

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Budge, 2012 NSPC 125

Date: 20121217

Docket: 2155316, 2155358

Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Sandra Budge and Melinda Gaigneur

Defendant

DECISION

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: December 7, 2011, February 3, February 29,
May 31, June 16, November 19, 2012

Decision: December 21, 2012

Charge: Section 266(b) *Criminal Code*

Counsel: Kathy Pentz, Q.C., for the Crown
Tony Mozvik and Alan Nicholson, for the Defence

Introduction

[1.] At the time of the alleged offence Mr. and Mrs. Gaigneur were separated. There were attempts at reconciliation. On the night in question Mrs. Gaigneur went to their home and found Mr. Gaigneur in bed with another woman, the complainant. As a result of the ensuing confrontation Mrs. Gaigneur and her sister, Sandra Budge, the defendant, were charged with assaulting the complainant. The trial began on December 7, 2011, with the Crown calling Mr. Kenny Gaigneur. As a result of his testimony the Crown applied to have his statement admitted as a principled exception to the hearsay rule. After a *voir dire* the court ruled that the Crown had met the “threshold” reliability test, but the question of ultimate reliability would be decided at the end of the trial. [see Appendix “A”]

[2.] Mrs. Gaigneur in the meantime pled guilty to assaulting the complainant, Joanne Wilson, and was sentenced on May 9, 2012. Ms. Budge continued with her trial. After the complainant testified on February 3, 2012 Mr. Nicholson made a *Charter* application and sought a stay of proceedings as a result of “non-disclosure” by Crown counsel, Mr. Drake. On June 15, 2012 the court denied the defendant’s motion [see R. v. Budge, 2012 NSPC 69]. The trial continued on November 29, 2012. The defence called three witnesses including the defendant.

Issues: - (1) Did Sandra Budge commit an assault on the complainant?

(2) Does the Crown “*Khalewan* application” meet the “ultimate reliability test”?

Review of the Evidence

[3.] Kenneth Gaigneur testified that he is married to Melinda Gaigneur but was separated from her at the time of the alleged incident. He stated he knew the complainant from work. He took a taxi to the “Radio Club” and was there for five or six hours drinking “rum and Pepsi”. He is not sure what Joanne Wilson was drinking but he thinks it was beer. He described them both as being “pretty full” – meaning intoxicated.

[4.] Mr. Gaigneur stated he did not go to the Radio Club with Joanne Wilson, he just met her and her boyfriend at the bar. He went to the bar by himself. He and Joanne Wilson left at closing, around 2:30 am, and went to a house party. They drove there in her car. They continued to drink at the party. He had rum, or beer, but he is not sure what Joanne Wilson was drinking.

[5.] Mr. Gaigneur and Joanne Wilson left the party together. He testified Joanne Wilson drove him home. They went in his house and continued to drink in his

house. They eventually ended up in bed together. He testified there was nothing romantic going on between them; “Just two people went to bed drunk, stupid.”

[6.] He thinks it was about four to four thirty am that his wife came to the house. She opened the bedroom door and he saw her, Sandra, Karen and Aubra.

[7.] Mr. Gaigneur testified he did not know Mrs. Gaigneur was coming to the house. Mrs. Gaigneur testified Kenny Gaigneur called her cellphone and asked if she was coming over and she said yes, she would see him later. [See Exhibit 4, at page 8 (1:36 am)]

[8.] Mr. Gaigneur stated “Joanne went upstairs. I never seen her until the next day.” Mrs. Gaigneur came over and began talking to him. Despite his wife finding him in bed with another woman, stating “It didn’t go over too good”, he maintained that nothing happened between the two of them. He said he called the police because they “were just wrecking the inside of my house.”

[9.] He testified that Melinda kicked the television and broke it, but he was not 100% sure. He just assumed she broke it, but he can’t recall.

[10.] Mr. Gaigneur reviewed the photographs of himself [Exhibit #1]. He said the injuries to his neck, nose and side of his face “were caused by Melinda just when

we were talking. After the incident catching us in bed”. She scratched him with her hands. He had no specific recollection of how he got the “welt” on his back [photo #6]. He thought it was Melinda but he was not 100% sure. He even suggested he could have gotten them at the Radio Club.

[11.] Regarding the other photos, #7 and 9 to 12, he has no recollection as to how these items “got there.”

[12.] Mr. Gaigneur identified Joanne Wilson in photos 14 to 16 but he has “no idea’ how she sustained those injuries. He can say she did not have them before they ended up in bed together.

[13.] Mr. Gaigneur testified he gave two statements to the police, but he could not recall the circumstances of giving either. He stated he did not remember the first one and he thinks he gave the second one a couple of months later. He does not recall the first one because he was “drunk.” And having read both statements prior to testifying did not “jog his memory.”

[14.] Crown counsel put Mr. Gaigneur’s statements to him in an attempt to refresh his memory. Having been unsuccessful, the Crown applied, pursuant to s. 9(2) of the *Canada Evidence Act* to cross-examine their own witness. The court, having read both statements, agreed there were inconsistencies with respect to them and

Mr. Gaigneur's testimony, and allowed Crown counsel to proceed. [transcript page 36, line 17-20]

[15.] Mr. Gaigneur denies doing any drugs on the night in question. He testified he "vaguely remember(s) talking to the officers that night. I don't know who they were, or couldn't tell you what they look like." He does not recall his statement being recorded, or what he told them despite reviewing the transcript of same.

[16.] Transcript at page 45, line 15:

Q. Okay, now if you could turn the... maybe all from that statement. So general you're just saying that you don't remember anything from this statement....

A. I don't even remember giving this.

[17.] With respect to the second statement, Mr. Gaigneur gave to the police, transcript page 46, line 8:

Q. Why did you give the second statement?

A. I don't know why I gave the second statement. I don't know what happened there.

[18.] But he did agree he was sober when he gave the second statement.

[19.] The court allowed the evidence heard on the s. 9(2) *voir dire* due to become part of the trial proper. Mr. Nicholson, counsel for Ms. Budge, did not cross-

examine Mr. Gaigneur. Mr. Mozvik, who represented Mrs. Gaigneur, did not cross-examine a Mr. Gaigneur. He testified he started drinking rum and Pepsi when he went to the club between 10:00 am and 11:00 pm. He knew “a bunch of people” that night. Then he and Joanne Wilson went to a party “up the Sterling”. He has “no idea what [he] was drinkin’ there”. Also, he has no idea how Joanne Wilson’s car got in the ditch.

[20.] Transcript page 57, line 5:

A. See I don’t remember nothin’ til the next day when I seen the pictures and... like what happened at my house I have no idea.

[21.] Yet Mr. Gaigneur testified that Melinda came into the bedroom with Sandra, Karen and Aubra. That it was not uncommon, even though he was separated from Melinda Gaigneur, for her to be in the house. Mr. Gaigneur stated Melinda Gaigneur was in the bedroom with him until the police arrived. That he did not see Melinda Gaigneur and Joanne Wilson fighting or arguing because Melinda Gaigneur was “pretty much with me.”

[22.] Transcript page 60, line 17:

Q. Do you have any clear recollection of her ever striking you, or – scratching you or doing anything?

A. Not... no.

[23.] Later at page 64, line 14:

Q. And you can't recall as your sitting here today if she got... you never seen Joanne get assaulted?

A. I know she never looked like that when she... when were were in my bedroom, me and the wife talked and Joanne did not look like that.

[24.] Crown counsel advised the court they would be making a *Khelowan* application with respect to the first statement given by Mr. Kenny Gaigneur. The trial resumed February 3, 2012.

[25.] The complainant, Ms. Joanne Wilson, testified she had worked at the Lingan Power Plant and knew Kenny Gaigneur from his place of employment. On the night in question she was at the "Radio Club". She arrived alone as she had dropped her boyfriend off (to play darts). She had one beer at five or six in the evening prior to arriving at the Radio Club. She denied taking any drugs or other substances.

[26.] As the Radio Club was a place "frequented by the neighborhood" she knew a lot of people there. She saw Kenny Gaigneur at the club. He came over and spoke to her when she was playing pool; it was "casual conversation." She was there for an hour to an hour and a half and she did not have anything to drink. She

said Mr. Gaigneur “seemed pretty sober”, although she had never socialized with him.

[27.] Ms. Wilson testified she saw Sandra Budge standing with a group of people close to the bar. She knows the defendant because they are from the same neighborhood and she has known her mother “for many years.” She knows the defendant is related to Melinda, but she did not see Melinda Gaigneur at the club.

[28.] When Joanne Wilson was leaving the club Kenny Gaigneur approached her and asked her where she was going. She told him a birthday party. He asked if he could go along and she agreed. She testified she had no idea that Sandra Budge and Kenny Gaigneur knew one another.

[29.] She went to the party for about half an hour and when she was leaving Kenny Gaigneur asked if she would drop him off at his house. She did not have anything to drink at the party. When Joanne Wilson pulled her car into the driveway she got stuck, so she went into Kenny Gaigneur’s house with the intention of calling a taxi.

[30.] Once inside the house, Kenny Gaigneur offered her a drink, she declined. They began to talk and then things got personal and they “started making out.” She does not recall if Kenny Gaigneur had a drink, but denies any drug use.

[31.] They were in the bedroom in the bed when they “heard somebody coming in the door”... “There wasn’t time for me to get up or get dressed....”

[32.] Ms. Joanne Wilson testified “they came directly in the bedroom. There were four of them... the only one I recognized was Sandra... Melinda... they came in and started to scream and yell at me... never gave me an opportunity to say much of anything. They just proceed to start beating on me at that point.”

[33.] The complainant testified that it was her understanding the parties were separated. Mr. Gaigneur also told her when they got to his house.

[34.] When asked what happened, Ms. Joanne Wilson stated at transcript page 86, line 13:

A. Melinda... came at me and... started pulling my hair, and slapping me and kicking me and screaming.... Sandra was quite belligerent and screaming and never gave me a chance to speak. And once Melinda... left me and went over to start bearing on Kenny, and then Sandra continued the beating of me.”

[35.] Late at page 87, line 7:

Q. Okay, so what specifically did Melinda do in relation to you?

A. Melinda originally grabbed at me pulling my hair, and slapping me and kicked me a couple of times. And at the time she... they... she was doing that, Kenny was trying to talk to her and calm her down, and that’s when she, she left me and went to start beat on me.

Q. So when Melinda's doing this to you, what are the... what is Sandra doing?

A. Sandra's standing right next to her stopping me from getting out of the bed, and when Melinda went past her, Sandra walked up and started punching me hard in the face, and screaming at me, and that continued until they got tire of it, I guess, and told me to my stuff, and get out. Proceeded to follow me in the kitchen, where I was trying to get my boots and things on and... still kicking at me, and told me that... at that time, I was lucky I was getting out at all.

Q. Okay. And who was it specifically that said that to you?

A. Sandra.

[36.] Ms. Joanne Wilson was not wearing any clothing at the time. She was on the bed, and unable to defend herself. When she did get out of the house, she flagged down a taxi and she went to the police station.

[37.] Upon review of the photos, she indicated the house looked "normal" when she first went in. There was no food on the floor, the television was not broken.

[38.] All of the injuries she sustained that night, she said, were caused by Melinda and Sandra. She had an x-ray which showed a fracture to her nose [Exhibit #3, Medical Record]. She suffered pain for a short period of time and did see a counsellor.

[39.] Ms. Joanne Wilson says there is one difference in her testimony at trial and her statement she gave to police.

[40.] Transcript page 92, line 5:

A. The only difference would have been where I said I was located when the beating happened....

Q. What did you tell police?

A. ...when I gave my statement I said that we were on the couch in the living room. I was embarrassed to say that we were naked in bed.

[41.] On cross-examination Ms. Joanne Wilson testified:

“that she did not have the opportunity to speak with police after the incident. She stated she told “the first prosecutor that was dealing with my case, Stephen Drake, when I met with him and the police.”

[42.] She did not know if Mr. Drake told anyone. She also told Ms. Pentz when she spoke with her.

[43.] Mr. Nicholson challenged Ms. Wilson in three areas of her testimony:

- (1.) Going into the residence to call a cab, then being attacked;
- (2.) The attack occurred while sitting on the couch (in her statement);
- (3.) The attack occurred in the bedroom (given in her direct testimony).

[44.] Ms. Wilson stated her car got stuck when she dropped Mr. Gagneur off so she went in the house to get a cab. She had no idea there was no phone in the house until questioned by defence counsel Ms. Wilson readily admitted to Mr.

Nicholson that she had lied to the police about where she was when assaulted. She said she was too embarrassed to tell the police.

[45.] She testified she was assaulted by both Melinda Gaigneur and Sandra Budge, but she stated Sandra, “she was more aggressive.”

[46.] Constable Ed Hall testified he was dispatched at 3:22 am to 7 Smith Street, Glace Bay, regarding a report of domestic dispute. Mr. Kenny Gaigneur answered the door.

[47.] The officer reviewed Exhibit #1, and only recalls the “scratches on his nose”. Ms. Melinda Gaigneur was also present in the home. Karen Cameron and Aubra Cameron were in the kitchen.

[48.] When asked about Mr. Gaigneur’s sobriety he stated at page 112, line 4:

A. ”...he didn’t appear to be in any form of intoxication.”

Q. Did you have any concerns about his degree of sobriety at that time?

A. Not at all.

[49.] The officer testified he spoke with Constable Gillard who informed him he was going to take a formal statement from Joanne Wilson. Regarding Karen and Aubra Cameron, Constable Hall testified at page 113, line 7:

Q. ...that were there. Did you speak to either of those witnesses?

A. Briefly, most of the conversation was with Constable Maxner.

Q. And were they able to tell you anything about what had occurred?

A. What they told me was... Karen Cameron indicated that she was inside of the, the car during the entire incident...

Q. Okay.

A. ...Aubra Cameron indicated that she was in the house, but she didn't witness any physical altercations.

Q. Okay. Were statements taken from those two witnesses?

A. Yes.

Q. Okay?

A. A time afterwards. It wasn't on that date.

Q. And how long afterwards were they taken?

A. I believe it was possibly the end of March 2000...

Q. Do you have the file with you Constable?

A. Yes I do.

Q. Could you look in the file perhaps and...

A. Certainly.

Q. ...and confirm that?

A. It was March 30, 2010.

Q. Okay. And can you tell the court how you came about... who specifically took those statements, which officer?

A. I did.

Q. Okay. Did you make contact with them, or did they make contact with you?

A. I, I tried earlier that month to make contact with them, on a few occasions but I received no, no response, and then they came to the station one evening I was working, and they, they indicated to me they wished to provide statements. So I wasn't busy at the time and took them right away.

Q. Were you expecting them to turn up that day?

A. No I wasn't.

[50.] In reviewing the photos Constable Hall stated they accurately reflected what he recalled seeing on the date in question except for the photos of Joanne Wilson, whom he did not see that night.

[51.] The 911 call was entered as Exhibit #2 and played in the court. Mr. Gaigneur reported "I got 3-4 women here who just assaulted me, beat the fuck out of my TV and destroyed my house." Later when asked to identify the women he said: "ex-wife, sister and friends... Melinda Gaigneur... Sandra Budge, Karen Cameron and another Cameron. This call was recorded at 3:15 am.

[52.] The Crown then requested a *voir dire* regarding Mr. Gaigneur's statement he gave to Constable Hall beginning at 5:00 am that morning. The evidence heard thus far in the trial was also considered at the *voir dire*.

[53.] Constable Hall testified that Mr. Kenny Gaigneur did not object to giving a statement that morning and the offender saw no signs of intoxication, otherwise he would not have taken a statement. He described the scene as some “commotion going on” and someone (not named) had mentioned Mr. Gaigneur tried to burn down the house by burning curtains. However, the statement was taken after everything had settled down and he was there by himself.

[54.] Based on all of the evidence I had heard to that point, I found that the Crown had met the *threshold* reliability test and admitted the evidence of the prior statement for the truth of its contents. The question of *ultimate* reliability was left to be decided at the conclusion of the trial. [See Appendix A]

[55.] Constable Brad Maxner testified he was dispatched at 3:22 am to 7 Smith Street, Glace Bay regarding a “domestic dispute in progress.” He met Kenny Gaigneur at the door and subsequently spoke with Melinda Gaigneur, Sandra Budge, Aubra Cameron and Karen Cameron inside the home. Neither Sandra Budge or Melinda Gaigneur provided the officers with a statement.

[56.] With respect to the Cameron’s he testified at page 140, line 3:

Q. Okay. And did you... and what about Karen or Aubra?

A. I spoke with Karen and Aubra in the kitchen area in relation to the incident that evening. Karen stated she was outside in the car, and

Karen, or Aubra said that she was in the home but didn't witness anything that had taken place that evening.

Q. So from your discussion with them on that date and time, did they reveal to you that they had evidence to offer?

A. No they did not.

[57.] Prior to the Crown closing its case, Mr. Nicholson gave notice that he would be making a *Charter* application due to non-disclosure and would be seeking a stay of proceedings. The court subsequently denied that application [R. v. Budge, 2012 NSPC 69]

[58.] Defence called three witnesses at trial.

[59.] Melinda Gaigneur testified she is married to the complainant, Kenny Gaigneur. At the time of the incident they were separated, but they are back together.

[60.] On the date in question she testified she had never met Joanne Wilson before, nor did she see her at the Radio Club. Even though she and Kenny Gaigneur were separated she still had a key to the house. Her reason for going to the house that night was because she had spoken to Kenny Giagneur earlier in the evening and also he called her at around 1:30 am and asked her if she was coming to the house and she told him "yes:. (Exhibit #4 – Melinda Gaigneur says this was

a phone call to her by Kenny Gaigneur at 1:36 am – Kenny Gaigneur was not asked about this by Mr. Mozvik or Mr. Nicholson. At sentence Mr. Mozvik says Melinda Gaigneur went to meet her husband but there is no mention of a phone call.)

[61.] They, meaning Sandra Budge, Karen Cameron and Aubra Cameron, left the bar when the club closed at 2:00 am. Melinda Gaigneur's plan was to stop at the house and "see what Kenny Gaigneur wanted and get some pajamas and go to Karen's house to stay overnight."

[62.] When she arrived there was a red car in the driveway. Kenny Gaigneur's car was not there, it was at the bar. Melinda Gaigneur entered through the porch, into the hallway to the kitchen. The lights were on, but the living room lights were out and the television was off.

[63.] She noticed clothes on the coffee table, a man's sweater she believed to be Kenny's and she hollered, but didn't get an answer. She went downstairs to the bedroom (to get pajamas) and Aubra Cameron continued to the bathroom.

[64.] Melinda Gaigneur opened the bedroom door and she saw Kenny Gaigneur standing there naked. They got into an argument: "How could you do this to me? Why did you call me?" Melinda Gaigneur hit Kenny Gaigneur, he shoved her and

she fell back on the bed. She stated the next thing she knew “some lady” hit her, so Melinda hit her and they got into an “altercation”. She testified Sandra broke them up. (She does not describe how that was done. Sandra Budge says she pulled them apart.)

[65.] Melinda Gaigneur later learned the woman was Joanne Wilson. This woman was also naked. After Sandra Budge broke them up, she and Kenny Gaigneur were by the wall arguing and her sister, Sandra Budge, and Joanne Wilson were off to her right. When Melinda Gaigneur hit Joanne Wilson she noticed “blood by her eye.” Melinda Gaigneur was shown Exhibit #1 and acknowledged the marks on the side of Joanne Wilson’s nose were caused by her diamond ring. As well, the injuries to Kenny Gaigneur were in a similar area and of a similar nature and caused by her. (Melinda Gaigneur pled guilty to assaulting Joanne Wilson only. Kenny Gaigneur recanted Melinda Gaigneur hit him – although 911 and the original statement say otherwise.)

[66.] There was another “altercation” between Melinda Gaigneur and Joanne Wilson in the kitchen. She stated Joanne Wilson came towards her and a fight began. Sandra Budge broke that up by pulling Melinda off Joanne Wilson and pushed her out of the way. Joanne Wilson went to the living room and she went to

the kitchen. Karen and Aubra Cameron were in the kitchen. Joanne Wilson eventually left through the front door. Melinda Gaigneur did not see Joanne Wilson leave the yard. All she knows is that her car was parked behind the red car in the driveway. She had no further contact with Joanne Wilson. She spoke to the police.

[67.] When asked about her observations regarding Kenny Gaigneur's condition/impairment. She stated "it was madness, arguing, screaming, he at one point lit the curtain on fire – he was crazy."

[68.] Regarding Joanne Wilson, she is not sure if she was drinking, but she was aggressive.

[69.] She did not see her sister, Sandra Budge, punch Joanne Wilson, but Karen Cameron and Joanne Wilson were in an altercation in the kitchen, shortly after her and Joanne Wilson. She does not know how it came about.

[70.] Everyone, except Sandra Budge, had been drinking that evening.

[71.] Melinda Gaigneur and Kenny Gaigneur are reconciled as of January 2011.

[72.] On cross-examination Melinda Gaigneur testified that her sister, Sandra Budge, was aware of issues between she and Kenny Gaigneur. She thought they

would get back together as Kenny Gaigneur had promised to stop seeing “other” women.

[73.] On the night in question Melinda Gaigneur said she did not notice Kenny Gaigneur was with another woman, even though she admitted Sandra Budge would normally tell her if that was the case.

[74.] When Kenny Gaigneur called her at 1:30 am she could hear loud music and noise in the background. She stated he said “Are you coming by?” and she said “Yes.” Melinda Gaigneur said she was not planning to go before Kenny Gaigneur called and asked her. She was “going to see what he wanted” and if it became an argument “I would have grabbed my clothes and left and went to Karen’s house.”

[75.] Melinda Gaigneur said she assumed Kenny Gaigneur was not there because his car wasn’t there, but once she got inside she decided to get pajamas (because her clothes were still in the bedroom).

[76.] She testified that she didn’t notice Joanne Wilson until Kenny Gaigneur pushed her on the bed and “she was over me, she hit me, I hit her back.”

[77.] Joanne Wilson was screaming, Kenny Gaigneur was saying she couldn't be there. She testified her "aggression was directed towards Kenny Gaigneur, not the lady."

[78.] All three women, Joanne Wilson, Sandra Budge and Karen Cameron, were out of her field of view. She cannot say what was going on, but she could hear them. She does not know when Sandra Budge came into the picture, but Sandra Budge broke her and Joanne Wilson up when they were on the bed. She is not sure if Karen was over by the bed. When asked if she discussed this incident with Karen and Sandra, she replied "I guess so."

[79.] When asked if she talked to them about giving a statement, she replied "Not really."

[80.] After Joanne Wilson came upstairs she walked into the hallway and hit Melinda Gaigneur and they were "rolling around the floor again." Sandra Budge broke that up, "she pushed me out of the way." She recalls Joanne Wilson and Karen Cameron "rolling on the kitchen floor." Joanne Wilson eventually left the house.

[81.] When Melinda Gaigneur changed her plea to guilty Mr. Mozvik stated that the parties had separated but that it was not uncommon for parties to break up, get

back together and meet up at times. That is why Melinda Gaigneur went back to the house, to meet up with her husband.

[82.] They have since reconciled. Melinda Gaigneur's actions were completely out of character. She accepted responsibility for the injuries to Joanne Wilson as show in the photographs, black eyes, bloody nose.

[83.] Karen Cameron testified she met Melinda Gaigneur, Sandra Budge and Aubra Cameron at the Radio Club. She had been out with friends from work. She knows Joanne Wilson but she did not see her with Kenny Gaigneur. She was at the bar for an hour to an hour and a half and left with Melinda Gaigneur, Sandra Budge and Aubra Cameron. They went to Melinda Gaigneur's house and while Melinda Gaigneur and Aubra Cameron went in, she and Sandra Budge waited in the car. They "heard a commotion" and went in the house.

[84.] They went downstairs. Kenny Gaigneur was in the corner of the bedroom, Melinda Gaigneur was hollering and Joanne Wilson was crawling under the blankets. Both Kenny Gaigneur and Joanne Wilson were naked. Melinda Gaigneur was standing at the left side of the bed with Kenny Gaigneur. They were yelling back and forth, arguing. Melinda Gaigneur hit Kenny Gaigneur. Joanne

Wilson was screaming at Melinda Gaigneur. She stated she was cursing, calling names and telling Melinda Gaigneur to get out of the house.

[85.] She saw Melinda Gaigneur go over to the right side of the bed. She swung and tried to hit Joanne Wilson but did not make contact at that time. Both Sandra Budge and she were arguing with Joanne Wilson to leave, but she was telling them to leave.

[86.] Finally Joanne Wilson wrapped a blanket around herself, Aubra gave her clothes, and she went upstairs to dress. Sandra Budge and Karen Cameron walked up the stairs behind Joanne Wilson. As she dressed in the living room Joanne Wilson said she did not know Kenny Gaigneur was married.

[87.] When Joanne Wilson was in the kitchen Karen Cameron said “You better leave” and Joanne Wilson smacked her in the face. Karen Cameron hit her back. This began a fight in the kitchen. Joanne Wilson eventually left. She doesn’t know where Sandra Budge was when they were fighting.

[88.] She went outside and Joanne Wilson was by her car arguing “back and forth” with them. Her car was stuck so she started to walk down the road. She does not know what happened to her after that.

[89.] When the police arrived she said they told her and Aubra to leave, so they walked home. When asked her opinion on their “condition” she stated: “They weren’t acting normal, Kenny Gaigneur was under the influence of something... Joanne Wilson was under the influence of something.”

[90.] She did not see Sandra Budge punch or strike Joanne Wilson.

[91.] On cross-examination Karen Cameron testified she did not expect to see Sandra Budge or the others, but when she saw them at the Club she stayed with them. She did not see Kenny Gaigneur, or know he had been there; no one had told her.

[92.] The plan was to go to Kenny Gaigneur’s house so Melinda Gaigneur could get pajamas and stay at her house. They, meaning she and Sandra Budge, were in the car for about two or three minutes out in the driveway when they “heard a commotion” and they decided to go in the house.

[93.] When asked whether she told the police officer “I didn’t see or hear anything” she answered: “No, I don’t think I said I didn’t see anything” but agrees she didn’t see the first of the confrontation. She was two to three minutes behind Sandra Budge. Karen Cameron insisted she kept telling police she wanted to press charges because Joanne Wilson hit her, but she said they ignored her. She went to

the police station at least five times and they would not take a statement. They called the very next day but the police officers were not on duty.

[94.] Karen Cameron admitted they were talking about what happened. She agreed Melinda Gaigneur could take the blame because “she did it.” She stated Sandra Budge was “yelling beside the bed, but didn’t do anything.”

[95.] She saw the injuries to Kenny Gaigneur, a red mark on his chest, Joanne Wilson was flushed, a mark maybe on her chest and when she opened her mouth there was blood. She admits Joanne Wilson could have had more injuries when they were downstairs.

[96.] When Melinda Gaigneur, Kenny Gaigneur and Joanne Wilson were in the living room another fight started. They came out in the kitchen and Melinda Gaigneur ended up under the table. That is when she said “time to leave” and Joanne Wilson hit her and they “got into it.” Melinda Gaigneur, Karen Cameron and Aubra Cameron were all under the influence of alcohol.

[97.] Sandra Budge testified she went to the Radio Club with Melinda Gaigneur. She was the driver that evening as she was not drinking. She was “socializing, talking to people.” She saw Kenny Gaigneur there. She knows Joanne Wilson as the complainant “used to hang out with my mother in the past... drank with her...”

and said she was “friends with her.” Sandra Budge saw Joanne Wilson at the Radio Club. She did not “make any connection with her and Kenny Gaigneur.

[98.] When asked if she saw Joanne Wilson at the bar, she said “probably saw her at the bar or pool table or whatever.” Kenny Gaigneur come up to “us” while they were at the Radio Club.

[99.] They, Melinda Gaigneur, Karen Cameron and Aubra Cameron, left the bar at closing time. They stopped to get pizza. Melinda told her “Boo kept calling” so they were going to get pizza, get Melinda Gaigneur’s pajamas and see what Kenny Gaigneur wanted.

[100.] Melinda and Aubra went to the house so Melinda Gaigneur could get her pajamas and talk to “Boo”. She stayed in the care with Karen Cameron. About four minutes later they heard screaming and hollering so they went in the house and downstairs because that was where the screaming and hollering was coming from.

[101.] Sandra Budge testified she saw all three, Melinda Gaigneur, Kenny Gaigneur and Joanne Wilson on the bed. She thinks Kenny Gaigneur was on the right side getting up off the bed. She saw Melinda Gaigneur fighting so she “broke them up.”

[102.] She described it as “everyone was everywhere, I took my sister off the bed.” She told Joanne Wilson “Get out before it gets worse.” Joanne Wilson was screaming at Melinda Gaigneur. She thinks Karen Cameron was by the door.

[103.] Aubra picked up Joanne Wilson’s clothes and gave them to her. Joanne Wilson wrapped herself in a blanket.

[104.] Sandra Budge said at that point “I kept an eye on Kenny Gaigneur and Melinda Gaigneur because I would have had to go over there and whatever.”

[105.] When they were upstairs, Melinda Gaigneur and Kenny Gaigneur were in the hallway and Joanne Wilson was dressing in the living room. Everyone was hollering and I told Joanne Wilson “Just get out.” Joanne Wilson came out of the kitchen and passed Melinda Gaigneur and “they got into it again.” They were fighting and Joanne Wilson was calling names. They were under the table, so Sandra Budge “broke them up.” Sandra Budge pushed Melinda Gaigneur and Kenny Gaigneur into the living room and went back to the kitchen.

[106.] She saw Karen Cameron and Joanne Wilson fighting. It was “chaos”. Eventually Joanne Wilson left the house and Sandra Budge and Karen Cameron were on the step watching Joanne Wilson try to move her car. It was stuck up against a tree.

[107.] Sandra Budge went back in the house. She does not know where Joanne Wilson went after that. She described Joanne Wilson and Kenny Gaigneur as intoxicated. Sandra Budge denies striking Joanne Wilson. She states she “might have touched her when I pulled them apart and pushed my sister one way.”

[108.] Her goal was to end the altercation. Melinda Gaigneur was “in a fit of rage.” She stated, “I didn’t know what happened before I got there but I knew it wasn’t good.”

[109.] On cross-examination she stated Melinda Gaigneur knew she was coming home [that weekend]. She also knew they were “broken up” because she was living with them when she was going to school.

[110.] She agreed this situation was upsetting for everyone and she would “take her side”, it was her sister. Sandra Budge was aware that Melinda Gaigneur and Kenneth Gaigneur were in touch and trying to reconcile.

[111.] She recalls seeing Joanne Wilson at the bar because she knows her, “I might have said hi, I don’t know”, but she did consider her a friend. She did not see Joanne Wilson with Kenneth Gaigneur and did not realize he had left the bar. “I didn’t watch him or keep my eye on him.”

[112.] Sandra Budge testified she went in the house first, Karen Cameron was behind her. Karen had stopped in the porch to take her boots off but Sandra Budge did not. Sandra went downstairs and she saw all three in bed, Melinda Gaigneur, Kenny Gaigneur and Joanne Wilson. Melinda and Joanne were fighting and Kenny Gaigneur was “just getting out of bed.”

[113.] Sandra saw that Joanne Wilson’s mouth, nose were full of blood and Melinda’s lip was full of blood. She stated “It was fairly obvious what was going on.” She knew he was seeing someone else. Sandra Budge testified she was focussed on splitting them up and watching Kenny Gaigneur and Melinda Gaigneur. “I would have physical contact with [Melinda and Joanne] to pull them apart.

[114.] Sandra Budge emphatically denies hitting Joanne Wilson “even once”. She stated “She was intoxicated. She doesn’t know who hit her. She was mistaken who hit her. Everyone had marks, couldn’t tell who did what.”

[115.] Sandra Budge denies having a grudge against Kenny Gaigneur and heard Kenny Gaigneur say “when they come, I’m saying you’d did it. You have the most to lose.”

Issues

- [116.] (1.) Did Kenny Gaigneur's statement meet the "ultimate reliability test"?
- (2.) Did the defendant assault Joanne Wilson?

The Law

[117.] *R. v. Jaulra*, [2006] O.J. No. 4157, p. 4, para. 12 and 13 states:

The assessment of credibility is not a science (*R. v. Gagnon*, [2006] 1 S.C.R. 621) nor can it be reduced to legal rules or formulae: *R. v. White* (1947), 89 C.C.C. 148 (S.C.C.). However, proper credibility assessment is closely related to burden of proof. For this reason, an accused is to be given the benefit of reasonable doubt in credibility assessment: *R. v. W.D.* [1991] 1 S.C.R. 742; (1991), 63 C.C.C. (3d) 397. Credibility must not be assessed in a way that has the effect of ignoring, diluting, or worse, reversing the burden of proof. What must be avoided is an "either/or" approach where the trier of fact chooses between competing versions -- particularly on the basis of mere preference of one over the other: *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.) cited with approval *R. v. Morin*, [1988] 2 S.C.R. 345; see also *R. v. Chan* (1989), 52 C.C.C. (3d) 184 (Alta. C.A. and authorities cited therein). Acceptance of a complainant's version does not resolve the case. The court must still consider and weigh the defendant's version and, if unable to reject it, must consider itself to be in a state of reasonable doubt: *R. v. Riley* (1979), 42 C.C.C. (2d) 437 (Ont. C.A.).

The learned trial Judge then proceeded to consider each version in isolation and preferred the version of the complainant to that of the appellant. Having concluded that he preferred the complainant's testimony to that of the appellant, he found that the Crown's case had been proved beyond a reasonable doubt. With respect, we think that he erred in approaching the issue before him in that manner.

The issue before him was not which version of the evidence was true, but rather, on the totality of the evidence viewed as a whole, whether the Crown's case had been proved beyond a reasonable doubt.

It is not without significance that the trial Judge did not specifically reject the evidence of the appellant nor find his evidence to be incredible. Yet, in this case the appellant could not be convicted unless his evidence on the issue of consent was totally rejected.

In assessing the credibility of any witness, including the accused, the existence of evidence that contradicts the witness is obviously highly relevant. For my part I regard it as the single most important factor in most cases, though the relative weight given to this versus other factors -- such as demeanour, contradictions within the witness's evidence itself, potential bias, criminal record or other factors -- varies from case to case. No witness is entitled to an assessment of his credibility in isolation from the rest of the evidence. Rather, his evidence must be considered in the context of the evidence as a whole. In a "she said/he said" case, that necessarily means that the defendant's evidence must be assessed in the context of and be weighed against the evidence of the complainant (and vice versa): *R. v. Hull*, [2006] O.J. No. 3177, (Ont. C.A. Aug 4 2006 at Para. 5):

W.(D.) and other authorities prohibit triers of fact from treating the standard of proof as a credibility contest. Put another way, they prohibit a trier of fact from concluding that the standard of proof has been met simply because the trier of fact prefers the evidence of Crown witnesses to that of defence witnesses. However, such authorities do not prohibit a trier of fact from assessing an accused's testimony in light of the whole evidence, including the testimony of the complainant, and in so doing comparing the evidence of the witnesses. On the contrary, triers of fact have a positive duty to carry out such an assessment recognizing that one possible outcome of the assessment is that the trier of fact may be left

with a reasonable doubt concerning the guilt of the accused
(underlining added)

[118.] I am also mindful of *R. v. W.D.* which states at para. 27:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well [page758] instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[119.] Ms. Budge's evidence falls into two categories:

[120.] Denial – It is difficult to elaborate on a denial. There is nothing inherently untruthful or contradictory in the defendant's denial. Her evidence suggests nothing inherently believable or unbelievable.

[121.] The defendant's evidence must be contrasted with the evidence of all the witnesses. It is impossible to give full consideration to the denial without considering it and testing it in light of all the details of the allegation.

[122.] The second category is that the evidence is intended to undermine the credibility of the allegations, i.e.: (a.) Ms. Wilson was mistaken; (b.) Ms. Wilson was intoxicated; or (c.) Ms. Gaigneur assaulted Ms. Wilson.

[123.] With respect to Kenny Gaigneur evidence, Mr. Kenny Gaigneur recanted on the stand by responding to questions put to him by Crown counsel as "I don't recall" and he gave a second statement to the police recanting his first statement given to them in the early morning hours after the alleged offence.

[124.] The court initially found the statement met the threshold reliability test. Now the court must determine if it meets the ultimate reliability test, having heard all of the evidence.

[125.] Are there other indicia of reliability that provide sufficient quarantees of its trustworthiness (other than oath, observation or cross-examination):

- (1.) Circumstances in which the statement came about. It was as a result of an incident at his home earlier, there was no delay in reporting or giving an audio statement to police.
- (2.) The declarant was available for cross-examination by both counsel, but only Mr. Mozvik (Melinda Gaigneur's lawyer) availed himself of that opportunity.
- (3.) The statement made by Kenny Gaigneur was not influenced by anyone. It was spontaneous, natural without suggestion, contemporaneous with events, and audiotaped by a police officer.
- (4.) Motive to lie? Sound mental state? Kenny Gaigneur knew assailants well. Sandra Budge accuses Kenny Gaigneur of threatening to tell police she did it because she had the most to lose. This was not mentioned by any other witness, including Melinda Gaigneur who pled guilty. But Kenny Gaigneur's evidence appears to be consistent with Melinda Gaigneur's plea of guilty and Sandra Budge's alleged actions.

- (5.) Corroborating evidence: (a.) photos and police observations; (b.) testimony from others, including the complainant Joanne Wilson; (c.) plea of guilty by the co-accused, Melinda Gaigneur.
- (6.) Strikingly similar statements by all witnesses except Sandra Budge's denial as to assaulting Joanne Wilson. Kenny Gaigneur sounded forthright on the 911 tape and the audio statement; he did not sound evasive or overstated on the audiotape.
- (7.) Police followed the usual protocol. The two Crown witnesses did not exhibit signs of impairment or appear to be under the influence, otherwise the police would not have taken statements.
- (8.) Kenny Gaigneur's answers during his direct testimony to the Crown's questions, particularly how items got on the floor, etc., just did not have an air of reality to them, and who injured him, did not have a ring of truth.

[126.] Based on all of the evidence, I find that Mr. Gaigneur's first statement does meet the test of ultimate reliability and will admit same for the truth of its contents.

[127.] Joanne Wilson was described as a liar by Mr. Nicholson. She admitted she was not truthful about her location at the time of the assault because she was embarrassed about what happened. A very plausible explanation. She advised someone in authority (Mr. Steve Drake, Crown) the first time she was interviewed for trial. As for the rest of her “key testimony” the defendant says Joanne Wilson was mistaken as to who assaulted her.

[128.] Ms. Wilson appeared to be quite frank about the events of that evening. And although the other witnesses say she was intoxicated, her evidence does not suggest that. She had one drink prior to the Radio Club, none at the bar or at the party, and refused a drink at Kenny Gaigneur’s home.

[129.] Kenny Gaigneur did not notice Joanne Wilson drinking at the bar and thinks she was drinking beer at his house. She exhibited no signs of intoxication when she gave her statement to the police.

[130.] Joanne Wilson did not embellish her evidence; if she was not sure, she said so.

[131.] Melinda Gaigneur admits to drinking that evening and upon seeing her husband in bed with another woman she became extremely angry. She has admitted her involvement in the matter (having pled guilty), but cannot say when

Sandra Budge “came into the picture” or “what was going on” and on the stand Melinda Gaigneur admitted to also assaulting her husband, Kenny Gaigneur (which she had originally denied).

[132.] Karen Cameron initially told the police on the date of the incident in February of 2010, she did not see anything. Then over a month later she attends the police station to give a statement. Why would Karen Cameron lie to the police and say she did not see anything when, based on her testimony, she did. The court can only conclude it was to protect herself or Melinda Gaigneur and or Sandra Budge. She was under the influence of alcohol at the time of the incident.

[133.] Melinda Gaigneur and Sandra Budge did not give a statement to the police and that is their right, “to remain silent.” However, passage of time can affect what one recalls and all three, Karen Cameron, Melinda Gaigneur and Sandra Budge, admit to discussing this matter, which might account for very similar stories regarding Sandra Budge’s involvement or lack thereof.

[134.] It is safe to conclude that every witness the court heard from, including the defendant, was less than truthful at some point in their testimony for various reasons. But despite that finding, has the Crown proven its case beyond a reasonable doubt.

[135.] The burden to prove every element of the offence beyond a reasonable doubt does not shift from the Crown and where credibility is important, the main point is that the lack of credibility on the part of the defendant does not equate to proof of his or her guilty beyond a reasonable doubt.

[136.] It is the Crown's burden. It is not a choice between competing versions and the court can believe some, none or all of any witness' testimony, including the defendant's.

The Conclusion

[137.] The "real" reason why Melinda Gagneur went to her house that night may never be known. The fact is she did and she subsequently found her husband in bed with another woman.

[138.] Thus began a chain of events wherein Kenny Gagneur and Joanne Wilson were assaulted by Melinda Gagneur and Karen Cameron – admittedly. Was Joanne Wilson assaulted by Sandra Budge? Was Joanne Wilson mistaken? Was Joanne Wilson so intoxicated she does not know who hit her?

[139.] I find:

- (1.) Sandra Budge was known to Joanne Wilson through her mother, drinking with her and through friends.

- (2.) Evidence does not bear out Joanne Wilson was intoxicated as claimed by Sandra Budge.
- (3.) Joanne Wilson, like Sandra Budge and Melinda Gaigneur, have Melinda Gaigneur going over to Kenny Gaigneur after assaulting her and arguing with him. Sandra Budge went to Melinda Gaigneur's right where Joanne Wilson was located.
- (4.) Joanne Wilson clearly states (page 87, line 7 of the transcript) what Melinda Gaigneur and Sandra Budge did to her.
- (5.) Unlike Kenny Gaigneur, who Sandra Budge accuses of blaming her because "she has the most to lose", no such claim can be made of Joanne Wilson.
- (6.) There is no evidence that Kenny Gaigneur and Joanne Wilson had talked about the incident to one another (unlike Melinda Gaigneur, Karen Cameron and Sandra Budge), and their evidence is similar as to what took place.

[140.] Based on all of the evidence I find the Crown has proven its case beyond a reasonable doubt. The defendant is guilty of assaulting Joanne Wilson.

The Honourable Judge Jean M. Whalen, J.P.C.

APPENDIX ‘A’

R. v. Budge “Khelawan Application”

Decision on Crown Application

Witness statement admitted as principled exception to hearsay

[1.] Justice Watt in *R. v. J.M.* [2010] O.J. No. 585 585 (C.A.) at para. 63:

The proponent who seeks exceptional admission of hearsay usually meets the reliability requirement in two different ways. One way is to show that there is no real concern about the truth of the hearsay statement because of the circumstances in which the statement came about. The second way of satisfying the reliability requirement is to show that no real concern arises from the fact that the statement is offered in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested in the proceedings: *Khelawon* at paras. 61-63; *R. v. Couture*, [2007] 2 S.C.R. 517, at

paras. 80, 88. These approaches are not mutually exclusive: *Khelawon* at para. 65.

The proponent of a hearsay statement who attempts to satisfy the reliability requirement on the basis of the circumstances in which the statement was made does not have the luxury of scrolling down a fixed and exhaustive list of factors. Relevant circumstances include, but are not limited to:

(1.) the timing of the statement in relation to the event reported;

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The proponent of a hearsay statement who attempts to satisfy the reliability requirement on the basis of the circumstances in which the statement was made does not have the luxury of scrolling down a fixed and exhaustive list of factors. Relevant circumstances include, but are not limited to:

(i.) the timing of the statement in relation to the event reported;

[2.] Constable Hall was dispatched and subsequently arrived at Kenny Gaigneur's home at 3:22 A.M. There was 911 call placed by Mr. Gaigneur stating that "3-4 women here, beat the fuck out of my TV and destroyed my house."

[3.] After an initial investigation Constable Hall took an audio statement beginning at 5:00 AM and ending at 5:09 AM.

[4.] Constable Hall testified that Mr. Gaigneur did not appear to be intoxicated (no usual signs of impairment); he responded and understood questions; there was no evidence of drug use.

[5.] If Constable Hall had felt the witness was under the influence he would not have taken a statement.

[6.] The court listened to the 911 tape. The witness sounded coherent, and answered questions put to him.

[7.] The second relevant circumstance referred to in *R. v. J.M. (supra)* at para. 54: “ii. the absence of a motive to lie on the part of the declarant;”

[8.] Defence counsel argues the court is dealing with two liars. The victim is a liar because under oath his version is entirely different.

[9.] Upon reviewing the victim’s statement to police and his testimony in court, Mr. Gagneur does “recall” something that happened between he and his wife at court transcript, p. 26-27: “scratching at me”, and p. 5 of the police statement “scratching me.” But for the most part, he does not “recall” or he is not sure of what transpired. Although he says he was sober when he gave the second statement he does not recall what he said.

[10.] There is no evidence of a motive to lie. Mr. Gagneur testified that he and his wife were separated, she had filed for divorce; she came to his house, he did not go to her place of residence.

[11.] Up to this point there is no history of animosity between the two or any evidence of previous false allegations.

[12.] The third circumstance set out in *R. v. J.M. (supra)* at para. 54: “iii. the presence or absence of leading questions or other forms of prompting;”

[13.] There are no leading questions regarding the specific allegations Mr. Gaigneur is asked:

- 1) What can you tell me about this? (p. 1)
- 2) What happened? (p.2)
- 3) What prompted her to come here? (p.3)
- 4) Who assaulted you? (p. 4)
- 5) What happened next? (p. 4)
- 6) So what exactly happened in the kitchen?
- 7) Everything that you told me is true and voluntary? Yeah (p. 7)

[14.] The fourth circumstance: “iv. the nature of the event reported;” from *R. v. J.M. (supra)*.

[15.] The initial 911 call reported the ex-wife and others in the home. Further investigation – domestic violence.

[16.] And the fifth circumstance: “v. the likelihood of the declarants knowledge of the event, apart from its occurrence;” from *R. v. J.M. (supra)*.

[17.] Mr. Gaigneur gives details over the 911 call and in his audio statement which indicates he would have intimate or firsthand knowledge of the event because he was present.

[18.] And finally the sixth circumstance from *R. v. J.M. (supra)*: “vi. confirmation of the event reported by physical evidence”, which in this instance includes:

- 1) Photos of both complainants;
- 2) Photos of the house from the date in question;
- 3) The officer’s recollection and observations of injuries from that date;
- 4) Mr. Gaigneur testimony of injuries consistent with some in his first statement.

[19.] In para. 50 of *R. v. Khelawan* the court confirms that threshold reliability is the issue to be inquired upon when you are discussing admissibility on the *voir dire*.

[20.] Based on all of the above, I find the Crown has met the threshold reliability test and will admit the evidence of the prior statement for the truth of its contents. The question of ultimate reliability will be decided at the end of hearing all evidence presented.