# IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

R. v. B.R.J. 2012 NSPC 32

Date: May 1, 2012
Docket: 2364452, 2364455
Registry: Halifax

**BETWEEN:**

**Her Majesty The Queen**

**v.**

**B.R.J.**

## DECISION ON THE ADMISSIBILITY OF A CO-ACCUSED'S STATEMENT FOR THE TRUTH OF ITS CONTENT

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**JUDGE:** The Honourable Anne S. Derrick

**HEARD:** April 19 and 26, 2012

**DECISION:** May 1, 2012

**CHARGES:** sections 344 and 267(b) of the *Criminal Code*

**COUNSEL:** Gary Holt, for the Crown

Claire McNeil and Mark Russell, senior law student, for B.R.J.

By the Court:

*Introduction*

[1] On September 20, 2011, D.A., a Grade 8 student at * School was beaten up and had his IPod Touch stolen. Three young people were charged as a result including B.R.J. B.R.J. is charged that he robbed D.A., contrary to section 344 of the *Criminal Code* and that at the same time he committed an assault on D.A., causing him bodily harm, contrary to section 267(b) of the *Criminal Code*. Also charged for robbing and assaulting D.A. were T.S. and S.S. This decision relates to the issue of the admissibility of a statement that S.S. gave the police on September 20, 2011.

[2] I heard evidence in a voir dire on April 19 and submissions on April 26. I had expected to deliver my decision on the voir dire on April 26 and continue B.R.J.s' trial. However technical problems arose in relation to my viewing of the S.S. police interview which counsel indicated was a necessary feature of my determining the admissibility issue. The whole interview had not been played during the voir dire. The technical problem that prevented me from watching the video on April 26 had to be solved and my decision and the trial adjourned to today.

*S.S. Testimony and His September 20, 2011 Police Statement*

[3] S.S., whose criminal proceedings in relation to the D.A. incident have concluded, was called as a Crown witness at B.R.J.s' trial. He claimed to be unable to remember anything about what happened on September 20 other than his own involvement. His memory was not improved by being shown his police statement, obtained by Cst. John Beer, a detective with the Halifax Regional Police General Investigation Service, on September 20.

[4] In light of inconsistencies between S.S.'s testimony in the witness box and the fulsome details he gave about the D.A.s' incident in his September 20 police statement, we proceeded with the section 9(2) *Canada Evidence Act* procedure. I permitted cross-examination by Mr. Holt of S.S. about the statement but S.S. was no better able or willing to recall under cross-examination what he is shown as saying in the video-taped statement about the events of September 20. All he said he recalled was getting put in handcuffs and taken to the Booking area of the Halifax Police station.

[5] S.S. confirmed that it was him on the video. However he told Mr. Holt: "I don't remember saying all that shit…I don't remember that day." He said he had no recollection of talking to Cst. Beer, adding "I don't really remember if I was with T.S. [T.S.] and B.R.J. on September 20." All he remembers, he says, is that he got charged for the D.A. incident and did his sentence for it.

[6] After proving S.S.'s statement with evidence from various police officers, Mr. Holt re-embarked upon an examination of S.S. This went nowhere. S.S. continued to claim he could remember nothing about what he was saying in the videotaped statement. "I didn't know at the time I was saying it" he said, indicating he had been "messed up" when he was being interviewed. As far as the four names he gave to Cst. Beer of the youths he was with just prior to and during the D.A. robbery and assault, S.S. said, "Those names came off the top of my head." He testified he knew T.S.'s full name because he "knew his brother" and knew B.R.J.s' full name because of knowing "his younger sister." But he was unable to tell Mr. Holt the sister's name. And, contradicting the information he gave Cst. Beer, S.S. now says it was he who went up to D.A. and asked about his IPod. He told Mr. Holt that his saying to Cst. Beer that T.S. had asked for the IPod was "a lie" and that he had told D.A. "give it to me." He suggested that his statements in the video could have been a distortion of what had happened. Although he described in his videotaped statement how D.A. was assaulted, he told Mr. Holt he didn't know who "whacked" D.A., that he was "pretty sure" it wasn't B.R.J., and that D.A. fell to the ground because he, S.S., had "whacked" him.

[7] Mr. Holt concluded his examination of S.S. on the basis that nothing of evidentiary value was being obtained. Defence counsel then commenced to cross-examine S.S. on the statement and the circumstances under which it was obtained.

[8] S.S. told Defence counsel that he was “messed up” on September 20 and had been smoking “weed” and drinking and had taken a couple of ecstasy pills. He claimed that the “weed” smoking and pill-taking had been before the incident and the drinking after, it all having occurred before he gave his statement. He claimed to have been drunk and said he was tired. The statement was taken late in the evening of September 20 and S.S.’s fatigue is evident from the videotape. He told Cst. Beer he was tired.

[9] S.S. had no better memory when questioned by Defence. He testified that he did not now remember what had happened that day. He agreed that as he has been placed in handcuffs a number of times in the past, the recollection of that happening on September 20 may not be accurate.

*Admissibility – Considerations at the Threshold Stage*

[10] Mr. Holt gave notice that in the circumstances, the Crown would be seeking to have S.S.’s statement admitted for the truth of its content. This can be achieved on the basis of a principled exception to the hearsay rule as the S.S. statement is otherwise inadmissible hearsay.

[11] In *R. v. Poulette, 2008 NSCA 95* the Nova Scotia Court of Appeal observed, "Hearsay is excluded not because it is irrelevant to the inquiry before the court, but due to the difficulty in testing its reliability." A statement is not like a witness: it cannot be tested through cross-examination for the possibility of misperceptions, incorrect recollections, misrepresentations, and lies.

[12] The fact that S.S.’s statement cannot be tested through cross-examination does not preclude it being admitted as evidence for the truth of its content:

> ... it is recognized that the inability to test evidence through cross-examination does not bar the admission of the hearsay evidence when (i) there is no real concern about whether the statement is true or not because of the circumstances in which it was made; and/or (ii) circumstances are such that the trier of fact will be able to sufficiently test the truth and accuracy of the statement. These situations are not mutually exclusive alternatives and can both be considered in assessing the admissibility of a statement. (*R. v. Khelawon, 2006 SCC 57, at paragraphs 49 and 61-63.*)

[13] The key features of the principled analysis are proof of necessity and reliability. As we are dealing with the statement of someone formerly accused, a co-accused, I must also be satisfied, on the balance of probabilities, that the statement "was not the product of coercion in any form, whether it involves threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct." (*R. v. K.G.B., [1993] S.C.J. No. 22, paragraph 117*) As stated in *K.G.B.*: "…the test developed by this Court for the admission of confessions is well-suited to making a threshold determination of whether the circumstances under which the statement was made undermine the veracity of the indicia of reliability." *(paragraph 115)*

[14] The *K.G.B.* requirement obliges me to "examine the circumstances under which the statement was obtained, to satisfy [myself] that the statement supported by indicia of reliability was made voluntarily if to a person in authority, and that there are no other factors which would tend to bring the administration of justice into disrepute if the statement was admitted as substantive evidence." *(paragraph 120)*

[15] The issue of voluntariness was addressed in submissions and conceded, to the extent of Defence acknowledging there is no evidence of any threats or promises made by any of the police officers who had contact with S.S. The Defence also accepted that there is no evidence of S.S. being subjected to oppression. What the Defence does dispute is S.S.'s capacity to give a reliable statement given the effects of the drugs and alcohol he had ingested prior to being

questioned, an issue I will address in due course. Both Crown and Defence concede that section 146 of the *Youth Criminal Justice Act* is not relevant to the admissibility of S.S.'s statement as evidence against B.R.J. Section 146 only applies to the admissibility of a young person's statement as evidence against that young person.

[16] The Defence did not anchor its objection to S.S.'s statement being admitted in the necessity aspect of the principled analysis but rather in the issue of its reliability. I will address both features of the principled approach to this hearsay evidence. There is also a residual discretion to exclude the statement even where the criteria of necessity and reliability are made out if the probative value of the statement is outweighed by its prejudicial effect. (*R. v. Blackman, [2008] S.C.J. No. 38, paragraph 33*)

[17] However it is important for me to acknowledge the limitations inherent in the threshold reliability determination: "It is essential to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility voir dire." *(R. v. Khelawon, [2006] S.C.J. No. 57, paragraph 93)* Threshold reliability focuses on the admissibility of the statement not on whether it 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 statement 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*)

[18] The admonition in *Khelawon* to not pre-determine ultimate reliability at the voir dire stage satisfies me that the application of *Vetrovec* considerations relevant

to a co-accused's statement should occur if and when the ultimate reliability of the statement is being assessed.

[19] The *Vetrovec* caution *(R. v. Vetrovec, [1982] 1 S.C.R. 811),* also discussed by the Supreme Court of Canada in *R. v. Bevan, [1993] S.C.J. No. 69 and R. v. Khela, [2009] S.C.J. No. 4,* and *R. v. Smith, [2009] S.C.J. No. 5,* emphasizes that it is dangerous to convict an accused on the unconfirmed evidence of an untrustworthy witness. The trier of fact should look for independent evidence that offers "comfort ... that the witness can be trusted in his or her assertion that the accused is the person who committed the offence." (*Khela, paragraph 42*)

[20] If I admit the S.S. statement then the question of the weight it should be accorded comes into play, in the context of the ultimate assessment of the Crown's case and whether the Crown has met its burden of proving the charges against B.R.J. beyond a reasonable doubt. At that point I would have to give myself "a clear and sharp warning" in accordance with the law in light of the allegations by S.S., a co-accused, of B.R.J.s' involvement in the robbery and assault of D.A. (*R. v. Kehler, [2004] S.C.J. No. 1, paragraph 24*) At this voir dire stage however, I am only considering whether S.S.'s statement will be admitted as part of the Crown's case for the truth of its content. Although the issue of reliability is a central concern at this admissibility stage, a *Vetrovec* caution does not come into play now.

*The Principled Approach - Necessity*

[21] I find that S.S.'s statement is necessary to the Crown's case in light of the fact of S.S.'s gutted memory of the events in issue. I find that under the principled approach to admitting hearsay evidence, this is an appropriate basis for finding necessity. The Crown's case should not be required to founder on the shoals of S.S.'s apparent inability to recall any details about events that occurred only seven months ago. The S.S. statement is central to the Crown's case on the essential issues of identification and the nature of B.R.J.s' role in the robbery and assault of

D.A. Other than the statement, there is only D.A.s' in-dock identification of B.R.J. and his testimony describing that B.R.J. was present at the scene.

[22] Although S.S. did not refuse to testify, his memory loss is, in effect, really not much different. I find he has essentially been refusing to remember. I do not believe S.S.'s claims about the extent of his loss of memory. I do not believe that he hardly knew T.S. and B.R.J.. He knew their names to tell Cst. Beer because he knew them, not because he knew their siblings. As his statement indicates he knew how to direct Cst. Beer to B.R.J.s' house. I observed S.S. speak to B.R.J. as he was being taken from the courtroom by the sheriffs at the end of the day on April 19. He would hardly have done so if he did not know B.R.J. at all. This event stood out enough that I noted it on the record as S.S. left the courtroom.

[23] I also do not believe that S.S. can remember nothing about the D.A. incident other than his own role which he gave some testimony about, taking more responsibility for the incident than he had in his police statement. If, as S.S. has tried to claim, he was so "messed up" on "weed", alcohol, and ecstasy that he really can't recall now who was involved, how is he able to remember that he demanded the IPod? Why would his memory have such selective retention? I further do not accept as truthful S.S.'s claim that he can recall nothing about giving a police statement.

[24] I believe S.S. did not want to testify about what others involved in the D.A. incident may have done. Perhaps he is adhering to the "code" of the street and does not want to talk about anyone else's role other than his own. It was obvious to me that in the witness box he did not want to give anyone up. I simply do not believe his memory has genuinely disappeared. I believe he presented with a significant memory problem to avoid giving any evidence that could, as a matter of truth or not, implicate anyone else. This trial is "not to be held hostage" to S.S.'s refusal to recall anything about the events of September 20. I find there is no issue as to necessity. *(R. v. Scott, [2004] N.S.J. No. 38, paragraph 11)*

*The Principled Approach - Reliability*

[25] The more challenging issue to be determined is the issue of reliability. There are some indicia that support the statement's reliability. Although not a statement taken under oath, S.S. was told by Cst. Beer that if he did give a statement it could be used against him as evidence in court. He was told he did not have to give a statement and could ask Cst. Beer to stop anytime. The statement was obtained on the basis that S.S. was going to be charged for the robbery and assault of D.A. and consequently Cst. Beer went through the requirements of section 146 of the *Youth Criminal Justice Act*.

[26] The Crown submits the indicators of reliability lie in the following features of S.S.'s statement: (1) it was only a few hours after the incident so the events would have been fresh in S.S.'s mind; (2) what S.S. described to Cst. Beer was consistent with known facts – the nature and location of D.A.s' injuries, the number of participants (D.A. testified to seeing two perpetrators and a third person present. S.S. described himself, T.S. and B.R.J. being involved); the grade levels of the perpetrators (D.A. described T.S. and S.S. as being Grade 8 students like him and heard the third person referred to as "the high school student. S.S. confirmed that he and T.S. were in Grade 8 and told Cst. Beer that B.R.J. was in Grade 11.)

[27] Mr. Holt invited me to find as an overall impression that S.S. was endeavouring to tell Cst. Beer the truth about the D.A.s' incident, "as he knows it", to use Mr. Holt's words. S.S. was, in Mr. Holt's submission, "quite willing" to give up details about what had happened earlier. Cst. Beer did not have to expend much effort drawing out his statement.

[28] The Defence submitted that S.S.'s statement does not pass the reliability test, basing their argument on various features of the interview. The importance of S.S. telling the truth was never directly mentioned. S.S. was told by Cst. Beer that "…you can just tell me whatever you want…" He assures S.S. the statement taking can be done quickly so that S.S., who complained of being "really tired", can go and lie down. The solemnity of the occasion was undermined by this, says the Defence, and S.S.'s demeanor suggests the solemnity of the occasion had not been impressed on him.

[29] The Defence also makes the following submission about the statement's reliability: at first S.S. minimizes his own role, responding to Cst. Beer's question about his involvement by telling him he hit D.A. twice in the head. He tells Cst. Beer that he just punched D.A., "About twice, three times". He repeats this later in the statement and confirms in response to Cst. Beer's questioning that he kicked D.A. "a few times" which he refines by saying "at least 10 times." S.S. starts smiling at this point in the interview although he tells Cst. Beer he doesn't think the situation is funny, "It's just like I've got a smiling problem."

[30] At this point in the statement, S.S. tells Cst. Beer he knows "for a fact" that he "only punched [D.A.] once…in his face." He acknowledges kicking D.A. "pretty hard" and admits to Cst. Beer he would not be surprised if D.A. suffered broken bones as a result of being kicked.

[31] The Defence has argued that the interview indicates Cst. Beer believed the earlier part of S.S.'s statement was a lie and that at this point he is beginning to get the truth from him. This, says the Defence, reveals the unreliability of the statement. Furthermore, in the Defence submission, the initial portion of S.S.'s statement - which the Defence claims is riddled with lies - contains the allegations made by S.S. about B.R.J.s' role in the assault on D.A. B.R.J.s' involvement is not further explored by Cst. Beer as he draws more of the truth of the events out of S.S.

[32] I watched the S.S. interview carefully. S.S. does start out with a more modest description of his role. Cst. Beer keeps asking him about the incident and, encountering no resistance, obtains more admissions from S.S. of what he did. Cst. Beer indicates his confidence that S.S. is telling him the truth. After S.S. is more forthcoming about his actions, Cst. Beer tells him: "So you're being honest with us." He only expresses skepticism about S.S.'s claim that he did not know D.A.: "You got to know the victim", he says, challenging S.S.'s portrayal of D.A. as a stranger.

[33] Cst. Beer secures more elaboration from S.S. who goes on to admit to kicking D.A. in the arms a couple of times "because he wouldn't let go of the

IPod." Cst. Beer wraps things up by accepting that S.S. did not know D.A.s' name and telling him, "I appreciate you being honest with me."

[34] I do not draw the same inferences from the statement as the Defence. S.S. appears to take the interview seriously. His "smiling problem" does not interfere with what moves smoothly along as an exercise in Cst. Beer reeling in the details he is seeking. I infer that Cst. Beer believed S.S. gradually admitted to the true nature of his role. He focuses in the interview on S.S.'s involvement and says to S.S. at the conclusion: "I think you told me everything you had to tell me." Early on, when he told S.S., "you can just tell me whatever you want…" it was in the context of saying he was not going pressure S.S. into telling him anything.

[35] I also do not accept that S.S. was so impaired by drugs and alcohol that he could not have observed and remembered the incident that had occurred 5 or so hours before he was interviewed by Cst. Beer. Cst. Kennedy who knew S.S. well and was involved in his transport to Booking following his arrest around 8 p.m. on September 20, testified that he was "on something for sure" which she could tell from his behaviour. She knew S.S. was going to be interviewed but there is nothing to suggest she thought he was not in a fit state for giving a statement. She did not testify that she thought S.S. was impaired.

[36] Although S.S.'s fatigue is obvious from the video, he has no difficulty responding to Cst. Beer's questions, does not seem at all confused, and provides a coherent version of events. He is oriented enough to spontaneously offer up B.R.J. in the middle of Cst. Beer exploring whether the attack on D.A. was retaliatory. S.S. gives a very precise description for the location of B.R.J.s' house and tells Cst. Beer: "His mom will give him up."

[37] I do not find that S.S.'s admitted drug and alcohol consumption prior to his interview with Cst. Beer affected the reliability of his recall or what he was able to observe of the incident. Cst. Beer testified he did not believe S.S. to be impaired during the taking of the statement and from my observations of the interview, I find that to have been a reasonable assessment.

[38] There are corroborated details in S.S.'s statement that support its reliability when assessed on a balance of probabilities. These include the consistencies with known facts that Mr. Holt identified. S.S. also accurately described to Cst. Beer being seen by Csts. Hueston and Kennedy and running off into the woods. He admitted to being in breach of conditions not to associate with T.S. Cst. Kennedy testified that she had seen S.S. on September 20 "in a wooded area breaching a no-contact order."

*Conclusion*

[39] Measured on the standard to be applied for determining threshold admissibility, I find the S.S. statement clears the reliability hurdle for the reasons I have indicated. A basis has not been made out for excluding it on a probative value versus prejudicial effect analysis. I will admit S.S.'s statement to Cst. Beer into evidence to be considered by me, with all the other evidence at the conclusion of the trial in determining whether the Crown has met its burden of proving B.R.J.' guilt beyond a reasonable doubt.