

IN THE PROVINCIAL COURT

R

vs

PAUL OAKLEY
(Cite as R v. Oakley, 2001 NSPC 36)

DECISION

The Honourable Judge C. H. F. Williams, JPC
Delivered orally December 17th, 2001

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The Honourable C. H. F. Williams , JPC

Counsel: Ms. C. Driscoll, Crown Attorney
Ms. S. Kennedy, Defence Attorney

Introduction

It was 0145 hours on November 14, 2000. Lisa Drummond, a student and the superintendent of 48 River Road, an apartment complex in the Halifax Regional Municipality, heard a knock at her apartment door. When she opened it, Elizabeth Ede, the complainant and friend of the accused, Paul Oakley, entered quickly into the apartment. Ede was dressed only in a knee length night shirt. In addition, she was tearful, very upset, shaking and her right eye was blackened. She requested the superintendent to be quiet because the accused was looking for her although he did not know which apartment she had entered. The superintendent's apartment was number ten while that of the accused was seventeen. However, because they could hear the accused walking up and down the stairs calling Ede's name the superintendent extinguished the lights in her apartment.

Ede told Drummond that her sister had called the police who were on route and, because of her state of undress, Drummond covered her with a blanket. She, Ede, then disclosed to Drummond a series of events that occurred commencing from November 9, 2001 to the time of entering Drummond's apartment. When the police arrived and in the presence of Drummond, Ede recounted the same ordeals as she had earlier divulged to Drummond.

The officers who arrived on the scene were Constable Danny Doiron and Constable Derrick Boyd. On arrival and entry into the apartment building they encountered the accused whom Constable Boyd escorted to his apartment number seventeen.

Constable Doiron went to apartment ten where Ede had sought assistance. There, Doiron observed Ede's injury. Quivering and crying she gave him a narrative of what she had experienced since November 9, 2001. She asserted that on November 9, 2001, she went to visit her sister who lived in Fall River. It was a birthday party. She stayed overnight and returned to apartment seventeen, where she lived with the accused, the morning of November 10, 2001 at 1100 hours. On her arrival in the apartment, the accused questioned her about the sleeping arrangement at her sister's place. They argued. He became upset and struck her in the eye. For the following days because of her eye's blackened condition he confined her to the apartment by placing screws in the door. November 14, 2001 was her first opportunity to escape. She also told the Constable of the location of the screws in the door which he went and observed and confirmed.

Constable Boyd who was in apartment seventeen with the accused was then not aware of the discussions between Ede and Constable Doiron. However, when he was with the accused he asked him what was "going on." The accused informed him that Ede had received a black eye when she

had attended a party at her sister's place and that now she was going to blame him for it. When Constable Doiron came to apartment seventeen and saw the condition of the door jam he mentioned this aspect of his conversation with Ede to Constable Boyd. Boyd also examined the door jam and saw the screw holes and a screw in place. The accused explained that the screws were placed in the door for security against his estranged brother.

On the information received from Ede, Constable Doiron arrested and charged the accused with unlawfully assaulting and confining her. When transporting the accused to the police precinct, Constable Doiron then told Constable Boyd all that was related to him by Ede. He also turned over the investigation to Constable Boyd. Possessing two versions concerning the causation of Ede's black eye, Constable Boyd, for clarification, telephoned Ede's sister in Fall River. He spoke not only with the sister but also with her husband. However, he received further conflicting reports. The husband did not recall seeing any black eye while the sister thought that she did observe one. Making further investigation, Constable Boyd returned to 48 River Road to speak to Ede. He wanted to determine whether she had obtained the black eye at her sister's place or afterwards. For confirmation, Ede gave him the name of a third person who was present at the party. He telephoned that person who informed him that Ede did not have any black eye at the party.

Thereafter, Constable Boyd informed her that he wanted her to tell him truthfully how she received her black eye. He cautioned her that she had the right to consult with counsel and that she was not obligated to say anything because anything she said might be used as evidence in a trial. Additionally, he warned her that if she was lying she could be charged with misleading the police in an investigation. She responded, "I swear I am telling the truth." Believing that she would be truthful and being satisfied from the admonitions that he had given her, Constable Boyd commenced to record, in writing, her recounting of her experiences. Essentially, she recounted what she had already disclosed to Constable Doiron. After she read the written statement, she signed it.

Nonetheless at trial, she admitted making the statement but denied that its contents were true. She denied that the accused intentionally struck her in the eye. She testified that she and the accused were playing when she lost her balance on a couch and fell and struck his elbow. Her eye blackened over the time period in question. She admitted going to Drummond's apartment. However, she went only because she had revealed to her sister an intimate detail about the accused which he did not care for anyone to know and she felt that he would be upset with her. She called her sister from Drummond's apartment and told her that the accused had struck her in the eye. In spite of all this, she insisted that the accused did not assault her or unlawfully confine her.

The Crown made an application pursuant to the *Canada Evidence Act*, s.9(2) and was granted permission to cross-examine her. Further, the Crown applied to use her statement as substantive evidence of reliability under the procedures set out in *R. v. F.J.U.*, [1995] 3 S.C.R.764.

The accused testified. He denied the allegations made against him. He explained that the screws were put in the door for added security against any unlawful intrusions from an estranged brother. Additionally, he supported Ede's story on how she received her black eye. However, his testimony was that when she lost her balance he put his hands out to catch her. He also supported her story

of why she left his apartment to go and see the superintendent.

This case therefore raises the issue of the use of Ede's prior inconsistent statement and the criterion of threshold reliability.

Analysis

Here, I have a case of an outright denial of the truth of what the complainant told the police on their initial contact. I refer to the analysis that I made in *R.v. Howe* (today's date, unreported). In that case I stated that:

In addition, I have a case of domestic violence where all too often this court hears complainants who, for various reasons, recant the statement that was contemporaneous to the incident reported and which they gave to the police in trustworthy circumstances. Now, it may be difficult, for reasons best known to her, for the complainant to repeat or to affirm, in the witness box, what she told the police. Therefore, it seems to me, that the principled approach stated by Kerans J.A., and, as amplified by Iacobucci J., in *R.v. Starr*, [2000] 2 S.C.R. 144, would be applicable in this case, where the circumstances surrounding the taking of her statement could "provide circumstantial guarantees of trustworthiness."

Additionally, I stated that:

... when I apply the principle concerning the adoption of prior recorded statements as was pronounced by Cory J., in *R. v. C.C.F.*, [1997] 3 S.C.R. 1183, a case of videotaped evidence and the adoption of the tape by a child witness pursuant to s. 715.1, it seems to me that here, in a case of domestic violence with similar vulnerabilities for recantation or adoption, the test of whether the complainant adopts in full or recalls the details of her prior recorded statement should not be the final determination of reliability but rather it should be a means of determining whether the prior recorded statement meets the threshold degree of reliability required to admit it for the truth of its contents. Here, her inconsistencies fulfill the requirement to render the prior recorded statement "necessary" evidence. Thus, it seems to me, on the same principle as the adoption of videotaped evidence as pronounced in *C.C.F.*, that her prior statements, together with her viva voce evidence given at trial, would then become her complete evidence-in-chief.

Therefore, the fact that Ede may have contradicted her recorded statement does not necessarily mean that the statement is false or unreliable. Her recantation, at trial, may not be fatal as it does not render the impugned statement inadmissible. Further, as was put by Sopinka J., dissenting, in *R.v. W.(D.)* [1991] 1 S.C.R.742, 747 (the Supreme court made no criticism of the following jury direction):

In deciding what the facts are in this case you will be the sole judges of the truthfulness of the witnesses and of the weight to be given to the testimony of each of them. In deciding whether a witness is worthy of belief you should bring your own common everyday experience to such matters. Simply, in effect, exercise your good common sense. I tell you that you are entitled to believe all of the evidence given by a witness, part of that evidence or none of it. In determining whether to believe that witness you should consider such things as his or her ability and opportunity to observe his appearance or her appearance in the manner while testifying before you, his or her power of recollection, any interest, bias or prejudice that he or she may have, any inconsistencies in the testimony and the reasonableness of that testimony ought to be considered by you when considering the light of all of the evidence in the case. You are not obliged to accept any part of the evidence of a witness just because there has been no denial of it.

Furthermore, as I stated in *Howe*:

... in assessing the circumstances under which it was taken and the overall reliability of her evidence, the recorded statement may well be more reliable than her viva voce evidence. *R.v. B.(G.)*, [1990] 2 S.C.R. 30,55. Therefore, from the above noted authorities it seems logical that after the prior statements have been admitted, I must then assess the circumstances in which the statements were made, assess her credibility, and the overall reliability of the evidence, in determining how much weight I should give to the recorded statement . . .

Thus, as I observed her as she testified and read and assess her statement contextually not only in light of the total evidence-in-chief, but also on the total evidence and when I apply the above-noted principles I find and conclude that Ede's viva voce testimony was scripted and a "shrewd and deliberate attempt to prevent the Crown from imputing credible evidence against the accused." I find that her statement to the police was recorded in a reliable way. The police were investigating a possible domestic violence incident reported to them by a third party who was apparently contacted by the alleged victim, Ede. On the scene, Ede spontaneously related orally to an officer what she had experienced having previously related the same occurrence to her building superintendent. Before she gave a written statement the police cautioned her about lying and impressed upon her that she should tell the truth because of the conflicting version of facts they had received concerning her observable injury. She "swore" that she was being truthful. Further, the incidents that she related were sufficiently fresh and vivid in her mind as to make her description of them probably accurate. Additionally, she was aware that she spoke to the police and that they recorded what she said. The officer was neither oppressive in his conduct nor did he coerce her to give a statement. In fact, he cautioned her about giving a statement and in particular giving a false statement. Her statement was voluntary and without any pressures or influence from the police. She read the written statement and signed it.

Thus, as I stated in *Howe*:

...she was aware of the contents of the statement and her signature, without any contradictory evidence, in the circumstances and, in my opinion, is her then acknowledgement that the facts recorded and which she read were accurate. Additionally, the police testimony of the surrounding circumstances and of their observations were capable of inducing a rational belief that [Ede] was telling the truth when she spoke to them.

At trial she denied the truth of the statement. However, as I assessed her demeanour when she testified I concluded that she was not telling the truth. Her story that her eye struck the accused's elbow when she lost her balance did not have an air of reality. Additionally, it was not "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." *Faryna v. Chorny* [1952] 2 D.L.R. 354, 357 (B.C.C.A.)

The accused testified. In my opinion his testimony was scripted. My impressions of his testimony were that it lacked an air of reality and also was not "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." In short, his testimony did not raise a reasonable doubt. However, the burden is on the Crown to prove its case against the accused beyond a reasonable doubt.

Conclusion

Here, credibility was the paramount issue. However, I conclude that Ede's recorded statement has met the minimum reliability threshold and that it is sufficiently reliable to be substantially admissible. As I concluded in *Howe*:

It is sufficiently reliable because it was made under circumstances that "provide circumstantial guarantees of trustworthiness." Further, it was the product of her "present intentions" and "state of mind" and is therefore supportive of the conclusion of what in fact she did recollect concerning the conduct of the accused when she declared it. Additionally, it relates evidence which could be admissible as her sole testimony. Concluding that her in court testimony was entirely truthful was difficult. However, when combined with the total evidence I accept and do not doubt that she did tell the police that the accused assaulted her [and confined her.]

Accordingly, in deciding the ultimate reliability question concerning the statement, given her recantation and the analysis that I have made, I am satisfied that the Crown has proved beyond a reasonable doubt that the accused, Paul Andrew Oakley, did assault the complainant, Elizabeth

Christine Ede and also unlawfully confined her as charged. In the result, I find him guilty of the assault and also of the unlawful confinement of Elizabeth Christine Ede and I will; enter convictions on the record.