellBC 272 (B.C. C.A.) at [30], [31]; *R. v. Howard and Trudel* (1983), 3 C.C.C. (3d) 399 (Ont. C.A), at p. 412, [30].

92. What distinguishes these cases and ultimately drove the majority to conclude that no meaning could possibly be ascertained from what Warren Schneider Jr. overheard was primarily the fact that because he was not a party to the conversation his evidence regarding the gist of

what he overheard was worthless:

> [198] There is a distinction between a third-party overhearing part of a conversation and the incomplete recollections of a party to the conversation. If the witness was a party to the conversation, their testimony as to the gist is equivalent to their testifying as to what was said -- albeit in a less persuasive fashion than if they had recalled the exact words spoken to them. But, crucially, they were still the party to whom the accused was speaking. A third-party testifying as to the gist of a conversation in which they only overheard one speaker is engaged not in recollection but speculation. In this case, WS is necessarily speculating as to what meaning "I did it" or "I killed her" had. *Appellant's emphasis*

93. This distinction is valid, but its import overstated. The majority raises what should be a fact-driven contextual analysis for the jury, to a determinative admissibility conclusion. This is an error as it essentially leads to an automatic exclusionary rule for an overheard conversation unless the non-participant "ear witness" has perfect and near complete recall of the words that were overheard. It elevates the evidentiary expectations of such a witness beyond what is required at the admissibility stage.

94. Although the majority noted in paragraph [193] that it was not implying that one-sided overheard conversations are presumptively inadmissible the effect of this decision, in the appellant's submission does amount to a ruling that one-sided overheard conversations *are* presumptively inadmissible without the witness being able to provide the exact words spoken.

95. Similarly, the absence of surrounding words, at least in the majority's opinion, will almost certainly be determinative of the admissibility of the overheard utterance. That approach is inconsistent with the low threshold for logical relevance and "it risks 'laying down a rule of inadmissibility' of the type explicitly rejected by the majority itself": *BCCA at [90], dissent*.

96. Also as noted by DeWitt-Van Oosten J.A. in dissent, unlike *Ferris*, the impugned words came before any police involvement with the respondent or allegations of wrongdoing against him. There could be no suggestion that the respondent was simply repeating accusations made by police or responding to questions asked by the person on the other end of the phone about what police alleged he had done. With respect, the alternative non-incriminatory conversation conjured by the majority in paragraphs [178], [179], [185], is a stretch, in light of Warren Schneider Jr.'s testimony about what his brother had already told him.

97. The majority erred in its appreciation of why the trial judge and dissenting justice found the surrounding context was sufficient to make the utterances *capable* of being given meaning by the jury. In paragraph [204] the majority holds that the "macro-context" items identified by the dissenting justice (paragraph [78]) form the setting for the respondent's statement, but concludes that these items are essentially of no assistance, or no substitute for the missing "micro-context", this being the conversation "before or after the overheard words": *BCCA at [205]*. There are adequate substitutes for being a participant to the call, such as in this case when the call is part of an on-going dynamic between the accused and the witness.

98. The majority and dissent considered the *Ferris* decision and many of the cases that have considered it. These cases certainly were not binding, as an assessment of logical relevance is necessarily a fact driven and circumstance specific assessment. But these cases are instructive regarding what circumstances should be considered in assessing the logical relevance of an overheard conversation, and arguably through the results reached on those facts. The appellant's position is that these cases support the trial judge and dissenting judge's conclusion that despite Warren Schneider Jr. not being a participant to the conversation, and despite not being able to testify to the exact words spoken, or remembering all of the conversation, his evidence as to the "gist" of what the respondent was saying, in light of what the respondent had already said and done, and was about to do (another suicide attempt) was capable of meaning.

99. Those are clearly factors that the jury would consider in assessing what if any weight to give the overheard utterances - indeed defence counsel relied on these facts, and the trial judge directed them to these facts. But these circumstances, which could certainly undermine or negate the weight of the overheard utterances do not make them inadmissible. The trial judge properly left the meaning of the impugned words and their weight with the jury.

100. For example, in the decisions of *R. v. Cador*, 2010 ABCA 232 and *R. v. Yates*, 2011 ABCA 43, considered in paragraphs [62]-[65] of the BCCA reasons, the witnesses were only able to give "incomplete", "equivocal" and "fragmented" descriptions of what they heard, yet their statements were admitted and appeals on this basis dismissed. In *R. v. Buttazzoni*, 2019 ONCA 645, the uttered words were "more than simply partial thoughts" and there was considerable context within which to consider them because of what the officers also saw: *[56]-[59]*. In *Charron c. R*, 2020 QCCA 1599, the police overheard snippets of a conversation

between the accused and another person and the context included the chronology of events, earlier conversations, the actions of the accused handing over documents: *[85], [86]*.

101. In *Bennight*, the jail guard witness was able to testify as to the gist of the statement and provided the context in which it was given: [90]-[93]. In *R. v. Reierson*, 2010 BCCA 381, the witness was not sure of the exact words the accused used, but described words as "something to the effect of" what the accused was saying: [39]-[40]. In *R. v. Curran*, 2004 CanLII 10434 the conversation the police officer overheard was "much more detailed" than in *Ferris* and the judge's charge provided correct instruction for this post-offence conduct (conversation): *[16]-[20]*.

102. In *Ferris* and other cases, it has been considered relevant that the other party to the conversation did not testify. But again, this is not determinative on the issue of admissibility. The absence of testimony from the other participant to the conversation is typically a result of the dynamics of the trial (in this case that other participant being a non compellable estranged spouse living in Japan, the mother of the accused's son). As the jury was told, "neither the Crown nor the accused are obliged to call every witness who may have knowledge of the matters in issue": *Jury Instructions, [44], AR, Vol. I, Tab 1D*.

Stage 2: Legal Relevance / Instructions to the Jury

103. The trial judge concluded that the probative value of the evidence outweighed the prejudicial effect that it might be used improperly. Importantly, she noted that the prejudicial effect could be ameliorated by a strong caution to the jury about what use can be made of the evidence: *Ruling at [21], AR, Vol. I, Tab 1.* In conducting this weighing exercise, the trial judge is only deciding the threshold question of "whether the evidence is worthy of being heard by the jury" and not "the ultimate question of whether the evidence should be accepted and acted upon": *Abbey*, at [89].

104. As noted earlier, whether evidence should be excluded because its probative value is overborne by its prejudicial effect involves an exercise of discretion. The trial judge's assessment in this regard is treated with significant deference on appeal: *BCCA at [29], [91], [94]*. The weighing of probative value and prejudicial effect takes place in the context of the

evidence that has been called and the dynamics of the trial, and the trial judge is in the best position to assess those factors: *R. v. Herntier*, 2020 MBCA 95 at [276]; *R. v. Mohan*, [1994] 2 S.C.R. 9. As noted in *R. v. Melnychuk*, 2008 ABCA 189:

> [14] The probative force of the evidence needs merely to exceed the prejudicial effect. The content of statements by an accused does not itself have to prove guilt nor must it be proven beyond a reasonable doubt before admission: *R. v. Evans*, 1993 CanLII 86 (SCC), [1993] 3 S.C.R. 653, [1993] S.C.J. No. 115 (QL), at paras. 25 to 32. Whether words are as attributed to the accused is a matter of weight for the trier of fact: *R. v. Mulligan*, (1955), 1955 CanLII 124 (ON CA), 111 C.C.C. 173 (Ont. C.A.) at pp. 175, 179, 181 approved in *R. v. Gauthier*, (1975), 1975 CanLII 193 (SCC), [1977] 1 S.C.R. 441, 27 C.C.C. (2d) 14 at p. 20, [1975] S.C.J. No. 125 (QL); *R. v. Park*, 1981 CanLII 56 (SCC), [1981] 2 S.C.R. 64, 59 C.C.C. (2d) 385 at pp. 394-5, [1981] S.C.J. No. 63 (QL); *R. v. MacKenzie*, 1993 CanLII 149 (SCC), [1993] 1 S.C.R. 212, 78 C.C.C. (3d) 193 at pp. 216-217, [1993] S.C.J. No. 7 (QL) at para. 54. *A fortiori*, what a statement *means* is for the trier of fact. See also *R. v. Hall*, 2018 MBCA 122 at [125]

105. The appellant's position is that the dissenting justice properly deferred to the trial judge's assessment:

> [95] In this case, the trial judge determined that the potential prejudice to the fairness and integrity of the trial arising from the fact that the overheard telephone conversation was one-sided and incomplete and that WS could not recall the exact words was mitigable with a strong ameliorative charge on proper use. In my view, that conclusion was reasonably open to her…. Consistent with the appellate analysis brought to bear on the overheard utterances in *Buttazzoni*, I am satisfied the trial judge identified and applied the appropriate legal test for admission of the phone conversation, considered the frailties of the evidence, and reasonably left it to the jury to determine its weight. 'The admission of such evidence is a discretionary call'.

106. The respondent did not challenge the trial judge's jury instructions at trial, or on appeal. Indeed, the final instructions in this case were favourable and prophylactic against misuse of the evidence of the telephone call. The trial judge made it clear to the jury that it could accept all, part or none of a witness's evidence including, of course, that of Warren Schneider Jr. The judge told the jurors that in assessing the credibility of a particular witness, or deciding "how much to rely" on that person's evidence, questions to ask included whether the witness was "in a position to make accurate and complete observations about the event" (*Instructions, [37], emphasis*

added by DeWitt-Van Oosten, J.A., BCCA at [97]). If the jury had a reasonable doubt about the respondent's guilt "arising from the credibility" of the witnesses, the jury was obliged to acquit.

107. To further attenuate any improper prejudice the trial judge gave the jury two specific instructions on how to approach the overheard conversation, as well as the use that could be made of it, reproduced earlier in paragraphs 14, 25 and 63. The judge acknowledged the deficiencies in the evidence and made it plain that if the jurors had any doubt about what the respondent said during the phone call, *or what he meant by the words used*, they should ignore the evidence: *BCCA at [98]*. The warning was similar to the instruction approved in *Bennight* ([92]), where Bennett J.A. said, "The trial judge's instructions to the jury on this evidence…put the matter beyond question." Likewise, in *Herntier*, a partial statement when the witness could not recall the surrounding discussions was properly admitted because the jury were told to disregard the statement if they concluded it did not relate to the victim in that case.

108. The majority states that the problem of not knowing the exact words is "highlighted by the jury charge": *BCCA at [180]*. The judge told the jury it was up to them to decide whether the [respondent] made a particular remark or statement and that they must not use it against him unless they decided he made a particular remark: *Written Instructions, [81]*. The majority states that there is "no way the jury could determine whether or not the accused said 'I did it' or 'I killed her' because the witness who testified was unable to recollect what was said: *BCCA at [181]*.

109. This analysis is not correct for a number of reasons. First, the jury was not required to decide the exact words the respondent used, rather they were being instructed to assess whether he made the "particular remark" as described by Warren Schneider Jr. - the "gist of the conversation". Second, with this reasoning the majority is essentially concluding that no "gist" evidence can ever be led as no jury could ever be properly instructed regarding it. Third, the effect of the majority's interpretation of the instruction is that it *nullified* the alleged prejudicial evidence of the phone call, as the jury would necessarily have given no weight to Warren Schneider Jr.'s evidence because he did not recollect the exact words. If that is correct, then there is no basis to have allowed the appeal and the *curative proviso* should have been applied. See *Cody c. R.,* 2007 QCCA 1276, where no relief was provided as although the judge should

not have admitted the utterances, the judge's instructions to the jury "neutralized" the prejudicial nature of the testimony and highlighted its essential valueless nature: *[46]-[58]*.

110. The majority describes the error in the instructions being compounded when Warren Schneider Jr. testified that it seemed to him that the respondent was "admitting" to the missing Japanese student's death. To clarify, this was his evidence on the *voir dire*, but not his evidence at trial.

111. For these reasons it is the appellant's position that the majority should not have found that the judge erred in leaving this evidence with the jury. The judge properly left the meaning of the impugned words and their weight, if any, with the jury. The jury saw Warren Schneider Jr. testify and could assess the import of his responses. The jury was given thorough and cautionary instructions to follow while engaging in this fact-finding exercise. As noted in the excerpt from *White (2011)* in paragraph 104 of the dissenting reasons, they can be trusted to have properly weighed the evidence in this case.

PART IV: SUBMISSION CONCERNING COSTS

112. The appellant does not seek costs and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

113. The appellant requests that this Court allow the appeal, set aside the order for a new trial and restore the respondent's conviction for second degree murder.

PART VI: SUBMISSION ON CONFIDENTIAL INFORMATION

114. There are no orders, bans, classifications of information in the file as confidential under legislation or restrictions on public access to information in the file that could have an impact on the reasons of this Court, if any, in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Mary T. Ainslie, Q.C.
Counsel for Appellant

Dated this 12th day of May, 2021
Vancouver, B.C.

PART VII – TABLE OF AUTHORITIES

APPENDIX "A" – Chronology of Events

Description	Date
respondent purportedly has three dates with Natsumi Kogawa.	mid-August to Sept.8, 2016
respondent and Ms. Kogawa walk together in downtown Vancouver, carrying a tent.	Sept. 8 (1-1:45p.m)
respondent returns to hostel, without the tent.	Sept. 8, 10 p.m.
respondent returns to hostel with suitcase.	Sept. 9, after 8 p.m.
respondent leaves hostel with suitcase.	Sept. 10, a.m.
respondent returns to hostel without suitcase and wearing different clothes.	Sept. 10, after 4 p.m.
Missing Persons Report filed with police.	Sept. 12, 2016
respondent leaves Vancouver for Kelowna and talks to brother ("did something bad").	Sept. 21, 2016
Warren Schneider Jr. calls appellant about RCMP Bulletin, meets him in Vernon at their father's house; respondent talks about missing Japanese woman.	Sept. 27, 2016, after 10:30 p.m.
respondent and brother go to Polson Park, talk about Ms. Kogawa; respondent gives further details, the location of body to be disclosed to police after he is dead, attempts suicide, calls his wife in Japan.	Sept. 28, 2016, 10:30 a.m.
Warren Schneider Jr. and the respondent take photographs (selfies) and their sister arrives to the park, the respondent is left in the park	September 28, 2016, 11 a.m.
Warren Schneider Jr. advises police location of Ms. Kogawa's body; police locate suitcase and body.	Sept. 28, 2016
respondent arrested in Vernon.	Sept. 28 at 11:45 p.m.
respondent's interview/statement with police.	October 18, 2016
respondent's letter to father - "not premeditated".	November 4, 2016