IN THE PROVINCIAL COURT

R.

vs.

DAVID CHRISTIAN LEWIS

(Cite as R. v. Lewis 2003 NSPC 3)

DECISION

The Honourable Judge C.H.F. Williams, JPC
Delivered orally January 17, 2003

Counsel: **Eric R. Woodburn, Crown Attorney**
Roger Burrill, Defence Attorney

Introduction

The complainant, Cassandra Casey, reported to the police that the accused, David Christian Lewis, had assaulted her. She gave two statements of the same allegation. Essentially, in her first statement taken by the police in writing on the day of the event, she averred that, on September 5, 2001, during an argument over money she had taken earlier from the accused charge account, he threw her onto his apartment's floor, smacked her in the face and pushed it into the carpet causing some injuries. She went to the hospital, spoke to a medical health social worker and the police, but did not wait to receive any medical attention.

On March 8, 2002, she gave a warned and cautioned statement to the police attesting that her earlier statement was not true. In her own writing, she wrote that the accused did not assault her and that she had sustained her injuries from falling off her bicycle that had its brakes cut by someone whom she suspected was the accused. As they were having difficulties in their relationship, her earlier statement was a malicious attempt to get the accused into trouble. Likewise, she gave the earlier statement because she was staying at a woman's shelter and the complaint of assault was also to ensure her continued stay there.

The police, after some efforts, were unable to secure the attendance of the complainant at trial. As a result, the Crown called for a voire dire to introduce the statements of the complainant, particularly her first statement, as necessary and substantially reliable.

Voire dire evidence

In her testimony, Rene Murray identified that she was the medical social worker who spoke with the complainant at the QE2 Emergency Department. The complainant was distraught and crying and her face and nose were swollen. She reported that she was assaulted and that she was going to a woman's shelter.

Constable Bruce Bentley was the police investigator. On September 5, 2001, he went to the hospital and interviewed the complainant. He observed that she was crying and had a bump to her nose and a cut inside the lip. Upon asking her what occurred, the complainant gave him a statement that he wrote down as she related it. Exhibit VD2. This statement was not made under an oath nor was it videotaped. Additionally, the police did not caution her about the need to tell the truth and the consequences if she did not do so. She informed the police that during an argument, the accused had assaulted her causing the observed injuries.

On March 8, 2002, the Constable, upon the complainant's request, arranged to take another statement from her. Exhibit VD3. On this occasion, he warned and cautioned her about telling the truth and the consequences if she did not do so. In her own writing, she corrected her first statement and disavowed that the accused had assaulted her and had caused her injuries. Her first statement

concerning the accused was motivated by malice toward him and her desire to maintain her stay at the woman's shelter.

Issue

Does the complainant's statement written by the police on September 5, 2001, meet the criteria of necessity and reliability as decided in Kahn and subsequent cases?

Analysis

The out of court statements attributed to the complainant are hearsay which under the proper set of circumstances could meet the necessity objective. The difficulty here, however, is that the complainant has not testified at trial to either replicate or adopt relevant evidence contained in the statements. Her testimony is not before me to test and assess objectively the reasons for the inconsistencies and any reliability in either statement. See ***R. v. Howe***, [2001] N.S.J. No. 536 (Prov. Ct.)

Additionally, I have concerns about the reliability of the out of court statements. In ***R. v. Smith*** (1992), 75 C.C.C. (3d) 257 (S.C.C.), at 270 the court stated:

> The criterion of "reliability" -- or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness -- is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established.

In ***R. v. K.G.B.*** (1993), 79 C.C.C. (3d) 257 (S.C.C.), at 294 Lamer C.J.C. summarized the governing indicators of reliability most likely to diminish the concerns about hearsay evidence:

> Therefore, the requirement of reliability will be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of its trustworthiness with respect to the two hearsay dangers a reformed rule can realistically address: if (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement,

> there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement. Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires

Here, Exhibit VD2, was not taken after a caution or a warning by the investigator as to the consequences of providing false or misleading information to the police. The police made no videotape of this statement and there was no voice recording in support. Hence, there exist no impartial or reliable indicia to accurately portray the complainant's out of court reactions to questions, her hesitations, degree of commitment to utterances made, or the subtle observations that would go toward assessing her credibility. In the absence of any electronic reproduction of the complainant's interview with the police, I cannot fairly assess any sense of the presence at the time of the making of the statements attributed to the complainant. Further, as the complainant did not testify and was not subjected to cross-examination, it is, in my view, impossible to weigh two out of court statements, compare them against each other, in abstract, and arbitrarily select the one suggested by the Crown to be reliable as it assists the Crowns case.

Conclusion

I think that here there exist a paucity of support for the Crown's contention that Exhibit VD2 is necessary and reliable. The complainant has not testified under an oath nor at trial to adopt or recant any prior out of court statements. She was available for trial but could not be secured by the police to attend as required. Thus, it is speculative to say as to what would be her in court testimony. In the absence of her in court testimony, in the present circumstances, I think that as the witness has not recanted, as she was incapable of doing so, necessity does not arise. ***R. v. F.J.U.***,[1995] 3 S.C.R. 764. Further, on the analysis that I have made and the authorities cited, I do not think that the Crown has met any threshold test for reliability. Moreover, I think that in combating the domestic violence syndrome the Crown must not seek to attenuate the burden of production and the burden of proof and persuasion that are mandatory in the prosecution of a criminal trial. Put succinctly, the evidence on the voir dire does not, in my opinion, support the established criteria of necessity and reliability. Therefore, the Crown's motion must fail and it is dismissed.