

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. R.D. Longard Services Ltd., 2015 NSPC 7

Date: February 4, 2015

Docket: 2690136 and 2690137

Registry: Halifax

Between:

Her Majesty the Queen

v.

R.D. Longard Services Limited

Decision on *Khelawon* Application

Judge: The Honourable Judge Anne S. Derrick

Heard: February 3, 2015

Decision: February 4, 2015

Charges: section 74(1) of the *Occupational Health and Safety Act*,
R.S.N.S. 1996, C. 7 x 2

Counsel: Peter J. Craig, for the Crown

Robert C. Hagell, for the Defendant

By the Court:

Introduction

[1] This decision addresses the Crown's application to have certain hearsay utterances said to have been made by someone who is deceased admitted into evidence for the truth of their contents. Such an application, which deals with whether the evidence in issue is necessary and reliable, is often called a "*Khelawon*" application after a leading Supreme Court of Canada decision, *R. v. Khelawon*, [2006] S.C.J. No. 57. The principled approach to hearsay discussed in *Khelawon* and other Supreme Court of Canada decisions on the issue requires that, "When it is necessary to resort to evidence in this form, a hearsay statement may be admitted, if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth." (*Khelawon*, paragraph 2) If the criteria of necessity and reliability are not satisfied, the statement or utterance is inadmissible.

[2] The principled approach to hearsay evidence encompasses the issue of trial fairness. As explained in *Khelawon*:

The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it...(paragraph 49)

Facts Relevant to the Application

[3] R.D. Longard Services Limited (“Longard”), a commercial and residential electrical services company, is on trial for offences charged under the provincial *Occupational Health and Safety Act*. The charges were laid following the tragic electrocution death on May 21, 2013 of a Longard employee, Christopher Boyle. Mr. Boyle was working at a job site at 201 Chain Lake Drive when he was electrocuted. Also present at the job site with Mr. Boyle was Jonathan Matthews, another Longard employee, and Joshua Francis, who was on a work term with Longard.

[4] In simplified terms, Mr. Boyle, Mr. Matthews, and Mr. Francis were at the Chain Lake Drive job site on May 21 to finish adding an electrical service to a newly renovated retail space in a strip mall. Completing the job required them to work in the main electrical room for the mall.

[5] The Crown alleges that shortly before he was electrocuted, Mr. Boyle made a cell phone call to the owner of Longard, Randy Longard, himself an electrician, from the electrical room. In this decision I deal with the issue of whether the evidence of utterances made by Mr. Boyle in the course of the telephone call are admissible in evidence for the truth of their contents. Intended for this purpose, the utterances, of course, are hearsay. The parties agree that hearsay is presumptively inadmissible and that the utterances can only be admitted as a principled exception to the hearsay rule. None of the traditional exceptions to the hearsay rule apply.

The Evidence at the Voir Dire

[6] The Crown’s *Khelawon* application was dealt with by way of a voir dire. Three witnesses were called by the Crown – Joshua Francis, Jonathan Matthews, and Randy Longard. The Defence called no evidence.

[7] It is what Mr. Francis recalls hearing Mr. Boyle say during the phone call that the Crown wants admitted into evidence. Mr. Francis testified that he heard Mr. Boyle ask Mr. Longard for directions on how to go about adding the service cable to the electrical panel which was energized at the time. According to Mr. Francis the call was very short – 1 to 2 minutes – and after it was over, Mr. Boyle proceeded to work on the service cable without shutting the power off. He told Mr. Francis and Mr. Matthews that it was dangerous and would not let them work

on the panel because of the danger. Shortly after Mr. Boyle started to do so, he was fatally electrocuted when he came into contact with the energized electrical panel.

[8] Mr. Matthews was also in the main electrical room with Mr. Boyle and Mr. Francis. He testified that due to the trauma of Mr. Boyle's electrocution he has only a vague recollection of the events of May 21. He does not recall anything about a phone call being made in the electrical room before Mr. Boyle was electrocuted.

[9] Mr. Longard was asked about a phone call with Mr. Boyle on May 21. He only recalls speaking to Mr. Boyle in person at the start of the workday, between 8 a.m. and 8:30 a.m. He does not recall any other conversation that day with Mr. Boyle. He testified that the only call he got came from Mr. Matthews to tell him about Mr. Boyle's electrocution.

[10] Mr. Francis was asked about a statement he gave to an *Occupational Health and Safety Act* investigator on May 29, 2013. In that statement he did not mention the electrical room phone call. He says that was because there was a lot going through his mind at the time and the investigator did not ask him about it. I will return later to that point.

The Submissions of the Parties

[11] Mr. Craig submits that Mr. Boyle's utterances as described by Mr. Francis are admissible as necessary and reliable. He says I can consider all the evidence I have heard during the trial proper as well as the voir dire. In his submission, the trial evidence indicates Mr. Boyle was a very safety-conscious electrician and that there has to be a reason why he would have gone ahead and worked on a live system which was inherently dangerous. This, says Mr. Craig, is relevant to my assessment of the reliability of the sought-after evidence because the explanation for why the careful Mr. Boyle would expose himself to such risk lies in the call – Mr. Boyle seeking direction on how to do the job in these dangerous circumstances. Doing so, says Mr. Craig, was a marked departure from Mr. Boyle's customary safety-first work practice. Mr. Craig also submits that I should find reliability in Mr. Francis, describing him as a "reliable reporter" of the events in the electrical room.

[12] Mr. Hagell argues that the reliability requirement for admission of this evidence is not satisfied in this case. He notes that Mr. Francis did not mention the call to the *OHS*A investigator and acknowledged that he had told no one about the call until his testimony at this trial. Mr. Hagell says there is no reliability to be found in the fact that only Mr. Francis remembers the call. Mr. Matthews and Mr. Longard do not recall Mr. Boyle making the call.

The Principled Analysis

[13] The principled exception to the hearsay rule will permit the admission of Mr. Boyle's utterances if the Crown succeeds in showing, on a balance of probabilities that their admission is (1) necessary and (2) reliable. The admissibility of the utterances is dealt with as an issue of threshold reliability. Threshold reliability focuses on the admissibility of the utterances not on whether they will be relied on for deciding whether the charges have been proven against the defendant. In addressing the matter of threshold reliability and whether the utterances should even be allowed into evidence,

... all relevant factors should be considered, including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility. (*Khelawon*, paragraph 4)

[14] The assessment of threshold reliability is not confined to the circumstances under which the utterance were made. (*Khelawon*, paragraph 53)

Necessity Criterion

[15] While not conceded by Mr. Hagell, the necessity requirement was not the focus of the Crown and Defence arguments. I am satisfied that necessity has been established by the facts of this case: Mr. Boyle is deceased and not available to testify. I find that is dispositive of the necessity requirement. In *R. v. Smith*, [1992] S.C.J. No. 74 the Supreme Court determined that necessity was made out where

the declarant was dead, and would “never be able to testify as to what happened...”
As the Court explained in *Smith*:

...The relevant direct evidence is therefore unavailable. Ms. King’s mother’s evidence of what her daughter told her on the telephone that night was clearly necessary, in the sense that there is no possibility that evidence of what was said could be adduced through the declarant. (*paragraph 37*)

The Reliability Criterion

[16] A hearsay statement may be admitted “if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth.” (*Khelawon, paragraph 2*)

[17] In my analysis of the reliability of the utterances Mr. Boyle is purported to have made, I have considered the following evidence:

- Mr. Francis has never mentioned this call before his testimony in this trial;
- He did not mention the call when interviewed by the *OHSA* investigator even though he was asked whether he, Mr. Matthews and Mr. Boyle had a conversation about not turning the power off. In response to that question he said no, Mr. Boyle just would not let them touch the live system “because it was dangerous.” Mr. Francis told the investigator that Mr. Longard had directed that the power was not to be turned off to the electrical panel and said this was “probably just a phone call in the morning” when Mr. Longard assigned the work for the day to Mr. Boyle. I find, notwithstanding Mr. Francis’ explanation for not mentioning to the investigator what he now says was a later call by Mr. Boyle from the electrical room - that explanation being that he was not asked about it - the failure to mention the call, in the circumstances I have referenced, contributes to the evidence about the utterances being unreliable;
- Mr. Matthews does not recall there being a call. He testified that the stress of witnessing Mr. Boyle’s death has plundered his memory. I accept that the trauma may have affected Mr. Matthew’s recall but that does not help the Crown’s case. The fact that he has no recollection of a call makes Mr. Matthews’ evidence a neutral factor, which is to say, it does not support the

reliability of the utterances. It is evidence that provides no assistance to the Crown's application;

- Mr. Matthews testified in his evidence for the trial proper that when Mr. Boyle was electrocuted, he made a cell phone call to 911 but had to leave the electrical room to get cell phone service;
- The fact that Mr. Boyle was safety-conscious yet got electrocuted does not satisfy the reliability requirement for admitting the utterances Mr. Francis says were made during a phone call from the electrical room.

[18] I am unable to find indicators of reliability in the evidence about Mr. Boyle's phone call utterances to satisfy the reliability requirement for its admissibility under the principled exception analysis. The Crown has not discharged its burden on this application. The evidence about the utterances remains inadmissible hearsay.