SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Ord, 2012 NSSC 13

Date: 20120110
Docket: Hfx No. 352400
Registry: Halifax

Between:

Jason John Ord

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: November 23, 2011, in Halifax, Nova Scotia

Counsel: Lee Seshagiri, for the appellant
Tanya Carter, for the respondent

By the Court:

[1] Jason John Ord (the "appellant") appeals his conviction for:

(i) assault, contrary to s. 266 of the Criminal Code; and,

(ii) failure to comply with a condition of a recognizance, contrary to s. 145(3) of the Criminal Code.

[2] He was convicted in Nova Scotia Provincial Court before Her Honour, Judge Anne S. Derrick.

[3] The trial commenced on February 28, 2011 and was continued first to April 8, 2011 and then further continued to June 14, 2011. In total the trial consumed about seven hours of court time spread over the three days. After a brief recess on the final day of the trial Judge Derrick gave her oral decision convicting the appellant on both counts.

[4] In his Notice of Summary Conviction Appeal, counsel for the appellant asks the Summary Conviction Appeal Court to allow the appeal and set aside the convictions or, alternatively, to order a new trial in Provincial Court (before a different Provincial Court Judge).

[5] The grounds of appeal are listed as follows:

> 1. That the learned trial Judge erred in law by admitting an out-of-court hearsay statement into evidence;
>
> 2. That the learned trial Judge erred in law in applying the test for ultimate reliability for an out-of-court hearsay statement; and
>
> 3. Any other grounds that may be apparent from a review of the transcript and this Court may permit.

FACTUAL BACKGROUND

[6] The complainant was the former girlfriend of the appellant. On the night of the alleged assault she and the appellant had been drinking. They got into an argument which led to a physical altercation in which she suffered an injury to her left eye causing some bruising and swelling below the eye.

[7] Approximately two weeks after this event happened, the complainant called the police to report it. A police officer was dispatched to the apartment where the complainant was living at the time. A female friend of the complainant was present when the officer arrived.

[8] The complainant gave the uniformed police officer a statement. The statement was in the officer's handwriting and signed by the complainant and the officer. The complainant was not sworn to tell the truth prior to giving the statement nor was it videotaped or otherwise recorded.

[9] The police officer did not warn her of the potential serious ramifications for providing a false statement. When called to testify at trial, the complainant demonstrated a remarkable lack of memory. She testified that she could not recall

much about the evening or the events that led to the laying of charges against the appellant. She was familiar with the contents of her statement.

[10] After satisfying the Court of the existence of a prior inconsistent statement as required by section 9, subsection (2) of the *Canada Evidence Act*, R.S.C., 195, c. C-5, crown counsel was permitted to cross-examine the complainant on her earlier statement. A *voir dire* was conducted to determine whether the statement should be admitted for the truth of its contents based on the principled exception to the hearsay rule.

[11] Prior to conducting the *voir dire*, crown and defence counsel both agreed that the evidence on the *voir dire* could be used for trial purposes if the Court ruled the statement admissible.

[12] After conducting the *voir dire* and hearing the submissions of counsel, the Learned Trial Judge recessed to listen to some of the testimony of the complainant given during the *voir dire*. Later she returned to the courtroom to give her ruling. She allowed the statement to be admitted and provided her reasons for doing so.

[13] The appellant contends that the Learned Trial Judge erred in deciding that the crown had discharged its burden to satisfy threshold reliability of the prior inconsistent statement. The appellant is not challenging the necessity aspect of the principled approach to hearsay admissibility.

[14] In oral argument, counsel for the appellant identified two key areas where, he contends, the Learned Trial Judge erred in law:

1. That the trial judge effectively reversed the burden of proof or onus with respect to admissibility; and

2. That the trial judge failed to apply the principled approach correctly by relying on factors that do not necessarily provide the requisite circumstantial guarantees of trustworthiness.

He indicated that he would also briefly speak about a possible motive for the complainant to potentially misrepresent or fabricate a complaint.

[15] I will address the appellant's arguments after I review the existing law and principles respecting, so-called, **KGB** applications.

LAW

[16] The law with regard to the presumptive inadmissibility of hearsay evidence save for certain exceptional circumstances was made more flexible beginning with the Supreme Court of Canada's decision in **R.** v. **B. (K.G.) [K.G.B.]**, [1993] 1 S.C.R. 740. In the majority decision written by Lamer, C.J., at para. 104, it was stated:

> 104 Therefore, the requirement of reliability will be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of its trustworthiness with respect to the two hearsay dangers a reformed rule can realistically address: if (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement, there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement. Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

[17] Chief Justice Lamer had an opportunity to clarify and expand upon the rationale for his decision in **K.G.B.**, *supra*, in a subsequent decision indexed as **R.** v. **F.J.U,** [1995] 3 S.C.R. 764. At para. 34 he summed up what he held in **K.G.B.**, *supra*, in these words:

> 34 In sum, I held in *B. (K.G.)* that the gravest danger associated with hearsay evidence simply does not exist in the case of prior inconsistent statements because the witness is available for cross-examination. The other two dangers, absence of an oath and absence of demeanour evidence, can be met through appropriate police procedures and occasionally appropriate substitutes can be found. Finally, the prior statement is necessary evidence when a witness recants. The trial judge must make a threshold assessment of reliability at a voir dire; however, the ultimate determinations of how reliable the prior inconsistent statement is and what weight it should have remain with the trier of fact.

[18] In deciding threshold reliability Lamer, C.J. had the following to say at paras. 48, 49 and 50 of **F.J.U.**, *supra*:

> 48 At this stage, the trial judge need only be convinced on a balance of probabilities that the statement is likely to be reliable, as this is the normal burden of proof resting upon a party seeking to admit evidence. The trial judge must also ascertain at this stage that the prior statement relates evidence which would be admissible as the witness's sole testimony.
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> 49 I would also highlight here the proviso I specified in *B. (K.G.)* that the trial judge must be satisfied on the balance of probabilities that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.
>
> 50 The trial judge at this stage is not making a final determination about the ultimate reliability and credibility of the statement. The trial judge need not be satisfied that the prior statement is true and should be believed in preference to the witness's current testimony.

ANALYSIS OF THE TRIAL JUDGE'S RULING

[19] When one analyses the Learned Trial Judge's ruling, which she gave after a recess of approximately 50 minutes to allow herself sufficient time to review the evidence given by the complainant during the *voir dire*, she made it clear that the statement was "... hearsay and, therefore, inadmissible unless it can be received under the principled exception analysis." (Transcript, p. 94, lines 5 - 8.)

[20] She then went on to review in considerable detail the evidence provided by the complainant and the police officer who took her statement. She also made reference to some leading cases on the subject including the Nova Scotia Court of Appeal case of **R.** v. **Poulette**, [2008] N.S.J. No. 455; 269 N.S.R. (2d) 314 and the Supreme Court of Canada case of **R.** v. **Khelawon**, [2006] 2. S.C.R. 787.

[21] It is clear in her ruling that the Learned Trial Judge was well versed in the law pertaining to the admissibility of prior inconsistent statements. In her determination she considered the evidence offered during the *voir dire* and based on the law she found, on the balance of probabilities, that the crown had established both necessity and reliability. She clearly stated in her reasons how the evidence satisfied her of these two essential requirements.

[22] In regard to the threshold reliability requirement, she not only dealt with the factors that caused her to be satisfied but she also dealt with the various issues or concerns raised by defence counsel in his submissions as reasons why she should not allow the statement to be entered. Based on my read of her oral ruling, it is clear that the Learned Trial Judge knew the law and applied it correctly to the facts that she found based on the evidence presented. Furthermore, she made it perfectly clear that the burden to satisfy the requirements of the principled approach to admission of otherwise hearsay evidence rested on the crown. She did not, as was suggested by defence counsel, reverse the onus.

[23] As to whether or not the complainant had a motive to lie, I am not convinced that, in the circumstances of this case, this is a valid ground of appeal. Defence counsel had the opportunity to cross-examine the complainant during the *voir dire*. Her statement given to police just two weeks after the assault was not shaken or undermined in any way. Certainly there was no indication that she had fabricated her story in order to rid herself of her then boyfriend. She had already broken up with him. What prompted her to tell her story was his persistence in attempting to contact her. The events surrounding the assault were still relatively fresh in her mind when she gave her statement to the police. The physical effects of the assault were still visible below her left eye according to the testimony of the officer.

[24] If there was a motive to lie it was not when the complainant first reported the incident to the police. She might not have been totally forthright at trial in saying that she could not remember many of the details of the assault but that does not detract from the threshold reliability and hence admissibility of her statement.

FINAL RESULT

[25] I find that the Learned Trial Judge, in deciding to admit the prior inconsistent statement of the complainant, made no error in law. The appeal is, therefore, dismissed and the appellant's conviction on both counts is upheld.

McDougall, J