IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v.Skeir, 2005 NSPC 38

Date: 20050923
Docket: 1468069
Registry: Halifax

Between:

Her Majesty the Queen

v.

Leigh Phillip Skeir

Judge:	The Honourable Judge Pamela S. Williams
Voir Dire Heard:	September 9, 2005 in Halifax, Nova Scotia
Written Decision:	September 23, 2005
Counsel:	Christopher Morris, for the Crown Peter Mancini, for the Defence

By the Court:

INTRODUCTION:

[1] During the course of a trial (in which the accused, Leigh Skeir, is charged with assaulting his common-law wife, Judith Stubbert) a voir dire was held to determine the admissibility of two out-of-court statements allegedly made by Ms. Stubbert, for the truth of their contents. Both are verbal utterances, the first to a '911 call operator' (which is on audiotape) and the second to a police officer. Both were allegedly made within hours of a domestic dispute between the parties.

[2] Ms. Stubbert testified at trial that she has little recollection of the events giving rise to the charge or of her subsequent utterances. She attributes this to a day of excessive alcohol consumption prior to her encounter with Mr. Skeir at the doorway of their home.

[3] The Crown is not able to have Ms. Stubbert declared an adverse witness nor is the Crown able to cross-examine her pursuant to the provisions of the Canada Evidence Act (CEA) as Ms. Stubbert maintains that she has no memory of either of the events that give rise to the charge or her alleged utterances. The "past recollection recorded" exception to the hearsay rule does not apply as Ms. Stubbert does not adopt the statement made to the police officer and cannot or does not vouch for its accuracy.

ISSUE:

[4] Should the utterances made to the 911 operator and the police officer be admitted for the truth of their contents under either or both the 'res gestae' exception to the hearsay rule or the principled approach of necessity and reliability?

[5] For reasons which follow the Crown's application to have two out-of-court statements admitted for the truth of their contents is denied both under the res gestae exception and the principled approach.

FACTS:

[6] On August 28, 2005 Judith Stubbert returned to her home at 10 Randall Avenue in Halifax, N.S. after reportedly having consumed unknown quantities of alcohol during the preceding 12 to 15 hours. She testified that there had been a 'scuffle' between herself and the accused, Leigh Skeir (her common-law husband of 6 years). Ms. Stubbert stated that she landed on the floor; she remembers a chair being broken and then she left. Ms. Stubbert said she does not know when the scuffle occurred or how it started. She further stated that she got up and went back to the place where she had previously had a few drinks, that is, around the corner to an address on Gebhardt Street. She was upset and says sometime later on she remembers looking through the phone book and calling the police. Ms. Stubbert stated that she "had no idea how long [it was] after she arrived" that she called the police nor was she able to remember who she spoke to on the phone. She says that she remembers speaking with a female police officer at the Gebhardt address but can not recall what she said. Ms. Stubbert says that later when she woke she knew something had happened because she was not at home. She could not recall if she was injured or if she suffered any pain or discomfort after the incident.

[7] The audio recording of the 911 call was played in court and Ms. Stubbert stated that she recognized her voice on the recording. She confirmed the accuracy of information provided by her to the 911 operator such as her address, the address from which she placed the call, and both her date of birth and that of Mr. Skeir. She stated that the audio recording does not help to refresh her memory as to the events. Her only comment was "I could have swore I talked to a guy - not a female".

[8] Melanie Campbell, the 911 operator confirmed, after having listened to the tape, that she was the operator who took the call. She testified that she was "pretty certain" that the tape was accurate and that nothing had been omitted from the call. The call stood out in her mind because she was new in her position at the time and this was one of the first "in progress" calls she took.

[9] The contents of the 911 call reveal that Ms. Stubbert told the operator that Mr. Skeir drug her through the front door and then threw her onto the ground and kicked her in the face. She said that Mr. Skeir had been drinking and that she had had some beer to drink. She stated that she left as soon as she could get up off the floor and ran out the door. She further stated that Mr. Skeir started

picking things up and smashed them off the walls. When asked if she had any marks she stated she didn't think so but that her nose had been bleeding when she got to her neighbour's door.

[10] Cst. Jennifer Lake testified that she was the first officer to respond to the 911 call and that she arrived at the address on Gebhardt Street at 2:50 am. She asked Ms. Stubbert what had happened and was told the following: Ms. Stubbert had been out throughout the day drinking with friends. When she arrived home she was trying to get her key in the door. Leigh pulled her in the doorway and down to the ground. (Cst. Lake believes Ms. Stubbert reported having been pulled to the ground by the hair but did not appear certain of that). Mr. Skeir kicked her in the face and threw things around. Cst. Lake also stated that Ms. Stubbert told her that Mr. Skeir was mad because she'd been out drinking all day.

[11] Cst. Lake testified that she noticed swelling and a faint red mark on the left side of Ms. Stubbert's face. Ms. Stubbert had had a nose bleed as the officer was shown a towel or kleenex with blood on it. Ms. Stubbert also had a cut on the inside of her lower lip. Ms. Stubbert reportedly told Cst. Lake that she was not prepared to give a statement to police as she was too upset, too drunk and too tired to do so. Cst. Lake confirmed that Ms. Stubbert appeared to be intoxicated.

[12] Cst. Lake made notes summarizing her involvement with Ms. Stubbert approximately 1 hour later. Cst. Lake made two attempts to obtain a written statement from Ms. Stubbert within the following week but no one came to the door when Cst. Lake attended at the Randall Ave. address.

[13] Cst. Beer testified that he and his partner Cst. Flynn also responded to the call and that Cst. Lake was present when they arrived. He noted that Ms. Stubbert had a rag or a shirt in her hand and that it had blood on it. He stated that it appeared to him that Ms. Stubbert "had some alcohol in her system" because she said she had been out drinking and because her eyes were blood shot. He did not hear any of the discussion between Cst. Lake and Ms. Stubbert other than some talk of giving a statement the next day.

THE LAW:

[14] Hearsay evidence is inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place. However, they can be challenged to determine whether they are supported by indicia of necessity and reliability required by the principled approach: ***R. v. Mapara [2005] S.C.J. No. 23.***

Res Gestae

[15] Statements made spontaneously in circumstances where concoction or distortion can safely be excluded are admissible as a true exception to the hearsay rule and for the truth of their facts whether or not the statements were made exactly contemporaneously with the events to which they relate: ***Regina v. Clark (1983), 7 C.C.C. (3d) 46 Ont. C.A.; R. v. Slugoski [1985] B.C.J. No. 1835.***

[16] The 1987 House of Lords decision in ***R. v. Andrews 1 All E R 513*** has provided courts with a number of guidelines in assessing whether an utterance should be admissible under the res gestae exception. The primary question to be asked is: "Can the possibility of concoction or distortion be disregarded?" To answer this question the court must consider the circumstances in which the statement was made to determine whether the events were sufficiently startling or dramatic so as to dominate the thoughts of the victim and that there would be no opportunity for reasoned reflection. The statement must be so closely associated in time with the event that the witness's mind would still be over taken by the event.

[17] Summarizing the law as stated in ***R. v. Hartley [2000] O.J. No. 5635***, there is no precise test to determine the length of time that may elapse before utterances can no longer be considered contemporaneous with the alleged event. Each case depends on its own circumstances: ***R. v. Toy [1998] A.J. No. 147 (Q.B.).*** The case law would support as little as a few moments ***(R. v. Grand-P****ierre [1998] A.Q. No. 93)* to as long as 7 hours ***(R. v. Malette)*** as a permissible lapse of time after the event.

[18] The fact that the applicant is not able to pinpoint the exact moment upon which the event occurred is apparently not fatal to a res gestae application: ***R. v. Oliver [1996] N.W.T.J. No. 69 (S.C.).***

[19] The presence of an injury on the complainant is only one factor that should be considered, but is not conclusive proof in itself: ***R. v. Oliver, supra***.

[20] The fact that the statement was prompted by a question, will not in itself defeat the application for admission, however, if the utterance was elicited by specific, biassed questioning this will have a negative impact upon its admissibility: ***R.v. Aguilar, (1992) 77 C.C.C. (3d) 462 (Ont. C.A.).***

[21] Even traditional exceptions to the hearsay rule, such as res gestae must, if challenged, satisfy the principled exception requirements as well of reliability and necessity: ***R. v. Esford [2003] O.J. No. 1412.***

Principled Exception to Hearsay Rule - Necessity and Reliability

[22] Hearsay or out-of-court statements can be admitted into evidence where their admission can be justified on the twin pillars of necessity and reliability using a principled approach: ***R. v. Starr [2000] 2 S.C.R. 144; R. v. Smith [1992] 2 S.C.R. 915; R. v. Khan [1990] 2 S.C.R. 531.***

[23] At the admissibility stage the Court is concerned with 'threshold reliability' i.e., the circumstantial guarantee of trustworthiness which is a function of the circumstances under which the statement was given, not whether the statement is true or not. If circumstances substantially negate the possibility that the declarant was untruthful or mistaken, it is said to be reliable. Such circumstances include no motive to lie (***Smith, supra; Khan, supra***) or safeguards are in place so as to discourage or discover a lie (e.g. an oath; the ability, through videotape, to observe the

declarant's demeanor at the time the statement was given; contemporaneous cross-examination): ***R. v. U.(F.J.)(1995), 101 C.C.C. (3d) 97 (S.C.C.); R. v. B.(K.G.)[1993]1 S.C.R. 740.***

[24] The Nova Scotia Court of Appeal in ***R. v. Barnes [2004] N.S.J. No. 25*** reiterated much the same. Cromwell J.A. at pars. 34 to 36 stated that circumstantial guarantees of trustworthiness 'generally fall into two categories which are not mutually exclusive'. The first group of factors - those that tend to negate inaccuracy or fabrication - include the possibility of mistake, the presence or absence of a motive to lie, the mental capacity of the declarant and his or her ability to perceive, recall and recount accurately. At the end of the day, the question is whether the circumstances in which the statement was made compensate for the traditional 'dangers' of permitting the trier of fact to consider evidence adduced in the form of hearsay. The second group of factors - those which compensate for loss of the usual ways of evaluating testimony given in court - include whether the statement was made under oath and/or videotaped. If there is a full record of the statement and evidence relating to the way in which it was elicited and given these factors compensate for the inability of the trier of fact to observe the declarant while testifying.

[25] The Supreme Court of Canada has stated ***(Starr, supra)*** that courts should confine their focus to factors that concern the taking of the statement itself. Generally 'extrinsic evidence' and corroboration are irrelevant in determining threshold reliability. Extrinsic evidence relevant to the circumstances of the making of the statement can be considered however. For example, whether at the time the declarant made the statement he or she had a motive to make a false statement is a circumstance surrounding the statement. Also, extrinsic evidence about the declarant's state of mind at the time he or she made the statement is admissible at the threshold reliability stage: ***R. v. Khelawon [2005] O.J. No. 723 (Ont.C.A.).***

[26] The presence or absence of motive to fabricate is a principal factor in determining threshold reliability: ***Starr, supra; R. v. Scott [2004] N.S.J. 141; R. v. Czibulka [2004] O.J. No. 3723 (Ont. C.A.).***

[27] Whether there is a motive to fabricate the story related in the hearsay statement can turn on a number of considerations:

a. The nature of the relationship between the declarant and the person to whom the statement is made. That was the case in ***Starr***.

b. The nature of the relationship between the declarant and the person about whom the statement is made (usually the accused). That was the case in ***Merz***.

c. The circumstances themselves under which the statement was made which negate the suggestion of fabrication - as in spontaneous utterances.

[28] The question of motive to fabricate the hearsay statement raises two distinct but related issues. The first concerns the nature of the proof required for motive to lie. The second issue concerns the extrinsic evidence under which the hearsay statement was made: ***Czibulka, supra.***

[29] As to the nature of the proof required for motive to lie, Justice Rosenberg (at pars. 43 and 44 of ***Czibulka***) suggests three scenarios under which the Crown seeks to tender a hearsay statement under the principled approach. First, the Crown shows that the declarant had no known motive to fabricate the hearsay story to the witness about the accused. Second, because of direct evidence or logical inference it is apparent that the declarant did have a motive to fabricate this story. Or finally, there is simply no evidence and no logical inference that the declarant had no motive to lie. In the last scenario motive is in effect a neutral consideration. A finding that there is simply no evidence one way or the other that the declarant had a motive to fabricate cannot be converted into a finding in favour of the Crown that the declarant had no motive to lie.

[30] While the existence of a motive to fabricate is itself a circumstance surrounding the making of the statement, the motive concern cannot itself be resolved without looking to exterior factors. As well, the Court may bear in mind the nature of the relationship between the declarant and the person about whom the statement is made in making its determination –something that may as well involve resort to facts beyond those surrounding the making of the statement itself: ***Czibulka; R. v. Merz (1999) 140 C.C.C. (3d) 259; Khelawon, supra.***

[31] Categories of evidence not to be used for determining threshold reliability include:

a. Declarant's general reputation for truthfulness - but specific evidence of declarant's mental state is admissible: ***Khelawon supra at par. 103***;

b. Prior or subsequent statements, consistent or not - statements made by same declarant: ***Khelawon supra at par. 117***;

c. The presence of corroborating evidence - although there may be some cases where the corroborating evidence is so closely connected to the statement that they can fairly be considered 'the circumstances in which the statement was made', e.g. perhaps strikingly similar statements capable of being tested by cross-examination as in ***U.(F.J.)***: ***Khelawon, supra, note 10 p. 33***; or even where the declarant is not available for cross-examination but the declarant and the strikingly similar evidence must, at least, be referring to the same event: ***Khelawon,supra at par. 114*** but the strikingly similar comparison statement must be substantively admissible on its own: ***Khelawon, supra at par. 128***;

d. The presence of conflicting evidence.

[32] As noted above, the Supreme Court of Canada has declared in ***Starr*** that the presence of corroborating or conflicting evidence is not something to be considered in determining threshold reliability. Although this aspect of ***Starr*** has been criticised as being inconsistent with the way in which that court had previously dealt with the threshold reliability issue, it is my view that this is the current state of the law. With rare exceptions, such as the ***U.(F.J.)*** exception and matters concerning motive to fabricate, a trial judge may not consider external factors in determining threshold reliability.

ANALYSIS:

[33] Admission of the complainant's out-of-court statements for the truth of their contents, either under the traditional res gestae or the principled approach exceptions, requires that the Court is able

to make a finding that the circumstances in which the statements were made are such that distortion or concoction can, on balance, be safely ruled out.

[34] Under the res gestae exception I must determine whether the circumstances are sufficiently startling or dramatic and the statements are made close enough in time to the event so as to dominate the thoughts of the complainant and provide no opportunity for reasoned reflection. Little is known about the circumstances because Ms. Stubbert testified that her memory of the events is very poor because she had been consuming quantities of alcohol for upwards of 15 hours prior to arriving home. Even if the Court were permitted to consider Ms. Stubbert's evidence on direct examination as well as her evidence on the voir dire, (counsel did not clearly indicate there was agreement that the evidence given on direct examination was to be incorporated into the voir dire but did agree that evidence on the voir dire could be incorporated into the trial proper) I am unable to conclude that Ms. Stubbert would have considered her 'encounter' with Mr. Skier as being startling or dramatic. The most she could say is that when she got home they got into a 'scuffle', whatever that means, that Mr. Skeir smashed a chair and that he was 'freaking out'. Certainly the Court can conclude that the events were upsetting but there was no evidence as to whether this type of behaviour/interaction was commonplace between the parties or whether it was an isolated incident.

[35] As for the timing of the 911 call and the verbal utterance to Cst. Lake, the Court has a difficult time determining how long after the incident they were made. There is no evidence as to what time Ms. Stubbert arrived at her Randall Ave home. There is no evidence as to what time she arrived back at the address on Gebhardt Street. Nor is there any evidence as to the timing of the 911 call. It seems reasonable to conclude, given the time frame outlined by Ms. Stubbert as to her drinking (i.e., that she had started drinking in the morning and continued on during the afternoon of the previous day, had gone to a bar in the evening and then went to someone's house thereafter) and Cst. Lake's evidence that she arrived at the Gebhardt address at 2:50 a.m. on August 28th, 2004 that the statements were made no more than several hours after the incident. They may well have been made sooner. Ms. Stubbert's injuries (given the presence of dried blood on Ms. Stubbert's nose and the bloody cloth in her hand) likely occurred during this time frame. The Court did not

hear from the occupant of the Gebhardt Street address who likely would have been able to say when Ms. Stubbert arrived there and whether she arrived with the injury.

[36] The presence of an injury can be considered for the purposes of a res gestae inquiry but it is one factor only. There is nothing about the injury itself that points to it having occurred as a result of an assault. Given Ms. Stubbert's state of intoxication the bloodied nose, cut lip and swollen jaw may have resulted, for example, from a fall unrelated to anything that could be attributed to Mr. Skeir. In other words, there is nothing unique about her injuries that would cause the Court to conclude that the only reasonable explanation is that Mr. Skeir caused them. That is not to say of course that he could not or did not cause the injuries.

[37] In conclusion I am not satisfied that either the call to the 911 operator or the verbal utterance to the police officer fall within the res gestae exception. Despite the presence of an injury, there is simply insufficient evidence for the Court to conclude that the utterances were made in circumstances such that distortion or concoction can be ruled out given the lack of evidence as to the time frame involved and the intoxicated state of the declarant.

[38] The Court can and does conclude that the 911 call was made without prompting by the occupant of Gebhardt Street, given Cst. Lake's evidence that he did not want to get involved in the matter. However I am mindful that the utterance to the police was prompted by Cst. Lake asking Ms. Stubbert was had happened. Because the exchange between the officer and the complainant was not recorded by way of a written statement or an audio or video taped statement I can not say whether there was any biassed questioning by the officer. I can say, on the basis of my impressions of Cst. Lake on the witness stand that there is no evidence of any form of biassed questioning having been undertaken.

[39] Under the principled approach there is no question that the admission of the statements is necessary as Ms. Stubbert testified that she has very little memory of the incident. In assessing threshold reliability I must consider the circumstances surrounding the taking of the statement to determine whether they negate that the complainant was untruthful or mistaken. I must look to

whether there is any evidence of motive to lie and whether there were in place sufficient safeguards to discourage or discover a lie.

[40] Although one voir dire was held to determine the admissibility of two out-of-court statements. Each statement will be and must be considered separately for the purpose of assessing threshold reliability. The 911 call can not be used to corroborate the oral utterance to Cst. Lake or vice versa.

[41] It is clear from the evidence that Ms. Stubbert was intoxicated when she placed the call and spoke with the 911 operator. In fact, Ms. Stubbert's recollection on direct examination was that she had spoken to a male on the phone, not a female. The audio-taped recording reveals that Ms. Stubbert's utterances were direct and spontaneous. They were not prompted by biassed questioning on the part of the operator, Ms. Campbell. I accept that the tape recording accurately reflects all of the conversation between Ms. Stubbert and the operator. There is nothing unusual in the flow of the conversation which would lead me to conclude that portions of the conversation were not accurately recorded or were edited or deleted. There was no warning or caution given by the operator to Ms. Stubbert which would provide safeguards to discourage or discover a lie.

[42] As to whether there was a motive to lie I turn to the three possible scenarios set out by Rosenberg in ***Czibulka, supra***. The Crown did not lead any evidence that shows no known motive to lie. For example the Crown did not ask Ms. Stubbert whether she would have been truthful when speaking with either the 911 operator or the police officer. Ms. Stubbert may not have any recollection of the conversations but may have been able to say whether she believes she would have been truthful at the time.

[43] There is no direct evidence of a motive to lie and no logical inference should be made that Ms. Stubbert had a motive to lie.

[44] This is a case in which there is no evidence of motive to lie and no logical inference can be drawn that there was a motive to lie. This is therefore a neutral consideration. Having said that, I

can not conclude, on the basis of ***Czibulka***, that Ms. Stubbert had no motive to lie. I am able to consider the fact that the statements were made by an upset and intoxicated Ms. Stubbert about her common-law spouse following an argument and/or scuffle between the two over her drinking. Her mental state at the time was such that I can not conclude that she was able to perceive, recall or recount accurately. I am not able to consider the follow-up statement to Cst. Lake, the injuries or any other conflicting evidence in coming to this determination.

[45] The verbal utterance made by Ms. Stubbert to Cst. Lake was not audio or video recorded. There was no written statement signed by Ms. Stubbert either at the time or later. In fact the evidence showed that Ms. Stubbert refused to give a written statement because she said she was too upset, too drunk and too tired to do so. Efforts to obtain a follow-up written statement proved unsuccessful. Furthermore, there was no warning or oath administered to Ms. Stubbert prior to the utterance being made.

[46] The same considerations on the 'motive to lie' issue apply here as they did with respect to the call to the 911 operator although again, I am not permitted to consider the fact that a call was placed or that the call was similar in nature; Nor am I able to consider the presence of an injury.

[47] Threshold reliability has not been satisfied based on the evidence presented. Safeguards to discourage or discover a lie are not present. The Court can not conclude there was no motive to lie. Therefore the Crown's application to have the two verbal utterances admitted for the truth of their contents is denied.

Pamela S. Williams

A Judge of the Provincial Court of Nova Scotia