SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Jobe*, 2016 NSSC 275

Date: 2016-10-17
Docket: CRH No. 446890
Registry: Halifax

Between:

Her Majesty the Queen

v.

M'Bai Babou Jobe, Jordan Matthew Joyce, and Tyler Damian Kipper

Judge:	The Honourable Justice James L. Chipman
Heard:	September 19, 20, 21, 22 and 23, 2016, in Halifax, Nova Scotia
Final Written Submissions:	October 13, 2016
Counsel:	Sean McCarroll, for the Provincial Crown Luke Craggs, for Mr. Jobe Eugene Tan, for Mr. Joyce Jonathan Hughes, for Mr. Kipper

By the Court:

Introduction

[1] The three co-accused are charged as follows:

> That they on or about the 13th day of September, 2015 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did unlawfully rob Z.S., contrary to Section 344 of the Criminal Code.
>
> AND FURTHER that they at the same time and place aforesaid, did without lawful excuse point an imitation firearm at Z.S., contrary to Section 87(1) of the Criminal Code.
>
> AND FURTHER that they at the same time and place aforesaid, did unlawfully have in their possession a weapon or imitation of a weapon, to wit., "an imitation firearm", for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to Section 88(1) of the Criminal Code.

[2] Pursuant to the original Indictment, R.B. faced the same charges, along with two further counts related to breaching her Recognizance and Probation Order. However, at the commencement of the trial on the Crown's request, the charges against R.B. were stayed and a new Information was sworn on the basis that R.B. was a youth at the time of the September 13, 2015 incident. In this regard, the Crown indicated it was satisfied that R.B.'s birth certificate (which recently arrived from […]) confirmed her birthdate of November […], 1997, such that she was 17 years of age when the alleged armed robbery occurred.

[3] The Crown called R.B. as their third and final lay witness. In the midst of her direct examination, the Crown made a s. 9(2) *Canada Evidence Act* application to determine whether R.B. could be cross-examined on prior inconsistent statements she made. In particular, the Crown sought to cross-examine R.B. on exhibit VD2-2, the audio/video recording of an interview which took place between R.B. and D/Cst. Walsh on September 13, 2015. Accordingly, a s. 9(2) *voir dire* occurred and the Court went through the seven-step process outlined in *R. v. Milgaard* (1971), 2 CCC (2d) 206 (Sask. C.A.). In an oral decision rendered September 21, 2016, I permitted the Crown to cross-examine R.B. on her September 13, 2015 statement. Ultimately, both the Crown and Defence cross-examined R.B..

[4] On the basis of R.B.'s trial evidence and September 13, 2015 statement, the Crown advised that it sought to make substantive use of the statement. Accordingly, the Crown made application to have R.B.'s videotaped statement admitted pursuant to the principled exception to the hearsay rule. As a result, a *voir dire* was held wherein it was agreed all of the evidence from the trial (including R.B.'s testimony) would be adopted. In addition on the *voir dire*, the Crown called Cst. Gilles Boudreau, Cst. Brock Brooks and Sgt. Darrell Longley. The Defence did not call any evidence.

Issue

[5] Has the Crown proven on a balance of probabilities the reliability of R.B.'s prior inconsistent statement such that it can be tendered for the truth of its contents?

Parties' Positions

Crown

[6] In their written submission, the Crown submitted the following five seminal Supreme Court of Canada decisions:

> *Khan v. R.*, [1990] 2 S.C.R. 531
> *R. v. B. (K.G.)*, [1993] 1. S.C.R. 740
> *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764
> *R. v. Hawkins*, [1996] 3 S.C.R. 1043
> *R. v. Khelawon*, [2006] 2. S.C.R. 787

[7] It is the Crown's position that R.B.'s statement and the circumstances under which it was taken, "present both indicia of inherent trustworthiness and circumstantial guarantees of reliability". With respect to inherent trustworthiness, the Crown argues R.B.'s statement is corroborated by "real evidence". In this regard, they point out that toward the end of her statement, R.B. directs the police to an area where the alleged victim's stolen property is found in proximity to the accused. Further, the Crown says that R.B.'s statement concerning the three accused leaving the hotel without her is corroborated by security video (exhibit VD3-1), which the Crown says shows these same accused leaving the hotel after the robbery.

[8] The Crown submits that circumstantial guarantees of reliability are found because R.B. was present in court and subject to cross-examination from all parties regarding the taking of the statement. In the result, the Crown makes the point that the Court has had the opportunity to observe R.B. on the witness stand and hear her explanation for her recantation.

[9] Since R.B.'s prior statement was videotaped, the Crown states that as trier of fact, I am able to assess her demeanor. Accordingly, they submit that one of the traditional dangers of hearsay is therefore non-existent.

[10] Although R.B.'s statement was not taken under oath, the Crown points out that the importance of telling the truth was impressed upon her. In this regard, they state that she had been arrested and was informed that the interview was videotaped, that she had a right to speak to counsel, and was also advised of her right to silence.

[11] Finally, the Crown argues that there are striking similarities between R.B.'s videotaped statement and the testimony of the alleged victim, Z.S.. Indeed, they state that the evidence is so similar that, "it both defies coincidence and serves to bolster the reliability of the statement".

Defence

[12] In their submissions, Defence counsel do not take issue with the cases relied upon by the Crown. From the Supreme Court of Canada, they add the decisions of *R. v. Youvarajah*, 2013 SCC 41, and *R. v. J.(J.T.)*, [1990] S.C.J. No. 88. In addition, the Court is referred to the following lower court decisions:

> *R. v. L.(J.)*, [1997] O.J. No. 2642, 35 W.C.B. (2d) 176
> *R. v. G.(S.)*, 2013 ONCJ 419
> *R. v. Bidesi*, 2015 BCSC 126

[13] The Defence agree that under the principled exception to the hearsay rule, the Court must determine on a *voir dire* both necessity and reliability. All three defence counsel have conceded that necessity has been established. With respect to reliability, they argue that the Crown has fallen far short in its burden.

[14] The Defence does not dispute that the video of the interview of R.B. is an accurate recounting of the exchange between her and the questioning officer, D/Cst. Walsh. They also acknowledge that certain aspects of what R.B. told

D/Cst. Walsh is corroborated by other evidence. Nevertheless, they submit that given the totality of the circumstances, exhibit VD 3-1 is, "woefully unreliable and should not be considered in the ultimate question of guilt or innocence".

[15] Mr. Joyce emphasizes that the motive to lie must figure prominently in the Court's analysis. In his submission, it is pointed out that R.B. begins her statement by essentially refusing to respond in a meaningful way. As D/Cst. Walsh provides more information to her, Mr. Joyce submits that she then minimizes her involvement, primarily to the detriment of Mr. Joyce and Mr. Kipper.

[16] Mr. Kipper emphasizes that R.B. was a co-accused at the time she gave her statement. He adds that she was, "effectively in sole possession of the goods allegedly stolen from the victim". Mr. Kipper's submission notes that the co-accused were not found in possession of the stolen property.

[17] Mr. Kipper argues that R.B.'s statement should be deemed unreliable. He submits her trial evidence that she was high on cocaine at the time she gave the statement should be accepted. Although the statement was videotaped, in Mr. Kipper's submission, "the quality of the video does not lend the Court an ability to observe some of the more telling demeanors of the declarant to assess whether or not she was in fact high on cocaine at the time the statement was made. Indeed, it is effectively impossible to determine whether or not the declarant had an elevated heart rate, or dilated pupils just by way of example."

[18] Alternatively, Mr. Kipper submits that D/Cst. Walsh did not impress upon R.B. the importance of telling the truth and the consequences of lying. Finally, Mr. Kipper argues that to the extent there are "striking similarities" between the evidence of Z.S. and R.B.'s statement, they should be observed with caution and skepticism. In this regard, Mr. Kipper emphasizes Z.S.'s evidence to the effect that she relied on others, including R.B., in formulating her testimony.

[19] In Mr. Jobe's submission, he emphasizes the following:

- R.B.'s lack of oath in her audio/video statement
- her contempt for her oath in court
- R.B.'s interview was tied together by her responses to Mr. Jobe's statement (ruled inadmissible; see *R. v. Jobe*, 2016 NSSC 254
- D/Cst. Walsh was not compliant with s. 146 of the *Youth Criminal Justice Act*

- D/Cst. Walsh failed to take steps to determine R.B.'s actual age

[20] In all of the circumstances, the Defendants submit that R.B.'s audio/video statement falls far short of meeting the reliability threshold. They therefore take the position that the Crown has not met its burden and that the September 13, 2015 statement of R.B. must be excluded.

Governing Law

Hearsay and Reliability

[21] As Justice Beveridge noted in *R. v. Gerrior*, 2014 NSCA 76 at para 45:

> The danger in admitting hearsay is that the evidence may not be true. A trier of fact may be misled by relying on such evidence that has not been tested by in-court cross-examination that could expose problems with perception, memory, narration and sincerity (*R. v. Khelawon*, 2006 SCC 57, at para. 2).

[22] Hearsay statements are presumptively inadmissible because they are inherently unreliable (*Khelawon* at para. 3). They are made without the in court procedural safeguards. The party seeking to have a prior statement admitted must "demonstrate that the statement is sufficiently reliable to overcome the dangers inherent in hearsay evidence," (*Khelawon* at paras. 59-65). In *Khelawon*, Justice Charron explained that the reliability requirement can be satisfied in two ways:

1. By establishing that the circumstances in which the statement was made provide sufficient guarantees of the trustworthiness of the statement to negate reliability concerns (para. 62). Reliability is readily apparent from the trustworthiness of the statement contents (para. 3). Sufficient trust can be placed in the *truth* and *accuracy of* the statement (para. 62); (see for example *Khan* and *F.J.U.*)
2. By establishing that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested (para. 63). Reliability can be tested as a result of the *circumstances of the taking of the statement*. (see for example *K.G.B.* and *Hawkins*)

[23] The two means are not mutually exclusive, as reliability can be established through either method or a combination of both. In *Khelawon*, Justice Charron emphasized at para. 76:

> … The admissibility inquiry into threshold reliability, therefore, is not so focussed on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence.

[24] The admissibility of the prior statement of a recanting witness will most commonly turn on the circumstances of the taking of the statement. In *K.G.B,* the Supreme Court held that the traditional hearsay concerns will be addressed and the requirement of reliability will be satisfied to allow substantive use of a prior inconsistent statement if:

1. the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath of affirmation;
2. the statement is videotaped in its entirety; and
3. the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement.

[25] Extrinsic or corroborative evidence can be considered in assessing the trustworthiness of the statement and can be an important indicator of reliability (see *R. v. Couture*, [2007] 2 S.C.R. 517 at para. 4). In *Khelawon* at para. 92, Justice Charron explained:

> …When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not — recall *U. (F.J.).*

[26] The Supreme Court of Canada considered the difference between threshold and ultimate reliability in *Youvarajah*, at para. 24:

> Why not simply let the trier of fact determine both threshold and ultimate reliability? Professors D. M. Paciocco and L. Stuesser provide the following explanation, with which I agree:
>
> > In considering "reliability", a distinction is made between "threshold" and "ultimate" reliability. This distinction reflects the important difference between admission and reliance. Threshold reliability is

> for the trial judge and concerns the admissibility of the statement. The trial judge acts as a gatekeeper whose function "is limited to determining whether the particular hearsay statement exhibits sufficient *indicia* of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement." So long as it can be assessed and accepted by a reasonable trier of fact, then the evidence should be admitted. Once admitted, the jury remains the ultimate arbiter of what to do with the evidence and deciding whether or not the statement is true.

(*The Law of Evidence* (6th ed. 2011), at pp. 122-23)

(see *Hawkins* at para. 75; and *Khelawon*, at paras. 50-52)

Motive to Lie

[27] Justice Fichaud discussed motive to lie at length in *R. v. Scott*, 2004 NSCA 141 (see paras. 90-92). Later in the decision (beginning at para. 96) our Court of Appeal notes that the threshold reliability inquiry is limited to the circumstances of the statement, not to the extraneous matters related to ultimate reliability. Further on at para. 102, Justice Fichaud added the following instruction:

> It appears that the trial judge left to the jury any critical assessment of Mr. Halliday's motive to lie. With respect, this is not sufficient. It is the trial judge's responsibility to consider the impact of this central feature of the threshold reliability analysis. In my respectful view, he erred in law.

Youth Criminal Justice Act, s. 146

[28] The starting point for any discussion of the admissibility of youth statements is s. 146 of the *Youth Criminal Justice Act*. This section sets out familiar requirements for adult statements; namely the right to counsel and the burden on the Crown to prove the voluntariness of any admission by the accused, beyond a reasonable doubt. Further, there are a set of standards from which adults do not benefit:

- the youth must be told of his right to silence, and that any statement made may be used in evidence against him;

- the youth must be told that he has a right – and given a reasonable opportunity – to consult both with counsel and with a parent or other appropriate adult;

- any statement made *is required* to be in the presence of counsel and any parent/adult who was consulted, unless the youth waives this requirement; and

- for a youth to *waive* the right to consult with counsel and a parent/adult, and equally to waive the right to have those persons present for the statement, the waiver must either be audio/videotaped, or made in writing.

[29] The Supreme Court of Canada in *R. v. L.T.H.*, 2008 SCC 49, interpreted s. 146. For the majority, Justice Fish stated that the Crown must prove compliance with the s. 146 requirement (or a waiver) to the standard of proof beyond a reasonable doubt, rather than on a balance of probabilities. Discussing s. 146 at para. 3 in *L.T.H.*, Justice Fish wrote:

> … Parliament has in this way underscored the generally accepted proposition that procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults to suggestion, pressure and influence in the hands of police interrogators.

Discussion, Analysis and Disposition

[30] After observing R.B. testify, I easily conclude that she is not credible or reliable. In this respect, I am drawn to Mr. Craggs' submission that she paid no heed to the "solemnity" of the Court proceeding. R.B. was argumentative and uncooperative. It was apparent she did not want to be in the witness chair. She would not agree to most of even the most basic, uncontroverted propositions put to her by the Crown.

[31] R.B.'s demeanor switched back and forth, ranging from defiance to tenderness. At times she was aggressive in asserting denials and at other moments soft spoken and teary, seeming sincere when asking for breaks.

[32] When I consider the totality of R.B.'s in court testimony, I find it to be lacking in value. If is without hesitation that I conclude her witness stand evidence

to be useless, in the contest of shedding light on the events of September 13, 2015, as they pertain to the accused persons.

[33] Having dispensed with R.B.'s in court testimony, I must now consider the threshold reliability of her audio/video statement of September 13, 2015. Once again, with all parties in agreement that necessity has been made out, the crucial question is whether the statement is reliable, such that it may be received (as an exception to the hearsay rule) for the truth of its contents.

[34] As the positions of the parties reveal, the collective accused impressed several arguments on the Court as to why the statement should be considered unreliable. For example, Mr. Hughes emphasized R.B.'s in court testimony that she was high on cocaine at the time she gave her statement. He argued this aspect of her testimony should be accepted, in part, because of circumstantial evidence concerning the depleted baggie of cocaine taken from Z.S.. Of all that might be said of this, I am of the view that it would be highly speculative to conclude R.B. was impaired when she gave her statement. In any event, I accept D/Cst. Walsh's testimony that he observed no indicia of impairment when he questioned R.B..

[35] Mr. Craggs asked the Court to consider, among other things, the fact that R.B. was a youth at the time she was questioned. He emphasized s. 146 of the *YCJA* and argued D/Cst. Walsh should have accessed available police sources confirming R.B.'s birthdate of November 27, 1997.

[36] When I review all of the circumstances surrounding the age issue, I do not find it to be a compelling argument for the defence. First of all, R.B., early on in her statement says she is 18. To my mind, she does not give any indicia such that D/Cst. Walsh would have cause to seek out her actual date of birth.

[37] Further, s. 146(2) renders inadmissible statements that do not meet its special requirements, but only where the statement is being led "against the young person". If the statement is being led for some other purpose, it may be received. Now that R.B. is not an accused, her statement is not being led against her.

[38] Sifting through all of the parties' arguments, I am drawn to the one emphasized by Mr. Tan; i.e., R.B.'s motive to lie.

[39] The context of what was going on with R.B. when she gave her statement on the afternoon of September 13, 2015 is critical in examining her motive to lie. First of all, the incident in question occurred several hours earlier. R.B. was

arrested and given her rights. She had consulted with a lawyer and initially had very little of substance to say in answer to D/Cst. Walsh's questions. She lied when she told the officer she was 18, no doubt because she knew the police were aware of her activities as an escort at the time in question.

[40] R.B. was also in a romantic relationship at the time with one of the accused, M'Bai Babou Jobe. "Bobe" to her, it is apparent throughout the interview that she has feelings for Mr. Jobe. Indeed, having watched the video twice in Court and read the transcript several times over, I am of the overwhelming view that R.B. spends much of the interview minimizing her role and the role of Mr. Jobe in the alleged robbery. At the same time, I am concerned that she exaggerates the involvement of others who may have been involved.

[41] Accordingly, I can take little comfort in the reliability of her version of events, not only as it pertains to Mr. Jobe and herself, but also in respect of the other accused, Mr. Kipper and Mr. Joyce.

[42] Furthermore, as all three Defence counsel have argued, most of R.B.'s substantive answers are as a consequence of being prompted by D/Cst. Walsh with what he tells her he has learned from Mr. Jobe.

[43] I am concerned that D/Cst. Walsh elicited much of the substantive content in R.B.'s statement by putting Mr. Jobe's words to her. This is of concern because R.B. may have simply adopted what she perceived to be Mr. Jobe's version of events (through the suggestions of D/Cst. Walsh). The concern is amplified given that I previously ruled Mr. Jobe's statement to be involuntary.

[44] I would add that I do not accept that R.B.'s statement is strikingly similar to Z.S.'s evidence. In any event, I have concerns that Z.S. tailored her evidence to fit what she learned about the suspects from R.B. and others in the time since the alleged armed robbery.

Conclusion

[45] The statement in question was obviously audio/videotaped and R.B. was subject to cross-examination on her prior (inconsistent) statement. Nevertheless, as indicated above, I have significant concerns with respect to the overall threshold reliability of R.B.'s statement.

[46] R.B.'s statement, while receivable for impeachment purposes, does not satisfy me in terms of its reliability. I find there are not sufficient circumstantial guarantees of reliability. That is to say, the statement lacks inherent trustworthiness. I am not satisfied on a balance of probabilities that R.B.'s statement is reliable. Accordingly, the statement will not be received for the truth of its contents.

Chipman, J.