SUPREME COURT OF NOVA SCOTIA
Citation: R v. Hamilton, 2011 NSSC 305

Date: 20110727
Docket: CRH 336711
Registry: Halifax

Between:

Her Majesty The Queen

Provincial Crown

v.

Benjamin Joseph Hamilton

Accused

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	July 25, 2011, in Halifax, Nova Scotia
Oral Decision:	July 26, 2011
Counsel:	Christopher Morris, for the Provincial Crown Luke Merrimen, for the Accused

By the Court:

[1] Mr. Hamilton is charged that he did on November 15, 2009, in committing assault causing bodily harm, and uttering threats to cause death or bodily harm, to taxicab driver Jamal Alban, commit offences contrary to s. 267(b) and s. 264.1(1) of the *Criminal Code*. At the same time and place is charged with wilfully damaging Mr. Alban's taxicab, contrary to s. 430(4) of the *Criminal Code* - I accepted jurisdiction over this otherwise "absolute jurisdiction" to Provincial Court offence pursuant to s. 553(a)(v) following the Ontario Court of Appeal decision *R v. Tucker* [2006] O.J. No. 3679 at para. 7.

[2] A *voir dire* was held to determine the admissibility of 911 emergency calls made by Mr. Alban to police services in Halifax.

[3] The Crown submitted that the contents of these calls is admissible for the truth of their contents as an exception to the hearsay rule on the basis that the calls are "excited utterances" also known as *res gestae*. The Crown did not rely upon the principled exception to the hearsay rule as a basis for having these statements admitted for the truth of their contents.

[4] The Defence argued that such calls are presumptively inadmissible and in this case, inadmissible as they are prior consistent statements. Alternatively, the Defence argued that if the Court accepted these statements were *res gestae*, then the probative value of such statements by Mr. Alban, is outweighed by the prejudice of their introduction to the fair trial interests of Mr. Hamilton.

Evidence at the *voir dire*

[5] I heard from three police officers (Constable Bradley, Constable Murray and Constable Jessen) as well as Mr. Alban. The Defence called no evidence although it cross-examined these witnesses.

[6] On this *voir dire*, I found each of their evidence to be generally credible.

[7] In summary, I find that:

1. The allegation by Mr. Alban is that Hamilton sitting in the front seat of his cab, and upon being informed that since he had no more money, Mr. Alban was not driving him any further, Hamilton tried to grab some of the cab money at which point

Alban grabbed his hand and told to leave the money and leave the vehicle. Mr. Alban testified that Hamilton became out of control and kicked his taxicab on the rear door areas of both the passenger and driver side causing damage, then opened the driver's side door very quickly and punched Mr. Alban three times in the face area. Although Alban defended against the third blow with his hand, which was injured Mr. Alban says then Hamilton tried three times to pull him out of his car which Alban was only able to prevent by hanging onto the steering wheel.

Contemporaneously Hamilton said to him, "I will hit you, I will kill you... You'll see". Mr. Alban testified that this made him very afraid, and as he reached for his cell phone to call police, Hamilton ran from the area. While Mr. Alban was on the telephone making his 911 call, he continued to observe Hamilton's progress. *Voir dire* Exhibit #1 is an agreed to copy of the 911 calls (Mr. Alban's inadvertently terminated one call and when called back, was speaking to a different 911 operator). *Voir dire* Exhibit #2 is a agreed to transcript of the 911 calls. By agreement, counsel also referred to the photographs taken and entered as Exhibit #1 in the trial.

2. Mr. Alban estimated that he picked up Mr. Hamilton at about 3:30 a.m., November 15, 2009, and it was about 5 to 8 minutes before Hamilton made him aware he only had six dollars. Given his description of the driving distance it would have been several minutes later before the incidents alleged by Mr. Alban happened. Thus according to his evidence, these incidents would have started around between 3:40 and 3:45 a.m. According to his evidence immediately thereafter he called 911.

3. When 911 calls are made, they are answered by one of numerous "call takers", and once those call takers have the information they need, they pass it on to the one dispatcher responsible for the area of HRM (Halifax) who has the responsibility to inform police services in the area and direct their attendance to the scenes of crimes. These "voice over air" communications can be heard by all on-duty police staff in the Central Peninsula area of Halifax. Thus however, there is a time lag between the time a person calls 911 and the time of dispatch of the police, and consequently their arrival at the scene. Bearing that in mind, since we have no times in evidence as to the actual 911 calls, the times can be extrapolated based on the dispatch and arrival times given by the police officers and the testimony. Constable Bradley estimates he was dispatched at 3:39 a.m. He was at that time

only 500 metres driving distance away. He sought out the suspect and so did not have contact with Mr. Alban until after the arrest of Mr. Hamilton at 3:45 a.m.

4. Constable Murray heard the dispatch call at 3:45 a.m. and was six blocks away when he raced to the crime scene. The evidence suggests it did not take him more than a couple of minutes to get to the scene where he encountered Mr. Alban "very upset at the time" and on his cell phone. The evidence is clear that some police had arrived while Mr. Alban was still on the 911 call - see p. 9 Transcript, *voir dire Exhibit #2*.

5. Constable Jessen received the dispatch call at 3:40 a.m. and got to the crime scene area within several minutes, where he initially spoke to Constable Bradley who had arrested Mr. Hamilton. He estimated they dealt with Mr. Hamilton for 2 minutes and thereafter he proceeded to see Mr. Alban.

6. By all these accounts, and given differences in the time showing on different watches / clocks, I conclude that Constable Murray likely encountered Mr. Alban within 2 minutes of him having made the initial 911 call. Constable Bradley and Jessen most likely had their first contact with Mr. Alban within 8 minutes of having received the initial dispatch

call. Constable Bradley testified that Mr. Alban was “pretty shaken up” and “visibly upset” when he saw him.

7. When Constable Murray saw Mr. Alban, he noticed Mr. Alban’s right side cheek and forehead were “swollen”, and the cheek area was “red” and “swelling”.

8. The police officers who had contact with Mr. Hamilton all testified that he was highly intoxicated and none noticed any injuries on his person, nor that his clothing was in any disarray. The police officers who had contact with Mr. Alban all testified that he was sober.

Legal Analysis

[8] Whereas sometimes 911 calls are witness to an ongoing crime, this is not such a case. In this case, it is clear that the alleged crimes, according to the victim Mr. Alban, were completed before Mr. Alban began speaking to the 911 operator.

[9] An out-of-court statement by a witness tendered at a trial for the truth of its contents is presumptively inadmissible. Such statements are considered hearsay

because the purpose of their introduction is to have the trier of fact rely upon them for the truth of their contents. This is such a case.

[10] While there are exceptions to the hearsay rule, I need not canvas in this case, whether Mr. Alban's 911 call may be considered admissible evidence pursuant to the principled exception to the hearsay rule recently referred to by the Supreme Court of Canada in its decision, *R v. Khelawon* [2006], 2 SCR 787. I do note that, in relation to non-accused witnesses, the traditional *res gestae* analysis may profit from inclusion under the umbrella of the principled exception to the hearsay rule.

[11] Prior consistent statements of witnesses are also inadmissible as they constitute impermissible "oath helping". Their probative value is seen to be of such little weight, and their prejudice to the fair trial rights of the parties significant enough, that as a rule they are inadmissible.

[12] "Excited utterances" or *res gestae* are another exception to the rule that out-of-court statements made by witnesses, and tendered for the truth of their contents are not admissible.

[13] "Excited utterances" were considered by the Nova Scotia Supreme Court Appeal Division in *R v. Schwartz* (1978) NSR (2d) 335, where one of the accused who was charged with wilfully setting fire to a dwelling house, was described as being "very hysterical and in shock" and to have said:

> Oh my God, what have we done to deserve this. First my mother died, then my father, and now our house is burning down. Why, why is God punishing us, we didn't do anything to hurt anybody or we didn't harm anybody.

[14] It was the position of the Court:

> Whether hearsay evidence is admissible as part of the *res gestae* depends generally upon whether such evidence can be characterized as a spontaneous exclamation made without premeditation or artifice and before the speaker had time to devise or contrive anything for his or her own purpose.
>
> - para. 15 per MacDonald, JA.

[15] Justice MacDonald went on to note:

> In the present case the evidence is clear that Mrs. Schwartz was extremely upset when she made the utterance that (the witness) testified to. It is equally clear that it was made very soon after the fire started. It is capable of being construed as a spontaneous utterance. The reason that *res gestae* statements are admissible in evidence is as Lord Wilberforce said in *Ratten v. R.* supra, that they are "so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded". It follows that if an otherwise self-serving statement forms part of the *res gestae,* it is admissible in evidence for the

> party making it because a finding that is part of the *res gestae* is a finding that it was not deliberately concocted, contrived, made are manufactured by the party for its own advantage." - para. 20.

[16] Although dealing with an accused person, interestingly Justice MacDonald reiterated:

> In the result it is my opinion with respect to this ground of appeal that, assuming the evidence of [the witness] as to what she heard Mrs. Schwartz say, was hearsay, that such was admissible as part of the *res gestae* and as such it matters not that it might also be classified as self-serving evidence. - para. 26.

[17] More recently the Nova Scotia Court of Appeal dealt with *res gestae* in ***R v. Magloir*** 2003 NSCA 74. There something arguably spontaneously uttered by a witness to an assault, which could have been an "excited utterance", was determined not to meet the requirements in that case.

[18] Justice Oland for the Court stated:

> However, there is nothing in the record to indicate that the trial judge considered whether this exception might apply and if so, that the statement satisfied the requirements of contemporaneity and spontaneity discussed in cases such as ***R v. Teper*** [1952] 2 ALL ER 447 (PC), and in ***R v. Ratten*** [1971] 3 ALL ER 801 (PC) referred to in ***R v. Clark*** (1983) 7 ccc (3d) 46 (Ont CA) and in ***R v. Mahoney*** (1979) 50 ccc (2d) 380 (Ont CA) affirmed without comment in [1982] 1 SCR 834. - para. 27.

[19] A more fulsome examination of *res gestae* is contained in the British Court of Appeal's decision *R v. Slugoski* [1985] BCJ 1835. Justice Esson noted that: "the law as stated in *Ratten v. The Queen* has been generally adopted in Canada, not as changing the law, but as restating and clarifying what has always been the law." - para. 48.

[20] After a relatively brief review of the authorities, some of which were helpfully canvassed in the materials provided by the Crown in this case (eg. *R v. Khan* 2010 ONCJ 580, *R v. Villeda* 2011 ABCA 85), I come to the conclusion that the present state of law regarding *res gestae* requires (the onus being on the party seeking admission of the evidence):

1. An out-of-court statement made,

   (a) Very soon after an underlying event and;

   (b) While the person making these statements is still in an obvious state of upset and trauma resulting from those events (which tends to supply the reliability of such statements because the statement is made without time to

> fabricate, collude, and while the maker is still under the ongoing stress of very recent traumatic events);
>
> (c) And whose probative value is not such that it is outweighed by the prejudicial effect on a fair trial of admitting the evidence.

[21] In the case at Bar, Mr. Alban's 911 calls are arguably *res gestae* **or** prior consistent statements. To my mind much turns on the timing in this case. I say this because to the extent that Mr. Alban was still "under the ongoing stress of very recent traumatic events"; it is arguable that there was no time to fabricate.

[22] In contrast, his 911 calls while made very shortly after the alleged incidents here, arguably do not exhibit the kind of "upset and trauma" that is required to make the contents of 911 calls *res gestae* as opposed to prior consistent statements. I am inclined to find that they do exhibit such "upset and trauma", and are *res gestae*.

[23] Nevertheless, I am inclined to exercise my discretion to exclude this evidence on the basis that the probative value, being limited because it tends to be in the nature of a prior consistent statement and Mr. Alban is available for cross-

examination and did testify to the events in question (and that evidence has been consented to be applied to the main trail), is significantly outweighed by the possible prejudice to Mr. Hamilton's fair trial rights, where the 911 calls content does not add anything beyond Mr. Alban's testimony.

Conclusion

[24] While the 911 calls here are capable of being *res gestae*, and therefore admissible for the truth of their contents, in the particular circumstances of this case, I am not satisfied that the requirements for admissibility are met. That is, to the extent that they would have been met otherwise, I am inclined to rule them not admissible on the basis that their probative value was too limited when contrasted with the potential prejudice to the fair trial rights of Mr. Hamilton.

[25] For those reasons I rule the 911 calls (the exhibits, disc, *voir dire* Exhibit #1 and transcript *voir dire* Exhibit #2) as inadmissible.

J.