PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Boudreau,* 2015 NSPC 84

Date: 2015-12-03
Docket: 2841304
Registry: Pictou

Between:

Her Majesty the Queen

v.

Dale Rodney Boudreau

DECISION REGARDING PROSECUTION APPLICATION TO CROSS EXAMINE A WITNESS UNDER THE PROVISIONS OF SECTION 9 OF THE CANADA EVIDENCE ACT

Judge:	The Honourable Judge Del W. Atwood
Heard:	13 October, 3 December, 2015 in Pictou, Nova Scotia
Charge:	Section 266 of the Criminal Code of Canada
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Dale Rodney Boudreau

By the Court:

[1] Family violence in Canada poses a serious threat to public safety; those members of the public at greatest risk are women and children. Overall, the rate of police-reported intimate partner victimization is far higher for females than for males, regardless of age, with women accounting for nearly eighty per cent of all intimate-partner victims reported to police.[1] Significantly, physical assault is the most frequent type of police-reported offence committed against victims of intimate partner violence.[2] Of particular concern is the recurring nature of family violence.[3] This is a characteristic of violence in the home that is well known to courts: victims are coerced or coopted by their abusers, or their abusers' enablers, into recanting or dropping altogether out of the legal process; this may have the effect of defeating the strong public interest in holding perpetrators of family violence accountable for their actions by imposing just sanctions focussed on protecting the vulnerable. Recantation may lead to the repetition of violence, and a dangerous cycle may set in.

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[1] Statistics Canada, *Family violence in Canada: A statistical profile, 2013* (Ottawa: Minister of Industry, 2015) at 22-38.
[2] *Id*. at 25.
[3] Ming Cui *et al*., "The Continuation of Intimate Partner Violence from Adolescence to Young Adulthood" (2013) 75 Journal of Marriage and Family at 300-313, especially in relation to the analysis of continuing violence and assailant propensity.

[2] Courts are well aware of the pressures to which victims of family violence might be subject; and it is for that reason that the public interest must prevail over the personal wishes of intimate partners or family members who are most at risk of victimization when it comes to deciding whether to proceed with a trial of an alleged assailant.[4]

[3] However, there are two key principles that must not be forgotten: the first is the presumption of innocence in a criminal prosecution; the second is that the criminal-justice process must be inherently fair to all justice-system participants. Implicit in this is that an apparent recantation by a witness should be dealt with sensitively and carefully, given that many will have interests at stake. Nuanced decisions might be called for, to be sure; but that does not make them any less imperative.

[4] Dale Rodney Boudreau is charged summarily with assaulting his partner, Ms. Alison Marie Bonvie. The offence is alleged to have occurred on 26 February 2015.

[4] *See e.g., R. v. C.V.M.*, 2003 NSCA 36.

[5] The trial of this charge started on 13 October 2015. Ms. Bonvie was called by the prosecution to give evidence. Briefly stated, Ms. Bonvie testified that she had no recollection of the incident because she had been intoxicated by alcohol.

[6] The prosecution applied to have the court resolve into a *voir dire* under the provisions of sub-s. 9(2) of the *Canada Evidence Act;*[5] this provision permits the cross-examination of a witness called by a party, without the witness having to be found as adverse, when the witness winds up giving evidence in court that is inconsistent with an earlier statement.

[7] In *R. v. Milgaard*, the Saskatchewan Court of Appeal laid out a seven-step process for judicial authorization of own-witness cross-examination.[6] Most of the steps have to do with handling juries and authenticating the prior-inconsistent statement. Most of these steps were able to be skipped over in Mr. Boudreau's trial as there are no juries in Provincial Court, and as the earlier statement given by Ms. Bonvie was a video-and-audio recorded one which was played on a monitor in court, so that its proof was pretty much self-evident. A DVD containing the digital video file of the statement was tendered by the prosecution on the *voir dire* as Exhibit Number 1.

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[5] R.S.C. 1985, c. C-5.
[6] 2 C.C.C. (2d) 206 at para. 55, leave to appeal to S.C.C. refused [1971] S.C.R. x.

[8] The statement records Ms. Bonvie describing an argument with Mr. Boudreau of escalating intensity, culminating in Mr. Boudreau pushing and shoving Ms. Bonvie several times and punching her between her nose and forehead. Ms. Bonvie told the investigating officer: "I am intoxicated, but not to the point I don't know what's happening." She stated that she, too, had done some pushing; however, her statement does not make clear whether this had happened before or after she had been pushed by Mr. Boudreau.

[9] I accept the proposition that testimony given by a witness professing lack of memory of an incident, or of having made a statement describing the incident, may be enough to permit the witness to be cross-examined on a prior statement made when the memory of the witness was clearer.[7]

[10] Proof that a witness made a prior statement inconsistent with present testimony does not end the matter, as the court has a discretion that it must exercise judicially. More specifically, I must be satisfied that the ends of justice would be best served by permitting cross-examination.[8] In this case, I am not satisfied that the ends-of-justice criterion would be supported by allowing Ms. Bonvie to be cross-examined.

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[7] *R. v. McInroy*, [1979] 1 S.C.R. 588; *and see R. c. Aubin* (1994), 94 C.C.C. (3d) 89 (Q.C.A.), leave to appeal to S.C.C. refused [1994] C.S.C.R. no 424.
[8] *See, e.g., R. v. Carpenter* (1982), 142 D.L.R. (3d) 237 (Ont.C.A.).

[11] The assault committed allegedly by Mr. Boudreau occurred on 28 February 2015. Ms. Bonvie was interviewed by police only a few hours later. The information was laid on 15 March 2015. Mr. Boudreau was arraigned on 16 March 2015; on that date, the prosecution consented to striking from Mr. Boudreau's Form 11.1 undertaking a condition that he have no contact with Ms. Bonvie. Mr. Boudreau entered a not guilty plea on 23 March 2015, and his trial was scheduled for 15 June 2015. Defence counsel took ill on that date, and the trial got rescheduled to 13 October 2015.

[12] In the course of hearing the *Milgaard* application, I was informed by the prosecutor that the only meeting that he had held with Ms. Bonvie was at the court house just prior to the start of the trial. The prosecutor notified me as well that he did not show Ms. Bonvie her video-recorded statement because, based on what had happened during his meeting with her, he had had a "feeling we would be at this point." The prosecutor apprised the court that Ms. Bonvie had given him "considerable trouble in the interview room" and that it would not be appropriate to "waste any more time with her."

[13] Following an inquiry by the court, the prosecutor confirmed that the investigator had advised Ms. Bonvie of her right to submit a victim-impact statement and had submitted very promptly a written referral on behalf of Ms.

Bonvie to the local Victims' Services Division. This referral was tendered by the prosecution as Exhibit Number 2.

[14] The *Crown Attorney Manual: Prosecution and Administrative Policies for the PPS* is a public record.[9] It includes a practice note on the interviewing of witnesses:

> Proper preparation for trial often requires that victims and other important witnesses be interviewed by the prosecutor. *Indeed, establishing an appropriate rapport with vulnerable or sensitive witnesses may be essential to eliciting the information necessary to support a charge* [emphasis added]. Such interviews, however, must be conducted with great care, and in controlled circumstances. Prior to trial, unnecessary contact with witnesses should be avoided. If casual contact occurs, the case in which the witness is involved cannot be discussed. Prosecutors must always guard against inadvertently influencing the testimony of any witness in a manner which might be considered to be improper.
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> Ideally, a Crown Attorney would have an observer present at all witness interviews. This is simply not possible, having regard to the finite police and prosecution resources which are available. Interviews of the following types of witnesses, however, should be conducted with extra care :
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> • a witness 16 years of age or younger, who is the victim of a crime of violence(including any sexual assault), or who has observed a crime of violence;
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> • a witness to any serious crime, if that witness is the sole observer of the material events;
>
> • any witness who the Crown Attorney has reason to believe is, or may become, "adverse", as defined in the *Canada Evidence Act*.
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> . . . .

[9]Public Prosecution Service, online: http://www.novascotia.ca/pps/crown_manual.asp.

> Where a witness provides information which differs from previous statements or which is not contained in previous statements, that information, along with the general circumstances in which the information came to light, must be disclosed in accordance with the Public Prosecution Service policy on disclosure. Where feasible to do so, the new or different information should be reduced to writing or otherwise accurately recorded.[10]

[15] The *Manual* contains also a directive from the director of public prosecutions, and a directive from the attorney general of Nova Scotia, outlining special procedures to be followed in cases involving allegations of intimate-partner violence:

> 1.2 There are a number of opportunities the Crown Attorney can take to interview the complainant/victim both before and after the arraignment, but in any case, the Crown shall provide an opportunity to the complainant/victim and other witnesses to meet with the Crown Attorney prior to the trial.
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> 1.3 *The Crown Attorney shall refer the complainant/victim to the Victims' Services Division of the Department of Justice* [emphasis added].
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> . . . .
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> 1.5 When faced with a complainant/victim recantation, that factor alone is not sufficient to discontinue a prosecution. The Crown Attorney in those circumstances should consider the following:
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> (a) conducting inquiries or requesting the police conduct inquiries into the background of the recantation to determine its cause;
>
> (b) *meeting with the complainant/victim and advising of support services which might assist during the court process* [emphasis added];
>
> (c) instructing the police to take a statement from the complainant/victim concerning the recantation.
>
> (d) assessing the strength of the Crown's case and likelihood of conviction in light of the recantation with particular attention to the S.C.C. decision in *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257; [t]he use of this decision in appropriate cases will

[10] *Id.*, online: http://www.novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/InterviewingWitnesses.pdf.

> allow the Crown Attorney to use the complainant/victim original statement to police as evidence in court;
>
> (e) the Crown Attorney should, when a complainant/victim recants on the witness stand, in appropriate cases invoke the provisions of section 9 (2) of the *Canada Evidence Act*;
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> . . . .[11]

[16] The directive from the attorney general emphasises that:

> Safety of the victim is of paramount concern. Where charges are, or will be, laid pursuant to an incident of spousal/partner violence, police *shall notify the appropriate victim support service by the most expedient method at the earliest opportunity* [emphasis added]. If the police officer believes that children in the home are in danger of physical or emotional abuse, the officer shall notify Children and Family Services.
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> . . . .
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> Crown Attorneys will prosecute a spousal/partner violence charge whenever they are satisfied that sufficient evidence exists regardless of the victim's/complainant's wishes, unless public interest considerations dictate otherwise. The Crown shall provide an opportunity to the complainant/victim and other witnesses to meet with the Crown Attorney prior to the trial. *The Crown Attorney shall refer the complainant/victim to the Victims' Services Division of the Department of Justice* [emphasis added].[12]

[17] The court does not superintend prosecutors in the exercising of core areas of discretion.[13] It is not for the court to tell prosecutors when or how to interview witnesses, or whether to arrange support services for persons alleged to have been victims of a crime. I know that prosecutors are faced with heavy caseloads and limited resources. Furthermore, trials are becoming more complex and lengthy,

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[11] *Id*., online: http://www.novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/SpousalPartnerMay04.pdf.
[12] *Id*.
[13] *R. v. Lyons*, [1987] 2 S.C.R. 309 at p 348; *R. v. Beare*, [1988] 2 S.C.R. 387 at pp. 410-11; *R. v. Jones*, [1986] 2 S.C.R. 749; *R. v. Power* [1994] 1 S.C.R. 601 at pp. 626-7; *R v Kelly* (1998), 128 C.C.C. (3d) 206 at para. 63 (Ont.C.A.); *R. v. Laws* (1988), 128 C.C.C. (3d) 516 (B.C.C.A.); *R. v. Fitzgerald*, 2013 NSPC 128 at para. 11.

not less, and professional standards are rising with that apace. Finally, I know for a fact that Mr. Young appears before the court always well prepared to conduct his prosecutions. I expect that what happened here was that difficulties arose in trying to meet with Ms. Bonvie prior to the day set for trial—difficulties that might have some connection with Ms. Bonvie's memory issues.

[18] However, the fact that prosecutorial discretion might not be subject ordinarily to alteration by the court does not mean that the exercising of that discretion in a particular case will have no effect on outcomes that are the subject of judicial discretion.

[19] In deciding whether it would serve the ends of justice to allow Ms. Bonvie to be cross-examined on her prior statement, I believe that it is provident for me to consider whether that would be fair to Ms. Bonvie. More particularly, would it be fair to allow Ms. Bonvie to have her credibility questioned in court, given the fact that she was not given the opportunity to review her video-recorded statement, and given the fact that her only meeting with the prosecutor was just prior to the commencement of Mr. Boudreau's trial (regardless of how that circumstance might have arisen)?

[20] In answering that question, I find that I am unable to agree with the prosecutor that his meeting with Ms. Bonvie was a waste of time. Far from wasteful, what Ms. Bonvie had to say was worrisome—and it warranted further inquiry; this is because if Ms. Bonvie told the prosecutor what she said later in court—specifically, that she was unable to remember what had happened on 28 February—this was important information, as it was disclosable under the terms of the *Manual*; furthermore, it might have suggested the need to obtain an adjournment of the trial to have the police conduct a further investigation, or to put Ms. Bonvie in contact with a support person at the Victims' Services Division.

[21] As it is, I agree with defence counsel that allowing Ms. Bonvie to be cross-examined under these circumstances would run the risk of re-victimizing the alleged victim. It is true that, in not granting the application brought by the prosecution, the public interest in having Mr. Boudreau's charge dealt with on its merits might be seen as being defeated. Yet, it is my view that this outcome arises, not because of choices made by Ms. Bonvie, not because of the decision of the court in not granting the *Milgaard* application, but because of a factor underscored over a decade ago, right here in Nova Scotia, in a report dealing with institutional imperatives in combatting domestic violence:

> On the other hand, some of the literature on intimate partner violence . . . and some focus group participants indicated that in many cases, a victim's unwillingness to proceed with the charge is significantly reduced where adequate victim supports are in place. This suggests that often it is inadequate implementation of a pro-prosecution policy, not the policy itself, which disempowers victims.[14]

[22] The interests of the public having a criminal case tried on its merits is advanced when appropriate pre-trial witness preparation is conducted by counsel calling a witness; this may include seeking an adjournment of a case to allow follow-up investigation to be done and to put a witness in contact with support personnel. The forensic efficiency and evidence quality imperatives promoted by advance witness preparation have been summarized in these terms:

> . . . to
> -help the witness tell the truth;
> -make sure the witness includes all the relevant facts;
> -eliminate the irrelevant facts;
> -organize the facts in a credible and understandable sequence;
> . . .
> -introduce the witness to the legal process;
> -instill the witness with self-confidence;
> -establish a good working relationship with the witness;
> -refresh, but not direct, the witness's memory;
> -eliminate opinion and conjecture from the testimony;
> -focus the witness's attention on the important areas of testimony;
> -make the witness understand the importance of his or her testimony;

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[14]Dawn Russell & Diana Ginn, *Framework For Action Against Family Violence 2001 Review*, online:https://novascotia.ca/just/publications/docs/russell/crown.htm.

> -teach the witness to fight anxiety, and particularly to defend himself or herself during cross-examination.[15]

[23] In meeting with a witness well in advance of a trial, or in seeking an adjournment of proceedings when there is a good witness-readiness reason for doing so, counsel can advance these objectives. If a witness seems reluctant about meeting with the prosecutor or giving testimony in court, counsel may, as outlined in the PPS *Manual*, advise the witness of the availability of supporting services, and re-refer the witness to the Victims' Services Division if the initial referral by police has not been acted upon. Indeed, the need to re-refer victims of alleged family violence arises often because of the risk of victims' contact information being in a state of flux and becoming outdated as living arrangements get sorted out in the aftermath of a law-enforcement intervention. There might also be the need for further investigation, or to have the witness re-interviewed. All of this is comprehended in the *Manual*.

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[15] R. Aron & J.L. Rosner, *How to Prepare Witnesses for Trial*, 2d ed. (Danvers, MA: West, 1998) at 82-83.

[24] Had the prosecution sought an adjournment of this trial to allow further investigation, or to allow Ms. Bonvie to speak with a victim-services counsellor, the court would have considered it fully.

[25] As it is, the application was to forge ahead, and subject Ms. Bonvie potentially to a cross-examination by both the prosecution and the defence. In my view, that would not be fair to Ms. Bonvie. It would also have the prospective effect of entrenching a practice that would hinder the hearing of matters on their merits.

[26] The court declines to grant leave to the prosecution to cross-examine Ms. Bonvie on her video-recorded statement.

[27] I am grateful to counsel for their extensive briefs which were most helpful in assisting the court in making its decision.

JPC