IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Boone, 2011 NSSC 465

Date: 20111214
Docket: Syd 348848
Registry: Sydney

Between:

Blair Albert Boone

Appellant

v.

Her Majesty The Queen

Respondent

Judge: The Honourable Patrick J. Duncan

Heard: September 12, 2011, in Sydney, Nova Scotia

Counsel: Tony W. Mozvik, for the appellant

Kathryn Pentz, Q.C., for the respondent

By the Court:

INTRODUCTION

[1] The appellant was found guilty of committing an assault upon his wife, on the basis of her out of court, unsworn statements recorded in a 911 phone call, which statements she did not adopt at trial.

[2] While there are several issues put forward by the appellant challenging the trial judge's findings, the determinative questions are whether the statements were admitted properly, and what is the appropriate disposition, having regard to that finding.

BACKGROUND

[3] On January 24, 2010, the appellant, Blair Boone, and his wife, Helen (Leudy) Boone, celebrated the Ukrainian New Year. Their evening began at around 6:00 p.m. at a friend's house and they then went to a dance.

[4] They consumed alcohol at both locations. A designated driver returned them to their home from the dance. There was conflicting evidence as to the level of Mrs. Boone's intoxication.

[5] At some point after arriving at their home, Mrs. Boone sustained injuries to the bridge of her nose and her left eye. Mrs. Boone has a heart condition that induces fainting spells, which the consumption of alcohol aggravates.

[6] A phone call that originated from the Boone house was received by the 911 Service, which recorded some conversation between Mr. and Mrs. Boone. Mrs. Boone was heard to allege that her husband punched her, which he denied. He alleged she threw a chair at him. Police were dispatched at around 2:50 a.m. to the home.

[7] When police arrived, Cst. Dennis Burns made observations of Mrs. Boone's injuries and emotional state. He attempted to interview her and she made certain statements, some of which he later committed to writing in his notebook.

[8] Mr. Boone had a cut over his left eye, but no injuries to his hands.

[9] Mr. Boone was charged with the offence of *"assault on Helen Leudy contrary to section 266(b) of the Criminal Code."* The matter came on for trial before Ross J. P.C, sitting in Sydney on January 11, 2011.

[10] At trial, Mrs. Boone testified as to her extreme and "embarrassing" level of intoxication on the evening in question. She stated that she consumed "shooters" at the friend's house, followed by beer, wine, vodka and more shooters while at the dance. She was unable to recall leaving the dance.

[11] Mrs. Boone could recall little of what took place at the house after the dance, and what she could recall she repeatedly qualified by uncertainty as to the reliability of her memory. Mrs. Boone did not testify that her husband applied force to her at the time and place alleged. She testified that she didn't believe that he would or did, although by her inability to recall she could not rule it out either.

[12] After conducting a *voir dire*, the trial judge granted a Crown motion to cross-examine Mrs. Boone against the statements she was alleged to have made to, and which Cst. Burns did record. She did not adopt the statements. The statements

attributed to her did not directly accuse Mr. Boone of assaulting her. The trial judge concluded that the statements would not be considered for their truth but only to test the credibility of the witness.

[13] The Crown introduced the 911 recording and a transcript as exhibits. Mrs. Boone identified her voice and that of her husband. She did not adopt the statements she made in the call. While she recalled making a telephone call at some point after she got home from the dance she could not say that she made the call to 911.

[14] Mr. Boone testified and denied the allegation of assault. He confirmed Mrs. Boone's evidence as to her alcohol consumption and significant intoxication. He gave his version of what took place after the couple returned to the house and before the police arrived. He acknowledged an argument with his wife. He testified that his wife passed out and hit her head as she fell. Mr. Boone suffered a cut to his head when he lost his balance as he tried to catch Mrs. Boone during her fall. He confirmed that the 911 recording seemed accurate but was uncertain if the transcript was complete. He did not recall saying certain things that were recorded

in the call and denied the truth of comments that might inculpate him in the offence.

[15] The defence also called Gregory Martin, the designated driver on the evening in question, who recounted the events of the evening. He was not consuming alcohol. He testified to the alcohol consumption of the Boones, its impairing effects on them, and observations made during the drive to their house. He testified that Mrs. Boone "pass[ed] out" a couple of times in the car, and felt that she was "quite inebriated". She required assistance to walk while at the dance, and again when walking from the car to her house.

[16] The trial judge concluded that the statements of Mrs. Boone heard in the 911 call could be admitted for the truth of their contents as spontaneous utterances and thus an exception to the hearsay rule. He rejected Mr. Boone's explanation of what took place, and finding no other lawful justification for the application of force, found Mr. Boone guilty as charged.

GROUNDS OF APPEAL

[17] The appellant states the following as the grounds of appeal:

1. The trial judge erred in law in his application of the spontaneous utterances exception to the hearsay rule.

2. The trial judge erred in finding that, as a matter of law, the assault in question had been committed.

3. The trial judge erred in his assessment of the weight and reliability of the 911 call made by the complainant and other evidence submitted by the Crown.

4. The trial judge erred in law in rejecting or not giving appropriate weight to all or portions of the relevant evidence tendered on behalf of the appellant.

5. The trial judge erred in law in that his decision was unreasonable and was not supported by a fair and reasonable assessment of all of the evidence.

6. The trial judge erred in failing to apply the principle of reasonable doubt in his consideration of the whole of the evidence before him.

7. The trial judge erred in such other grounds as may appear from the transcript of evidence and decision of the learned trial judge.

[18] In the appellant's brief, he notes that the trial judge did not conduct a *voir dire* to determine the admissibility of the 911 recording. The Crown, quite correctly, acknowledged this to be the case and made submissions as whether this could constitute a valid ground of appeal.

POWERS OF A SUMMARY CONVICTION APPEAL COURT

[19] This appeal has been brought pursuant to section 813(a)(i) of the **Criminal Code**. The powers of a summary conviction appeal court are, in accordance with

the provisions of section 822 (1) of the **Criminal Code**, as found in section 686 (1) of the **Criminal Code**, which reads:

> **686(1)** Powers
>
> On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
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> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (*a*),

> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

STANDARD OF REVIEW

[20] The often relied upon statement of the applicable standard of review is set out in the case of *R. v. Nickerson*, [1999] N.S.J. 210 (N.S.C.A.):

> 6 The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C.. (2d) 169 (N.S.C.A.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. B. (R.H.),* [1994] 1. S.C.R. 656 (S.C.C.) at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was *some* evidence to support the trial judge's conclusions nor a new trial on the transcript.

[21] An essential question posed in this appeal is the appropriateness of the trial judge's decision to admit hearsay evidence for the truth of its contents. The applicable standard of review of such a question was set out in *R. v. P.* 2008 NSCA 95:

> [16] In *R. v. Smith; R. v. James*, 2007 NSCA 19 , 2007 NSCA 19, [2007] N.S.J. No. 56 (Q.L.), Cromwell, J.A., for this Court, set out the standard of review applicable to the admission of statements under the principled exception to the hearsay rule:
>
> > [166] Appellate review of the admission of these statements must accept the trial judge's findings of fact absent manifest error. However, the correctness standard of review applies to the questions of whether the judge invoked an incorrect legal standard, failed to consider a required element of a legal test or made some other error in principle. In addition, the judge's application of the legal principles to the facts will generally be reviewed for correctness in rulings such as this concerning the admissibility of evidence: *R. v. Merz*, (1999), 140 C.C.C. (3d) 259 (Ont. C.A.) at para. 49; *R. v. Underwood (G.B.)* 2002 ABCA 310, (2002), 170 C.C.C. (3d) 500 (Alta. C.A.) at paras. 60-63. *R. v. Assoun* 2006 NSCA 47, (2006), 207 C.C.C. (3d) 372, leave to appeal ref'd [2006] S.C.C.A. No. 233 (C.A.) at para. 54; *R. v. P.S.B.*, 2004 NSCA 25, (2004), 222 N.S.R. (2d) 26 (C.A.) at para. 37.
>
> [17] The trial judge's ruling on admissibility, if informed by correct principles of law, is entitled to deference. There is no basis to interfere with the trial judge's weighing of the factors supporting or countering the reliability of the statement absent error in principle or a finding that the trial judge's decision is unreasonable or unsupported by the evidence. (*R. v. Blackman*, 2008 SCC 37, [2008] S.C.J. No. 38 (Q.L.) at paras. 36 and 46)

[22] In *R. v. C.J.* 2011 NSCA 77, Fichaud J.A. provided this helpful summary:

> [19] Questions of law are reviewed for correctness. Factual issues are reviewed for palpable and overriding error. The judge's application of the law to the facts is reviewed as a question of fact unless there is an extricable legal error. *R. v. Van der Peet,* [1996] 2 S.C.R. 507, para 81; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, para 45; *R. v. Mann*, 2004 SCC 52; [2004] 3 S.C.R. 59; *R. v. Couture*, 2007 SCC 28;, [2007] 2 S.C.R.

[23] Cromwell J.A., as he then was, in *R. v. Barrett*, 2004 NSCA 38, outlined the scope of appellate review of evidence relied upon to support a verdict as follows:

> [15] This Court may allow an appeal in indictable offences like these if of the opinion that "... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: *Corbett v. The Queen*, [1975] 2 S.C.R. 275 at 282; *R. v. Yebes*, [1987] 2 S.C.R. 168 at 185; *R. v. Biniaris*, [2000] 1 S.C.R. 381 at para. 36.
>
> [16] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: *Biniaris* at paras. 38 - 40.
>
> [17] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "... re-examine and to some extent reweigh and consider the effect of the evidence.": *Yebes* at 186. As Arbour, J. put it in *Biniaris* at para. 36, this

> requires the appellate court "... to review, analyse and, within the limits of appellate disadvantage, weigh the evidence..."

ANALYSIS

Admissibility of statements recorded by 911 centre

[24] The 911 call recording and transcript were introduced in direct examination of Mrs. Boone. She identified the voices but did not adopt the contents. Mr. Boone was cross examined as to its contents.

[25] At the close of the Crown's case, counsel sought to tender the exhibits. The judge then inquired: *"… the 911 transcript, what, what use do I make of this?"* As the discussion unfolded, Mr. MacPherson, Crown counsel on the trial, stated that he hoped *"…that they could be ruled to be admissible, necessary and reliable…[though] not sworn…[and] that they could be primary evidence."* The Crown acknowledged that it had not made an application to have the 911 statements admitted into evidence. There was no clearer statement of what the Crown wanted the court to do with the statements.

[26] The learned trial judge deferred further consideration of the issue to the end of the trial, but before doing so made the following comments:

> ... there are exceptions to the hearsay rule and, it can come into evidence of the state of mind possibly, of the emotional state of… In some cases if it's intimately connected with the *actus reus*, it might come in as part of the , almost to the *actus reus*, almost like a verbal act, if you will. I don't know if it has that degree of proximity to the alleged assault, but there is that possible use and, as I say, as evidence of a state of mind, emotional state or a physical condition, it might come in as that. So these are sort of recognized conditions to the hearsay rule. That, that, it, it could come in for those but not come in of truth of the [assertion] that he hit me or you hit me. … They may be relevant to the Crown's case but in truth of the assertion Blair you hit me, I'm just paraphrasing, they may not come in for that in proof of the, of that assertion but they may come in as proof of her state of mind or upset or set of facts that he had some physical condition and then the Crown would argue that we have the other evidence. … And then from the point of view of Mr. Boone, these were not statements to anybody in authority. I don't know what relevance or weight they might have.
>
> A.B. at p. 198
>
> (emphasis added)

[27] After making this statement the judge asked defence counsel whether he wanted a ruling as to the use to be put to the 911 call before calling defence evidence. Counsel did not ask for it to be resolved at that time.

[28] The issue next arose in closing argument. The defence summed up first and referred to the 911 call for what it said about the comparative emotional states of

the Boones. *see,* at p. 251 AB. The Crown summation followed and raised, for the first time, the submission that the statements of Mrs. Boone in the 911 call should be admitted for the truth of their contents under the *res gestae* exception to the hearsay rule. It was submitted that the statements were reliable and necessary.

[29] Defence counsel opened his reply by stating: *"I really didn't know what my friend was going to make out of the 911 call until I heard his summations…"* He argued that it could only be considered to assess the credibility of Mrs. Boone. The trial judge, in response, described the 911 call as "critical evidence" and wanted to reserve decision. Before adjourning the trial, the judge asked defence counsel whether he wanted to make "further comments", which counsel did, but which did not speak to the question of whether the recorded comments of Mrs. Boone could be introduced for the truth of their contents.

[30] In his decision the learned trial judge, without inviting further submissions from counsel, concluded that Mrs. Boone's statements as recorded in the 911 call were admissible for the truth of their contents. Judge Ross acknowledged that the statements in the call are a form of hearsay and then stated, at pp. 270-271 of the Appeal Book:

> The statements in the recording that, or course, we're concerned about are those in which she accuses him of hitting her in the face. ... This is a form of hearsay ... And it comes replete with the possible dangers of hearsay, especially the lack of any opportunity for contemporaneous cross examination. ... I also, though, do need to consider *R. v. Starr*. That is the case where the Supreme Court of Canada permitted the introduction of hearsay on a so-called principled basis using necessity and reliability as the twin pillars. And that permits hearsay without resort to the common law categorical exceptions. However, its admission into evidence in that way contemplates a *voir dire* and there was no *voir dire* conducted for that purpose in this case.
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> ...
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> ... I have concluded that Helen Leudey's statements are admissible for the truth of the assertions contained therein. And I think the door to their admissibility lies in the so-called spontaneous utterances exception.... These are sometimes called the *res gestae* exception but I think that's not really the best approach because I don't think these statements are so intertwined with the acts that accompany them that they are needed to explain those acts. Rather, as I say, I think they, they should be admitted under the spontaneous utterances exception.

[31] The learned trial judge concluded that the statements were sufficiently contemporaneous with the events as to ensure reliability of the allegations. He also relied on Mrs. Boone's highly emotional state during the call as further evidence of the reliability of her statements.

[32] The decision next addressed the "necessity" of introducing the recording for the truth of its contents. The trial judge concluded that the evidence was necessary as Mrs. Boone:

> ... cannot remember saying such things and professes to have little or no recollection of the preceding and surrounding events.
>
> (A.B. at p. 274)

Necessity of a Voir Dire

[33] The Crown submits that the failure to hold a *voir dire* constitutes a "procedural error" out of which no prejudice arises to the appellant. The argument states:

> The trier of fact would have heard all of the same evidence whether a *voir dire* was held or not. A review of the transcript does not disclose any evidence that the appellant would have called at *voir dire* but wished excluded from the trial proper. Accordingly it is submitted that the procedural irregularity is saved by section 686(1(iv) and should not be considered a ground of appeal.

[34] The advisability of holding a *voir dire* was discussed in *R .v G.N.D.* (1993) 81 C.C.C. (3d) 65 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused (1993) 82 C.C.C. (3d) vi. In that case, the trial judge, after conducting a

voir dire, admitted into evidence the out of court statements of a child complainant by permitting the evidence in chief on the *voir dire* to be read in rather than given *viva voce*. The appellate court held, at p. 76:

> In the circumstances of this case, I agree with the respondent that no substantial wrong was occasioned by the procedure adopted, although it is certainly one which ought to be discouraged. In the ordinary course, in a *voir dire* before a judge conducting a trial without a jury, the evidence of the witness is given in-chief and the witness is then cross-examined. If the evidence is ruled admissible, an application is made by the proponent of the evidence to have the evidence given on the *voir dire* read in at trial, and, if consent is given, this is done. ...

[35] The decision in *R. v. Erven,* [1979] 1 S.C.R. 926 addressed the question of whether a *voir dire* was always necessary where the admissibility of an accused's statement made to a person in authority was in question. While the case at bar concerns the admissibility of a Crown witness' out of court statements, the underlying principles stated in *Erven* at pp. 931-932 are relevant:

> Function of the *Voir Dire*
>
> It is axiomatic that the *voir dire* and the trial itself have distinct functions. The function of the *voir dire* is to determine admissibility of evidence. The function of the trial is to determine the merits of the case on the basis of admissible evidence. The *voir dire* is conducted in the absence of the jury, who should not be informed, at any time, of the subject matter of the *voir dire*. The accused may testify on the

voir dire while remaining silent during the trial. Evidence on the *voir dire* cannot be used in the trial itself. The fundamental nature of this functional separation was recently reaffirmed by this Court in *The Queen v. Gauthier* [1977] 1 S.C.R. 441. Mr. Justice Pigeon, speaking for the majority, stated that the procedure is similar whether or not the trial is before a jury, and he emphasized the necessity for a *voir dire* in both cases, at p. 450:

> ... For this reason I fail to see how it could be decided that in a trial without a jury, a *voir dire* is unnecessary, and statements made by the accused may be admitted in evidence without a preliminary decision as to whether or not they were freely and voluntarily made. Furthermore, no one appears to suggest that in a trial without a jury a *voir dire* is unnecessary. But if this is so, how can it be maintained that the rules are different? ...

In a later passage, Pigeon J. also expressed his view that the holding of a *voir dire* is an essential requirement (at p. 451):

> In deciding as it did in the case at bar, the Court allowed the accused to testify on the *voir dire* on a portion of the case that suited his purposes, while avoiding cross-examination on the rest and preventing the prosecution from referring to it. This can hardly be described as formalism; it touches one of the most basic aspects of the administration of justice, namely the rule that any judgment must be based exclusively on the evidence presented at the trial. If it were to be held that in a trial without a jury it is not essential to hold a *voir dire*, and the judge may admit evidence of statements made by the accused, provided he rules on their admissibility at the end of the trial, I would not agree, but I would consider it less objectionable than a *voir dire* that does not respect the basic rule, namely that it is a trial within a trial, and accordingly the evidence produced therein is to be used on the *voir dire* only, even though the same judge presides at the *voir dire* and decides on the merits.

The courts have formulated strict standards governing the admissibility of statements in order to safeguard carefully the rights of an accused person. The principles focus on the jury trial, but they apply equally to trial by a judge alone.

...

[36] And at pp. 938-939:

> Statements should not slip in without a *voir dire* under the pretext that they form part of the *res gestae: see R. v. Spencer, supra; R. v. Toulany, supra.* The rules regarding *res gestae* are substantive rules regarding hearsay and the admissibility of evidence. They do not affect the procedure by which decisions are to be made regarding admissibility of statements made to persons in authority. Statements constituting part of the *res gestae* are admissible as exceptions to the general rule excluding hearsay. As with all statements by an accused, they are subject to the general requirement of voluntariness. In order to determine whether they are voluntary, as well as whether they are, in fact, part of the *res gestae* and otherwise admissible, such statements must be considered by the judge on a *voir dire* in the absence of the jury.

[37] The statements of Mrs. Boone in the recorded call are as critical to the outcome in this case as an accused's statement against interest made to a person in authority would be. There is no qualitative difference in the impact that admission would have on the verdict. As such, there is no reason to conclude that a *voir dire* is less necessary on the facts of this case than in the situation considered in *Erven.*

[38] While the trial judge has a discretion as to whether to hold a *voir dire* there are very important factors existing in this case which lead me to conclude that a

voir dire was required to determine the admissibility of Mrs. Boone's recorded statement.

[39] All agree that the statements are hearsay and were presumptively inadmissible in the trial. The defence position at trial was that the statements were not admissible for the truth of their contents and the defence did not consent to admission of the recording for that purpose.

[40] The burden was on the Crown to make application to admit the statements and in doing so to adduce necessary evidence from the 911 call center to prove the circumstances and accuracy of the recording. The Crown did neither.

[41] The error was significantly compounded by the trial judge's comments to counsel at the close of the Crown's case. He specifically and unreservedly indicated that the statements were not admissible for the truth of their contents. He indicated that he might consider the statements for assessing the Boones' emotional state. With the judge's position on record the defence elected to call evidence.

[42] In his closing submission defence counsel spoke directly to the 911 recording for its value in speaking to the Boones' emotional state. He did not address the evidence for the truth of the contents. When alerted to the Crown's attempt in summation to get a ruling to admit for the truth of the contents, the defence took the position that the statements were only usable for assessing credibility and emotional state.

[43] The trial judge rendered his decision without further representations from the parties.

[44] I conclude that the appellant suffered substantial prejudice as a result of the failure to hold a *voir dire*. The appellant's ability to make full answer and defence was substantially impaired. The Crown needed to make an application to admit the evidence. Without that notice, the defence had no opportunity to plan its' litigation strategy around the possibility of the admission of these statements for the truth of their contents.

[45] The trial judge's mid trial comments that the statements would not be considered for the truth of their contents misled the accused.

[46] Because of the failure to conduct a *voir dire,* the defence did not have an opportunity to examine witnesses or adduce evidence that went to admissibility of the evidence for the purposes put forward by the Crown, and ultimately accepted by the judge.

[47] I do not accept the respondent's argument that the trial judge would have heard all of the same evidence. The maker of the tape should have been called to prove the timing, circumstances, and the accuracy, of the recording. That was not done. In the absence of such evidence the trier of fact did not have an adequate evidentiary basis upon which to determine the accuracy of the recording or the threshold reliability of the information it conveyed.

[48] The authors of **The Law of Evidence,** 5th ed., (Paciocco, Stuesser) (Toronto: Irwin, 2008), state, at p. 127:

1.2 (b) Can the Evidence be Tested

> ... The optimal way of testing evidence is to have the declarant state the evidence in court, under oath and subject to contemporaneous cross-examination. This second aspect of reliability considers whether there are any substitutes that address the hearsay dangers arising from lack of oath, presence, and cross-examination. They include:
>
> . was the person under oath when making the statement,
>
> . was the making of the statement audio - or videotaped,
>
> . at the time of making the statement was the person cross-examined,
>
> . is the person now available to be cross-examined in court on making the out-of-court statement
>
> The focus under this ground is not so much on whether there is reason to believe the statement is true, but rather whether the trier of fact will be in a position to rationally evaluate the evidence.
>
> (Emphasis added)

Mrs. Boone was not under oath when making the statements. The audio tape was not properly proven and has gaps. Mrs. Boone was not cross-examined at the time

and though able to testify could not be cross-examined against the statements. These facts undermine the ability of the trier of fact to "rationally evaluate the evidence."

[49] I can find no legitimate reason for the Crown's failure to make an application to admit or for the court to have ruled on the matter of admissibility without a *voir dire*. I find that there was no practical efficiency gained in this case by the failure to hold a *voir dire*.

[50] While not necessary to my conclusion, I want to make some observations of the contents of the recording that may have been relevant to the threshold and possibly the ultimate reliability of the statements.

[51] There were substantive questions that could have been raised about the reliability of the recording. It is 11 minutes long. It does not indicate what time the first call was received or when the recording began. The latter part of the recording can be estimated by the sounds of the police arrival at the residence which their

testimony puts at 2:50 a.m. There is no way to know, from the tape, when the alleged assault occurred relative to the time of the phone call(s).

[52] The beginning of the tape appears to come in while a speaker is in mid-sentence, then there is a dial tone, then the conversation at the Boone household starts again. There is no testimony that explains what was happening at the 911 centre or when it was taking place. The best evidence available to the court is the recording, and the testimony of the dispatcher who is heard on the recording. He was not called to testify.

[53] There is no basis to accept the transcript as evidence in lieu of hearing from the dispatcher who took the call. Indeed, the transcript is flawed in certain ways. There are 15 “inaudible” portions. The transcript fails to reflect that the tape is muted or failed to record sounds on numerous occasions. This latter fact should have concerned the trier of fact.

[54] The first gap in the recording occurs approximately 3 minutes into the recording. There are 19 occasions when the tape appears to have stopped

recording sounds from the Boone end of the call, and for reasons that are unexplained. The longest gaps are 41 and 33 seconds in duration. Many are longer than five seconds.

[55] Many of the arguments raised by the defence on this appeal speak to the type of considerations that would properly have been put before the trial judge at the conclusion of the *voir dire.* The appellant should have had the opportunity to make those arguments at that time.

CONCLUSION

[56] I have concluded that the learned trial judge made an error in principle that amounts to an error in law, by failing to hold a *voir dire* to determine the admissibility of Mrs. Boone's statements, recorded in the 911 call, for the truth of their contents.

[57] I conclude it was an error in principle that amounts to an error in law for the trial judge to make a ruling to admit that evidence without giving the defence an

opportunity, prior to rendering the verdict, to make submissions that responded to the ruling.

[58] Having regard to these conclusions I find that the evidence of Mrs. Boone's statements, recorded in the 911 call, should not have been admitted for the truth of the contents. While not necessary to my decision, the recording, arguably, should not have been considered by the court for any purpose, given the lack of proof of the recording; the apparent gaps in the recording; the failure of the Boones to adopt the information contained therein; and the fact that no witness confirmed the completeness or accuracy of the recording.

[59] In the result, the appellant was found guilty on evidence that was improperly admitted. There was substantial prejudice to the accused that resulted. The appeal is granted and the conviction is quashed.

REMEDY

[60] Section 686 of the **Criminal Code** provides that:

> (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
>
> (a) direct a judgment or verdict of acquittal to be entered; or
>
> (b) order a new trial.

[61] The respondent Crown candidly acknowledges in its written submissions that:

> Given the testimony of the complainant, the 911 call was, in fact, the only evidence of the alleged offence.

[62] This is an accurate assessment of the evidence.

[63] Mr. and Mrs. Boone each sustained injuries at some unknown time on the evening in question. They were the only two persons present at the house. Mrs. Boone offers no admissible evidence to explain what occurred. Mr. Boone denied the commission of an assault upon his wife.

[64] Statements made by Mrs. Boone to Cst. Burns were, correctly, ruled by the trial judge as admissible only for assessment of credibility and not for the truth of them. Even if admitted for the truth they were insufficient upon which to conclude, beyond a reasonable doubt that the Crown had proved the essential elements of an assault by the appellant upon his wife.

[65] Evidence of the officers as to the injuries and demeanor of the Boones does no more than offer evidence that might have assisted the trier of fact in deciding the matter if there was better evidence of what had occurred to cause those physical and emotional conditions. It does not provide stand alone proof of the alleged offence, nor does it sustain a finding of guilt when considered as part of the totality of the properly admissible evidence.

[66] There is no evidence upon which a reasonably instructed trier of fact, acting judicially could reasonably render a guilty verdict. *see, R. v. Barrett*, at para. 15.

[67] I direct a verdict of acquittal be entered.

DUNCAN, J.