SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Al-Rassi, 2013 NSSC 204

Date: 20130703
Docket: CRH 396767
Registry: Halifax

Between:

Her Majesty the Queen

v.

Adnan Al-Rassi

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Publication Ban:	Section 486.4 of the *Criminal Code of Canada*
Judge:	The Honourable Justice Peter P. Rosinski
Heard:	June 18, 2013, in Halifax, Nova Scotia
Oral:	June 19, 2013
Written Decision:	July 2, 2013
Counsel:	Kimberley McOnie, Crown Donald C. Murray, Q.C., Defence

By the Court:

BACKGROUND

[1] The accused is charged with a sexual assault upon J. L.. The allegation is that on September 6, 2011 during the course of a massage, the accused masturbated himself to ejaculation, and deposited his ejaculate upon the naked body of Miss L. while on a massage table.

[2] The Crown's evidence to date has included the evidence of J. L.. She had given a verbal outline of the allegation to Constable Marshall Williams on September 7, 2011, as well as a statement to Constable Jason Withrow on September 12, 2011, and testified at a preliminary inquiry on June 8, 2012. At trial she insisted that she at no time was asleep, whether during, or after, the massage, before she showered at the massage clinic.

[3] The defence wishes to have put to the jury, for the truth of its contents, certain portions of the preliminary inquiry transcript evidence of J. L., in which she agreed in cross examination that she was "pretty much asleep" at the end of

the massage. The defence would then have the Court instruct the jury that the use to be made of such preliminary inquiry transcript evidence be as suggested by Justice Jenkins in *R v. Crosby* 2003 PE SCTD 78 at paragraphs 48 and 49.

[4] In part, Justice Jenkins proposed to instruct the jury there as follows:

> 48 - The witness has testified in direct examination and is being cross examined. He also made these statements which are coming into evidence within his cross examination. It is important for you to understand that both the testimony and the statements can be used as evidence of what happened. You may consider both the testimony and the statements as evidence of what he said happened actually took place. You may compare. It is up to you to decide which, how much or how little, how much or little of either or any of them you will believe a rely upon in deciding the case. You are the sole finders of fact. You can give either or any of them or any parts of them as much or as little weight as you decide. Assessment of the evidence is your job.
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> 49 - As mentioned at the opening in deciding how much to believe, accept or rely upon, you should apply the same process of observation and assessment of the evidence as you do with any other witness or evidence. You should also consider the fact, nature and extent of the differences that you find between what the witness said or says in court and what he said in the earlier statements and his explanations in deciding how much or how little you will believe or rely upon, his testimony and the statements in evidence. You should consider carefully the circumstances in assessing the credibility of the prior inconsistent statements relative to the witness' testimony at trial.

[5] The defence also relies for such authority upon *R v. Eisenhauer* (1998) 123 CCC (3d) 37 NSCA per Cromwell JA [as he then was] particularly paragraphs 40 to 93.

[6] I note that the defence also suggests that the evidence may be put to the proposed use pursuant to Section 10(1) of the *Canada Evidence Act*. The defence has provided no cases in support of this proposition – in fact cases tend to run to the contrary – see for example *R v. Campbell* (1977) 38 CCC (2d) 6 (Ont. CA). In my view this is likely because that would strain the interpretation of Section 10(1) beyond its proper boundaries. Moreover in light of the evolution of the hearsay rule, resorting to Section 10 of the *Canada Evidence Act,* if available, would essentially be superfluous.

LEGAL PRINCIPLES

[7] It is unquestionable that the defence may also rely upon exceptions to the hearsay rule to introduce evidence that the jury may consider for the truth of its contents – *R v. Kimberley* (2001) 157 CCC (3d)129 [Ont. CA]. In that case and others the Courts recognize that in light of an accused's entitlement to make full answer defence they will more likely decide in favour of admitting hearsay evidence tendered by the defence under the principled approach, than when it is tendered by the Crown. The thinking is that in proper circumstances it may be

necessary to prevent a miscarriage of justice; however as the court said in *Kimberley*, "those cases do not, however, invite an abandonment of the threshold reliability inquiry where hearsay evidence is tendered by the defence" – paragraph 80.

[8] In the case at bar the evidence proposed is the preliminary inquiry evidence of J. L., which is fairly regarded as presumptively reliable – it was made under oath in court, and she was subject to cross examination by the defence.

[9] A question arises however about whether the proposed evidence is "necessary" and passes the probative value versus prejudice test.

NECESSITY

[10] In *R v. Khelawon* 2006 SCC 57 the Supreme Court of Canada spoke about the principled exception to the hearsay rule. Justice Charron for the Court stated at paragraph 34:

> Hearsay evidence is not excluded because it is irrelevant… Rather as we shall see, it is the difficulty of testing hearsay evidence that underlies the exclusionary rule and, generally, the alleviation of this difficulty that forms the basis of the exceptions to the rule... the more recent definitions of hearsay are focused on the central concern

> underlying the hearsay rule: the difficulty of testing the reliability of the declarant's assertion… Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanor can be observed by the trier of fact, and whose testimony can be tested by cross examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: one – the fact that the statement is adduced to prove the truth of its contents and two – the absence of a contemporaneous opportunity to cross examine the declarant.

[11] Similarly at paragraph 47 the court stated:

> The onus is on the person who seeks to adduce the evidence to establish these criteria [necessity and reliability] on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence,… The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach.

[12] And at paragraph 49:

> The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form…… However because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.

[13] At paragraph 56, entitled "recognizing hearsay", the court stated:

> The first matter to determine before embarking on a hearsay admissibility inquiry of course, is whether the proposed evidence is hearsay.… Recall the defining features of hearsay. An out-of-court statement will be hearsay when: one – it is adduced to prove the truth of its contents, and two – there is no opportunity for contemporaneous cross examination of the declarant.

[14] Furthermore, in paragraph 60 the Court said this is about the interplay between the traditional exceptions to the hearsay rule and the principled approach to the hearsay rule:

> More recently, this court in *Mapara* reiterated the continued application of the traditional exceptions in setting out the governing analytical framework as noted in paragraph 42 above. Therefore, if the trial judge determines that the evidence falls within one of the traditional common-law exceptions, this finding is conclusive and the evidence is ruled admissible unless, in a rare case, the exception itself is challenged as described in both those decisions.

[15] Notably in the case at bar the proposed evidence would not fall within a traditional exception to the hearsay rule because the declarant is available for cross-examination.

[16] That requirement as a defining feature of hearsay persists in the principled exception to the hearsay rule. Therefore it is arguable that in the case at bar, where the complainant declarant is available for cross-examination, that the proposed evidence is not "hearsay". Rather at its core it is an out-of-court

statement of that person, upon which the complainant can be cross examined as to any inconsistencies between that statement and her testimony in Court.

[17] While I am sceptical that the proposed preliminary inquiry evidence is "hearsay" as contemplated by the Supreme Court, nevertheless I realize that the Supreme Court of Canada has said that "necessity" must be evaluated on a qualitative basis, and I will move on to consider the "necessity" of the proposed evidence assuming it to be properly characterized "hearsay". Very recently the Supreme Court has reiterated that its comments in *Khelawon* apply to express as well as implied hearsay - *R. v. Baldree* 2013 SCC 34 - see particulary the judgments of the majority per Fish J at paras. 30-32, 68 and 72; and the concurring reasons of Moldaver J at paras. 79-81 and 96-98; and 103.

[18] In the case at bar neither counsel put cases to the Court, addressing directly the "necessity" criterion. I note that the Supreme Court of Canada in *R v. Hawkins* [1996] 3 SCR 1043 stated in relation to "necessity" at paragraph 71:

> "Under this court's principled framework, hearsay evidence will be necessary in circumstances where the declarant is unavailable to testify at trial and where the party is unable to obtain evidence of a similar quality from another source: KGB at page 796. Consistent with a flexible definition of the necessity criterion, there is no reason why the unavailability of the declarant should be limited to closed, enumerated list of causes.… But as this court indicated in KGB at pages 797 – 798, the statement of

> a declarant may still meet the necessity criterion in limited circumstances where the declarant is not an available in the strict physical sense – see for example R v. Rockey [1996] 3 SCR 829 at paragraph 20 per MacLachlan J.
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> 72 – For the purposes of these appeals, it will suffice to hold that the preliminary inquiry testimony of a witness will satisfy the criterion of necessity where the witnesses generally unavailable to testify at trial. Without restricting the precise content of "unavailability", the categories of absence recognized under section 715 [criminal code] specifically death, illness and insanity, offer a helpful guide to the types of circumstances under which it will be sufficiently necessary to consider the admission of the witness' former testimony.

[19] Notably in the *Rockey* case the "necessity" related to a young child . Justice McLachlin found that necessity may be established based on the incompetence of, or the inability of, the child to testify, or the unreasonableness of having the child testify where the traumatic effect thereof would have been significant.

[20] In the case at bar , the purported "necessity" of having the preliminary inquiry transcript evidence [I, and counsel, recognize that strictly speaking the "best evidence" is the audio taped evidence] put to the jury is premised in part on providing a foundation for an expert opinion by a psychologist, who would testify that if the facts were such that the complainant was in a state of sleep and waking therefrom, then it is possible that the complainant may have experienced perceptual disturbances also known as hypnopompic hallucinations, which could account for a genuine yet mistaken belief on her part that she saw Mr. Al-Rassi

completely naked beside her table, hand on his penis and ejaculate on her abdomen.

[21] Without the preliminary inquiry evidence of the complainant, in which she testified that she was "pretty much asleep" at the end of the massage, or similar words to that effect found in several other locations in that preliminary inquiry evidence, which the jury then would be told could be used for the truth of their contents, the defence suggests its full answer and defence would be compromised.

[22] Assuming that this evidence is "hearsay", I start with the notion that hearsay evidence is presumptively inadmissible.

[23] Moreover, I conclude that given the governing jurisprudence, and the circumstances of this case, it cannot be said that "necessity" has been proved on a balance of probabilities. The declarant is available and was cross-examined on those exact preliminary inquiry transcript aspects regarding what level of sleep she experienced, if any, during the massage therapy session. The complainant's credibility [honesty and reliability] has been tested by contrasting her preliminary inquiry evidence with that of her evidence at trial in this respect. I also observe

that Mr. Al-Rassi testified that while he did not enter the treatment room or bathroom again after the organ massage, he noticed the shower running for a lengthy time thereafter, from which the Defence could argue that J. L. was either asleep during that time or was taking a long shower which is at odds with her testimony of a speedy exit from the premises. Thus there remains some evidence upon which the jury could find that Miss L. was asleep after the organ massage, even if the preliminary inquiry evidence of Miss L. is not available to the defence for the truth of its contents.

[24] I am greatly concerned that any suggested "value added" of the proposed evidence to the search for the truth or proper fact-finding in this case would compromise rather than enhance that process if the jury is presented with an instruction by me that they consider for the truth of its contents both the complainant's testimony at trial and her arguably inconsistent testimony at the preliminary inquiry. The defence has had the chance to discredit her, by cross-examining her on her arguably previous inconsistent testimony among other things. In my view admitting the proposed evidence would create a situation where the probative value of that preliminary inquiry evidence would be

significantly outweighed by the prejudice caused thereby to the proper and fair fact-finding process of the jury.

CONCLUSION

[25] No cases have been presented by the defence in which a complainant's preliminary inquiry evidence has been admitted at trial for the truth of its contents when the complainant also testified at the trial in a fulsome manner, and was cross-examined by the defence counsel.

[26] It is no accident in my view that such jurisprudence was not available. For good reasons ,when the declarant has testified at a preliminary inquiry, and is available and able to be cross examined at trial, generally that previous evidence is not considered "hearsay" as presently defined by the jurisprudence in light of the rationale for characterizing hearsay as such, and the exceptions thereto.

[27] Moreover even if such evidence could conceivably said to be "hearsay", and be admissible under the principled exception to the hearsay rule, I find that the "necessity" criterion has not been met in this case for the reasons above noted.

[28] Furthermore even if one could say that the “necessity” criterion had been met, in my view, in spite of the proposed use of that evidence generally, and in part as a foundation for an expert opinion by the defence in this case, I find that the prejudice of admitting the preliminary inquiry evidence of J. L. as requested substantially outweighs its probative value.

[29] The proposed defense evidence is therefore inadmissible.

Rosinski, J.