SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Muise, 2013 NSSC 141

Date: 20130502
Docket: CRH 373467
Registry: Halifax

Between:

Her Majesty the Queen in and for the Province of Nova Scotia

Crown

v.

Cody Alexander Muise

Defendant

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	April 24 and 25, 2013, in Halifax, Nova Scotia
Counsel:	Christine Driscoll and Darrell Martin, for the Crown Peter Planetta, for the Defendant

By the Court:

[1] This is a voir dire decision in relation to the so-called "dying declaration" made by Brandon Hatcher to Constable Brad Murray on December 3, 2010, at approximately 8:45 PM.

[2] From the evidence in the main trial, which counsel agree I may consider in this voir dire, I conclude that Mr. Hatcher was wounded by the path of a bullet which entered his left back area and exited in the midline front area of his chest, having struck a large blood vessel supplying the left arm. Dr. Marnie Wood the medical examiner indicated that the path of the bullet would have caused a fatal amount of blood loss which would have happened relatively quickly, however she could not estimate how long he would have lived after being struck because there were too many variables to consider. She considered it outside of her range of expertise as to whether Mr. Hatcher would have known that he had a fatal injury and was dying.

[3] Amber MacLeod, Mr. Hatcher's girlfriend, was present when he returned to the residence at 123 Lavender Walk in a wounded condition. She saw him leave

at approximately 8:15 PM carrying nothing except his cell phone, and that he came back within a few minutes from being outside a few seconds after she heard five or six shots, claiming to have been shot in the arm and that Amber should call 911.

[4] Exhibit 37 photo number one shows a yellow tarp under which was located a pump action shotgun which as is shown in photo 24 is just across from 123 Lavender Walk. The evidence thus far suggests that the shotgun was carried by Hatcher at the time he was shot and therefore its location gives some notion of where he likely dropped it after being shot.

[5] Amber MacLeod said she immediately called 911 while Hatcher ran upstairs. She followed him and observed him fall onto the floor upstairs. The only thing she recalls him saying was that "he loved me and his mother". She estimated that the police arrived approximately five minutes after he came into the house.

[6] Stephen LaDelpha was called as an expert forensic toxicologist to give opinion evidence regarding the analysis of Mr. Hatcher's bodily substances retrieved on autopsy. His overall conclusion was that the primary substance of

significance present in Mr. Hatcher's body at the time would appear to have been Bromazepam or a Valium related drug which would tend to cause sedation and muscle coordination problems, however because he was unaware of how tolerant Mr. Hatcher was to the drug it made it difficult for him to give a more precise opinion of its affect on him.

[7] Dr. John Ross, the emergency treating physician at the hospital who arrived shortly after Mr. Hatcher, indicated that Mr. Hatcher had no palpable pulse upon arrival. They were unable to resuscitate him. When asked whether Mr. Hatcher would have known the seriousness of his wound, Dr. Ross suggested that he may have known but that would be mere conjecture on his part.

[8] Constable Brad Murray was the first police officer at 123 Lavender Walk. He received a call to attend at 8:38 p.m. He testified that Constable Nick Joseph and he arrived virtually at the same time. Constable Joseph estimated he was there at 8:40 p.m. Constable Murray testified that he spent several minutes making sure the residence was clear of any threat to him before he attended to Mr. Hatcher. He was dressed in a police uniform, announced himself as a police officer, and Hatcher was familiar with him from at least one prior direct contact. Constable

Murray was of the opinion that there was no doubt that Mr. Hatcher understood that he was a police officer as he had his eyes open looking directly at the officer and was coherent and conscious at the time.

[9] Cst. Phil Aptt also testified that he was among the first police officers on scene. He arrived at 8:39 p. to find Constable Murray already present upstairs at 123 Lavender Walk. He accompanied Mr. Hatcher in the back of the ambulance to the hospital.

[10] Thus the evidence suggests it was no later than 8:45 p.m. when Constable Murray had direct contact with Mr. Hatcher. In summary, his evidence was that Mr. Hatcher was having trouble breathing, and the Constable noted he had blood soaked teeth so he helped him roll him to his side so he could more easily breathe.

[11] He said Mr. Hatcher's stated: "I can't breathe - I'm going to die"; but he couldn't recall whether this was before or after he was placed in the recovery position. Mr. Hatcher also said some other things, but he couldn't recall what they were although he noted that he repeatedly stated: "I'm going to die - this is it". Mr.

Hatcher was also able to talk sufficiently to give his name and date of birth to the paramedics when they arrived.

[12] Constable Murray stated that he asked Mr. Hatcher several times, "Who shot you?", to which he replied repeatedly, "I don't know"; and that he had stated: "I'm going to die", before the question was asked and while Constable Murray was clearing the rooms at 123 Lavender Walk as a matter of officer safety.

[13] I find as a fact that when Constable Murray asked Mr. Hatcher, "Who shot you?", Mr. Hatcher responded: "I don't know", was at a time when he was still conscious and coherent, but had also repeatedly stated words to the effect that "I'm going to die - this is it."

[14] In cross examination Constable Murray was asked his opinion about whether he had any confidence in the truthfulness of the answer given by Brandon Hatcher that he did not know who had shot him. [I expressly instructed the jury to disregard the officer's evidence about his belief regarding Mr. Hatcher's truthfulness]. In this way, however, the Crown was able to elicit from the officer that Mr. Hatcher had a history of being routinely uncooperative and perhaps

antagonistic with the police; and that in the Greystone area, given his chosen lifestyle and milieu, Mr. Hatcher would be extremely reluctant even at that point in the flickering moments of his life to cooperate with police. The officer testified that the prevailing sentiment or motto in the Greystone area with which Mr. Hatcher and his cohorts associated themselves, was "snitches get stitches", or that persons who cooperated with the police would get punished for doing so.

[15] Constable Murray was the only witness called specifically on the voir dire by the Defence. I found him to be credible. The Crown also presented evidence by way of the testimony of Kim Hatcher, Brandon Hatcher's mother. I found her to be credible as well.

[16] She testified that Mr. Hatcher was born as a twin on October 25, 1990, and was raised by her in Spryfield at 17 Kidston Road. He finished grade 9 in school and had moved in November 2010 out of her place to a residence in the Greystone area.

[17] She knew that he was in trouble with the law as a youth, as she was regularly contacted by police and was in court with him when this happened.

Filed as an exhibit VD-1 is the criminal record of Mr. Hatcher summarized in a "bail report" of 18 pages printed March 25, 2013. It demonstrates that his first conviction was for a summary assault occurring March 31, 2007; a 12 month period of probation under the *Youth Criminal Justice Act* was imposed October 11, 2008. From that time forward he sporadically continued to have criminal convictions and some under the *Controlled Drugs and Substances Act*.

[18] She testified that Mr. Hatcher had an attitude of not cooperating with the police and that he was not a religious person. She confirmed that in the Greystone area and Spryfield where she grew up herself there was very much an attitude that "snitches get stitches" - that is to say cooperation with the police would be unfavourably regarded by members of the community and could result in retaliation. She used to speak to him most days face-to-face at her home, but that he kept his criminal activity as removed from her attention as possible.

[19] His close friends Christian Clyke, Marcel Lawrence and Brandon Lawrence, all had criminal records as well. She conceded in cross-examination that she had never been present when he had actually had contact with police officers on the

streets although she was present when he was questioned by police at least once and on that occasion he did not say anything or give a statement.

The Law

[20] I received the helpful pretrial briefs from the Defence [dated March 28, 2013] and the Crown [dated March 22, 2013] in relation to the law relevant to so-called "dying declarations".

[21] The law is neatly canvassed in *R. v. Hall*, 2011 ONSC 5628, a decision of Ontario Superior Court Justice T.L. Archibald. In that case a deceased had been doused with gasoline in his backyard and set on fire allegedly by the accused. The deceased made several utterances implicating the accused in the burning which were overheard by various witnesses. Although conceded to be hearsay, the Crown argued that they should be admissible on the basis that they fell under one of the traditional exceptions to the hearsay principle, dying declarations or *res gestae* statements, as well as satisfying the principled approach to hearsay requirements of necessity and reliability.

[22] In *R. v. Mapara* [2005] 1 S.C.R. 358 MacLachlan C.J. summarized the framework for considering the admissibility of hearsay evidence at paragraph 15:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
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> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.

[23] Necessity is usually established if the evidence would otherwise be admissible and the declarant were available to testify, but the declarant is unavailable. That is the case here.

[24] The scope of the threshold reliability inquiry is determined by the particular dangers presented by the evidence - *R. v. Khelawon* [2006] 2 S.C.R. 787.

[25] In that case Charron J., for the court, identified two different ways in which the reliability requirement can be met. First it can be met where with there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Secondly it can be met where a statement's truth and accuracy can be sufficiently tested by way of adequate substitutes for contemporaneous cross-examination [paragraph 62 - 63]. These two ways of demonstrating reliability are not mutually exclusive.

[26] All relevant factors should be considered in the reliability inquiry including any supporting or contradicting evidence. Threshold reliability relates to the level of reliability required to admit hearsay evidence. Ultimate reliability relates to whether a statement that meets the threshold reliability is true or not. It is for me as a trial judge on this voir dire to determine threshold reliability, and it will be for the jury to determine ultimate reliability if that becomes the case. I am, however, since *Khelawon* able to consider conflicting and corroborating evidence when deciding whether a statement meets the threshold reliability test.

[27] *Res gestae* was helpfully defined by the Ontario Court of Appeal in *R. v. Khan* [1988] 207 OAC 142 as follows:

> A spontaneous statement made under the stress or pressure of a dramatic or startling act or event and relating to such an occasion may be admissible as an exception to the hearsay rule. The stress or pressure of the act or event must be such that the possibility of concoction or deception can be safely discounted. The statement need not be made strictly contemporaneous to the occurrence as so long as the stress or pressure created by it is ongoing and the statement is made before there has been time to contrive and misrepresent. The admissibility of such statements is dependent on the possibility of concoction or fabrication. With the spontaneity of the statement is clear and the danger of fabrication is remote, the evidence should be received.

[28] Justice Archibald in the *Hall* case points out that this definition requires three criteria to be met for statement to be classified as *res gestae*:

> (1) the statement was made under the ongoing stress or pressure of a dramatic or startling act or event;
>
> (2) the statement relates to the occasion that caused the stress or pressure; and
>
> (3) there is little or no possibility of concoction or fabrication

[29] In *Hall* admissibility was in dispute because the statements in issue there were in response to questions by persons, and arguably they were not "spontaneous" or *res gestae*. Justice Archibald canvassed the authorities and

concluded that the fact that the statement was made in answer to a question is but one factor to consider in assessing whether the statement was made "spontaneously" - see paragraphs 18 - 23.

[30] Dying declarations were considered by the Supreme Court of Canada in *R. v. Chapdelaine* [1935] S.C.R. 53. There the Court listed the criteria which are summarized as follows:

> (1) the deceased had he settled, hopeless expectation of almost immediate death;
>
> (2) the statement was about the circumstances of the death;
>
> (3) the statement would have been admissible if the deceased had been able to testify;
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> (4) the offence involved is the homicide of the deceased.

I note that to be precise, obviously it is also a requirement that the declarant's death ensued within a reasonable time after making the declaration.

Defence Position

[31] The Defence suggests that the statements here are admissible under the traditional exception of a "dying declaration" as well as under the principled approach to the hearsay exceptions - *R. v. Mapara* [2005] 1 S.C.R. 358.

[32] It specifically notes that the evidence of the medical examiner Dr. Wood and Amber MacLeod, including statements such as "tell my mom that I love her" and his physical condition as observed by Constable Murray clearly suggest Mr. Hatcher had a settled expectation that his death was imminent.

[33] In response to my question about whether the traditional rationale for the rule that “every motive for falsehood had been removed” in such circumstances, allowed the Crown to argue Mr. Hatcher’s lack of cooperation with the police and religious adherence should go to threshold reliability rather than ultimate reliability. Mr. Planetta pointed out that under the traditional exception the statement would be admissible in any event without an examination of the rationale, and that using the principled approach threshold reliability is also established in the circumstances of this case. He argues the Crown's concern is

really one of ultimate reliability which is a concern that the jury should have the opportunity to address.

[34] As he put it, there is nothing apparent in the evidence that would rise to the level that would make Mr. Hatcher's declaration so unreliable as to be inadmissible.

Crown Position

[35] Mr. Martin argued that Mr. Hatcher had many reasons or motive for falsehood in the circumstances - he had been notoriously uncooperative with police in the past; he may have been implicated in the shooting of Colin Gillis earlier that same day, possibly with that same shotgun, and in the possession of a prohibited sawed-off pump action shotgun, and he may have fired first. His criminal record was tendered. The Crown argues that all the evidence portrays him as a person familiar with the criminal justice system and unlikely to rely upon the police to pursue justice on his behalf.

[36] Furthermore, the Crown argues that he may not actually have known specifically who shot him, since if Ryan MacDougall's evidence is accurate that three persons shot at him, he would be specifically unaware of who struck him with the fatal shot. The crown would say that therefore the evidence has very little probative value.

[37] In response to my question regarding situations where the Defence attempts to introduce hearsay evidence and the residual discretion to exclude same if there was substantial prejudice to the "fair trial rights of the Crown", if I can call them that, Mr. Martin noted that such prejudice could be answered by the Crown having the ability to call evidence at the main trial, as it did on the voir dire, to demonstrate that Mr. Hatcher was so highly unlikely to have cooperated with the police that his statement should be given very little weight.

Analysis

[38] The Defence has argued that this dying declaration of Mr. Hatcher (that he was unaware of who had shot him) is relevant specifically to Mr. Muise's fundamental position that he is not guilty of the crime charged.

[39] If Mr. Hatcher were alive, he could give that evidence in his own testimony. Since he is deceased, the evidence is necessary under the principled exception to the hearsay rule. The more contentious aspect is whether threshold reliability has been established by the defence.

[40] I note that in the *Mapara* case, Chief Justice MacLachlan at paragraph 15 set out the state of the law of hearsay in summary. She acknowledged that traditional exceptions presumptively continue on as good law. Dying declarations and *res gestae* are both such traditional exceptions.

[41] I find as fact in this case that: Mr. Hatcher had a settled hopeless expectation of almost immediate death; his statement to Constable Murray was about the circumstances of his death; that statement would have been admissible if he was alive and able to testify; and that the offence involved the homicide of Mr. Hatcher.

[42] Thus the traditional dying declaration exception applies here.

[43] Examining the facts under the *res gestae* exception I conclude that in the circumstances I am satisfied that: the statement was made under the ongoing stress or pressure of a dramatic or startling act - that is being shot in a fatal manner; that the statement declared to Constable Murray relates to the cause of the stress or pressure; and that there was little possibility of concoction or fabrication regarding the ongoing stress related to such dramatic or startling act or event.

[44] Having said that, I do not suggest that there is no possibility of falsehood or deception on Mr. Hatcher's part. However, as a matter of admissibility, the threshold of concoction or fabrication is not sufficiently established by the Crown to prevent the admission of the declaration to Constable Murray.

[45] Thus the traditional *res gestae* exception also applies here.

[46] In relation to the principled exception to the hearsay rule as developed recently by the Supreme Court of Canada in *Khelawon* [2006] 2 S.C.R. 787, necessity is clearly established, and it is threshold reliability which is controversial.

[47] I note at this juncture as well that the Supreme Court of Canada in *R. v. Finta* [1994] 1 S.C.R. 701 confirmed that particularly in relation to proffered evidence by the Defence, courts should entertain a flexible application of some rules of evidence in order to prevent a miscarriage of justice. In that case the defendant was charged with war crimes and crimes against humanity; those being arguably the most egregious criminal actions of which a person could be accused.

[48] Justice Cory for the Majority stated at paragraph 286:

> 286 Finally, the majority held that the exception to the hearsay rule in the form of statements made against penal interest by a person who is unavailable could only be invoked by the defence. It concluded that it would be unfair to allow the crown to prosecute the accused today with the assistance of evidence which had been in existence for some 46 years and which the accused was not given the opportunity to challenge.
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> 287 In *R. v. Williams* (1985) 18 CCC (3rd) 356 Martin JA stated that there is a need for a flexible application of some rules of evidence in order to prevent a miscarriage of justice. He said at page 378: "it seems to me that the court has a residual discretion to relax in favor of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist". His words are particularly apposite to this case.
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> 288 In *R. v. Rowbotham* (1988) 41 C.C.C. (3d) 1 at page 57, the Ontario Court of Appeal held that rules of evidence were properly relaxed in order to permit a question to be asked of a witness the answer to which constituted inadmissible hearsay. This was permitted because to do otherwise would have denied the

> accused the right to make full answer and defence, a right encompassed in the term "fundamental justice" now enshrined in section 7 of the Charter."

[49] In *R. v. Kimberly* (2001) 157 CCC (3d) 129 - leave to appeal dismissed [2002] S.C.C.A. No. 29, Justice Doherty for the Ontario Court of Appeal, while discussing the relaxation of the rules of evidence in favour of the Defence where it is necessary to prevent a miscarriage of justice, warned at para. 80, however, that:

> those cases do not, however, invite an abandonment of the threshold reliability inquiry where hearsay evidence is tendered by the defence. As Martin J.A. said in *R. v. Williams, supra* at page 378:
>
> … It seems to me that a court has a residual discretion to relax in favour of the accused a strict rule of evidence **where it is necessary to prevent a miscarriage of justice and where the danger against which an exculpatory rule aims to safeguard does not exist.** [Emphasis added in the original].

[50] Justice Doherty continued at paragraph 81:

> Where hearsay evidence cannot pass the threshold reliability standard, the "danger" which justifies the exclusionary rule is very much in existence. What the cases referred to above do recognize is that fairness concerns may sometimes militate in favour of admitting defence evidence. These concerns may tip the reliability/necessity analysis in favour of the accused. Fairness concerns could not assist the crown were it to tender the same evidence.… Similarly, due process concerns, particularly the concern that an accused have a full opportunity to confront inculpatory evidence presented against that accused, may operate against admitting hearsay evidence tendered by the crown. That concern would not have any relevance if the same evidence was tendered by an accused.

[51] With these thoughts in mind I turn to assessing the threshold reliability of the statements made by Mr. Hatcher to Constable Murray.

[52] Recalling that he was asked: "Who shot you?", and he replied repeatedly to the same question: "I don't know", when he was in a state in which it is reasonable to infer he recognized that he was likely only a very short time away from death, I ask myself are there sufficient circumstantial guarantees of trustworthiness to allow this statement[s] to go to the jury to consider with the other evidence in the case?

[53] Following Justice Charron's comments in the *Khelawon* case I consider whether the circumstances in which the statement came about suggest that there is no real concern about whether the statement is true or not.

[54] On that aspect I note that while there is some argument to be made that Mr. Hatcher would be resistant to ever cooperating with the police even in his dying moments, the facts in the case indicate that he was likely shot from a distance of approximately 53 meters away by a gunman obscured by the cover of large boulders in an area elevated 6.3 meters over where Mr. Hatcher was likely sheltering behind a wooden fence, on a dark windy rainy night. Though Mr. Hatcher was aware that Mr. Muise was waiting for him outside, based on Ryan

MacDougall's testimony that Mr. Muise spoke to Mr. Hatcher inviting him outside, I bear in mind that Mr. MacDougall's testimony was that all three of them, Mr. MacDougall, Mr. Munro and Mr. Muise opened fire on Mr. Hatcher. It is possible therefore that Mr. Hatcher genuinely did not know specifically who had shot him. In the circumstances the corroborating evidence suggests that his declaration has circumstantial guarantees of trustworthiness sufficient to establish threshold reliability.

[55] From the perspective of Justice Cherron's second aspect of threshold reliability, arguably there are no adequate substitutes for contemporaneous cross examination - normally these would be things that bring home the solemnity of the occasion to the declarant, such as: the presence of an interviewing police officer (often in a police station); the administration of an oath or equivalent; the statement having been audio and/or videotaped; and the nature of the questioning of the declarant may give rise to some level of "cross examination". On the other hand I recognize that the traditional exceptions characterized as "dying declarations" and *res gestae* inherently contain rationales based on the premises that the circumstances and nature of the declaration presume that the declarant in such cases would have had either the solemnity of the occasion foremost in their

mind, such that it would bind their conscience, or had no time for reflection and may be presumed to have blurted out a sincere statement.

[56] Viewed from these two perspectives, I conclude that collectively the circumstances here establish threshold reliability.

[57] I next turn to consider whether the probative value of that evidence is sufficient to permit the admission of the evidence, and the prejudicial effect to the "fair trial rights of the Crown" would be substantial - see Justice Major's comments for the Court in *R. v. Arcangioli* [1994] 1 S.C.R. 129 at paragraph 30:

> The proposition is unquestioned that evidence which is logically probative may be excluded where its probative value is slight but its prejudicial effect upon the fair trial of the accused is great. However, courts are reluctant to exclude evidence offered by an accused in his defence: *R. v. Seaboyer* [1991] 2 SCR 577 per MacLachlan J at page 611.

[58] As noted in part by Justice Major, Justice MacLachlan stated in *Seaboyer* at paragraphs 43-44 (see also paragraph 37):

> Canadian courts, like courts and most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance found in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must

> substantially outweigh the value of the evidence before a judge can exclude evidence relevant to defence allowed by law… In short, [these principles] form part of the principles of fundamental justice enshrined in section 7 of the charter. They may be circumscribed in some cases by other rules of evidence, but… In most cases exclusion of relevant evidence can be justified on the ground that the potential prejudice to the trial process of admitting the evidence clearly outweighs its value.

[59] Based on my findings of fact in this voir dire I do not agree that, as argued by the Crown, the probative value of the declaration(s) of Mr. Hatcher are substantially outweighed by the prejudice to the trial process of admitting that evidence.

Conclusion

[60] I am satisfied based on the law and the facts that I found herein, that the Defence has established that the hearsay declaration(s) by Mr. Hatcher in his dying moments, that he did not know who shot him, are admissible at the instance of the defence, when they continue their cross examination of Constable Murray.

[61] In so far as the Crown's position that it should be permitted to establish at the main trial evidence of Mr. Hatcher's predisposition to not cooperate with the police under any circumstances, generally speaking I would be prepared to permit

the Crown to ask questions in redirect of Constable Murray to support its argument in this respect. The Crown may wish to lead similar evidence from other witnesses during the trial, and in every case the issue will be whether the proffered evidence is relevant to the ultimate reliability of Mr. Hatcher's dying declaration(s) and if admissible otherwise, followed by an assessment of the probative value and the prejudicial effect thereof.

Rosinski, J.