SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Marriott*, 2023 NSSC 157

Date: 20230524
Docket: CRH 510476
Registry: Halifax

Between:

His Majesty the King

v.

Brian James Marriott

HEARSAY ISSUE (*VOIR DIRE* 2) DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: May 15, 2023, in Halifax, Nova Scotia

Counsel: Rick Woodburn K.C. and Scott Morrison, for the Crown
Nathan Gorham K.C. and Breana Vandebeek, for the Defence

By the Court:

[1] The Crown has applied to have Brian James Marriott designated as a Dangerous Offender. Nathan Gorham K.C. on behalf of Mr. Marriott says that much of the Crown's documentary evidence is inadmissible because it is hearsay; it relates to contested allegations of prior criminal behaviour, which the Crown is seeking to prove as pattern evidence or evidence of Mr. Marriott's intractability; and it is not credible or trustworthy.

[2] Mr. Gorham has noted that the Crown has tendered several volumes of material containing, in part, files from the Correctional Services of Canada. Some of that material relates to unproven allegations of prison misconduct, criminality, decisions of CSC authorities, assessments and correctional plans. He says that most of the documents are hearsay because the authors of the documents did not testify in the application. He says that many of the allegations of untried criminal behaviour are based on lay opinion and further hearsay and in some cases the identity of the person making the allegation is not disclosed and details are withheld.

[3] Mr. Marriott contests the allegations of previously unproven criminality as well as the essential elements of the Crown's case, which includes pattern allegations and the ultimate question of intractability. Mr. Gorham cites, as examples, the allegation that Mr. Marriott bullied other inmates and was involved in drug trafficking and gang related activities while incarcerated. He notes that these allegations, recorded in the CSC records, are based on accusations made by undisclosed sources. And the conclusions reached by prison authorities keep getting repeated and the more they are repeated the more they seem to stand for an incontrovertible proposition.

[4] Mr. Marriott will face the decision of whether he will lead evidence and particularly whether he will testify himself. He is now in prison. Given the harsh realties of prison culture he may not want to expose himself to cross-examination during which he could be asked questions that would require him to identify other inmates who may have had both a motive and opportunity to fabricate these allegations. He wants to have a ruling saying that the evidence of untried criminal activity is inadmissible before he must make that decision. A comment about the weight to be assigned to it would not be enough.

Hearsay in Sentencing

[5] Hearsay is admissible in a sentencing hearing. That is not contested. And a dangerous offender application is a sentencing hearing. Courts should have the broadest range of information available in making decisions of these kinds. The court is required to assess whether there is a serious risk to public safety and that requires the "broadest range of possible information". *R. v. Jones*, [1994] 2 S.C.R. 229.

[6] It is also true however that the consequences of a sentencing hearing can be severe, especially in a dangerous offender application. Mr. Marriott by having pleaded guilty to an offence has not forfeited the right to due process of law in the sentencing phase.

[7] Hearsay is admissible on noncontentious matters. If the issue is contested, the hearsay evidence must be credible and trustworthy. That is the threshold for admissibility. It is not a finding about ultimate weight.

[8] Mr. Gorham argues that police or CSC summaries may fail to meet the admissibility threshold. In *R. v. J.K.L.*, 2012 ONCA 245, the Court considered the admissibility of a police synopsis at a sentencing hearing. (A police synopsis is roughly the equivalent of a Crown sheet in Nova Scotia.) Mr. Gorham draws the analogy between the police synopsis and the CSC records and reports.

[9] The trial judge in *J.K.L.* relied upon that police synopsis as providing proof of contested facts. The Court of Appeal concluded that while the strict rules of evidence do not apply in sentencing hearings it was difficult to understand how a Crown synopsis standing alone, is an accurate reflection of events. The sources of information may not be specified, and an assessment of reliability and trustworthiness may be difficult or impossible.

[10] Mr. Gorham says that the observation would apply with even greater force where the court is faced with summaries prepared by correctional authorities based on confidential sources who have strong incentives to provide dishonest evidence.

[11] Mr. Gorham has also cited *R. v. Williams*, 2018 ONCA 437. That case involved a dangerous offender proceeding. The Ontario Court of Appeal commented on the reasoning in the earlier *J.K.L.* case. In *Williams* the Crown tendered a police synopsis of an earlier offence and the trial judge relied on the allegations set out in the document. The Ontario Court of Appeal noted that while the credible and trustworthy test applied it was necessary to use caution when considering whether to use a police synopsis. The Court held that the trial judge

erred to the extent that they relied upon the synopsis to prove contested facts beyond a reasonable doubt.

[12] In commenting on *J.K.L.* the Court of Appeal in *Williams* acknowledged that there are issues respecting the reliability of information contained in police synopses, but it would be wrong to say that they are wholly inadmissible at a sentencing hearing. The court must take a "generous approach" to admissibility in a dangerous offender proceeding. Once evidence has been admitted, the court must "grapple with the appropriate weight to be accorded to the information contained within synopses." (*Williams*, at para. 45).

[13] The Court of Appeal found that the sentencing judge correctly admitted the police synopses in the dangerous offender proceeding but was wrong in finding that the documents provided the basis for finding that the statutory elements of dangerous had been proven beyond a reasonable doubt.

> Due to the evidentiary frailties inherent in the nature of a police synopsis, caution is required when the sentencing judge is considering whether the contents of those records can, along with the rest of the record, provide the basis for a finding that the statutory elements of dangerousness have been proven beyond a reasonable doubt. The incidents set out in the synopsis must be considered in light of all of the evidence led at the hearing. Certain parts of a synopsis may find support and confirmation, either directly or by reasonable inference, in other parts of the record. If so, it is open to the sentencing judge to rely on those incidents as evidence in support of a finding that the statutory elements of dangerousness, such as the requisite pattern of behaviour, are made out. (*Williams*, at para. 55)

[14] Parts of records may be more reliable than other parts. The Court of Appeal held that it was an error for the trial judge to have treated the admissibility of the synopses as an "all or nothing decision". They were properly admitted but the contents had to be considered carefully before being relied upon.

[15] In this case, the CSC records were prepared by public officials carrying out important public duties. They were completed at the time of the incident that they purport to record. And the records were made in accordance with the policies and procedures that require the preparation of those reports. The records are kept securely and not maintained by the person who created the record. These records are relied upon by officials within the institution to make decisions involving the safety and security of the institution.

[16] The CSC documents filed by the Crown are sufficiently reliable and trustworthy to be admitted into evidence at the sentencing stage. That is not to prejudge the weight to be given to them on any issues within the application itself. It does not foreclose the potential that some documents may be given significant weight while others or portions of others, may be given much less weight. Mr. Gorham has pointed out correctly that Mr. Marriott should know what evidence is admissible so that he can make decisions about what other applications he will advance. For example, the bullying allegations from Springhill and Atlantic Institutions are based on confidential source information. If that information is admissible, he may assert the right to have the source or sources disclosed.

[17] Mr. Gorham argued that in effect, a ruling that the documents are admissible would limit Mr. Marriott's right to decide for himself whether he wishes to give evidence. He would face the prospect of being cross-examined in a way that would require him to "name names". But, like a defendant in a trial, he will know the case against him. He will know what has been ruled admissible. And, as with a defendant in a trial, it will be for Mr. Marriott and his counsel to determine how much weight is likely to be given to that evidence.

[18] At this stage in the process a determination has been made that the CSC documents are sufficiently reliable and trustworthy to justify their admission. The weight to be given to those documents should not be determined at this stage.

[19] The Crown has noted that there are other ways in which the CSC documents can be admitted.

***Canada Evidence Act,* Section 30**

[20] The institutional records were records made and kept in the usual and ordinary course of business. The Crown advised Mr. Gorham of its position that the records were admissible under Section 30. Witnesses appeared from the Correctional Services Canada and provincial correctional facilities as required by Section 30.

[21] The documents were created by employees in the regular course of their duties within the correctional system. As in *R. v. Gregoire*, [1998] M.J. No. 447 (C.A.), they were prepared for the purpose of recording the progress and problems experienced by inmates. They include opinions and recommendations. Their sources include Mr. Marriott, other inmates, and staff members. They contain

hearsay statements about Mr. Marriott based on the observations of others within the corrections system.

[22] In *R. v. Shea*, [2014] NSPC 78, Judge Derrick (as she then was) applied *Gregoire.* She admitted CSC documentation under both Section 30(1) of the *Canada Evidence Act* and the principled exception of the hearsay rule. She found the documents admissible as evidence of pattern analysis in a dangerous offender application. The evidence included evidence of untried criminal offences.

> Evidence of untried criminal offences which the Crown seeks to rely on to establish a pattern of behavior is subject to the proof beyond a reasonable doubt standard. … The quality and detail of the records will determine whether this standard has been met. (*Shea*, at para. 22)

[23] As Judge Derrick observed, documents that record firsthand observations by correctional officers or reviews of CCTV footage were in that case, "reliable evidence that establishes basic facts" (*Shea*, at para. 55). That might be contrasted with evidence obtained from third parties, especially undisclosed or secret sources.

[24] Subsection 30(10)(a)(i) exempts from admissibility under Section 30, records that are made in the course of an investigation or inquiry. In those cases, the circumstantial guarantees of reliability are not present. Those documents are not "inherently reliable", *R. v. Farhan*, [2013] O.J. No. 5519 (S.C.J.), at para 12.

[25] That exception does not apply to institutional records created within a correctional institution. They are not created for the purpose of preparing for litigation or as part of an investigation. They are made for the purpose of insuring safety and security and the management of those incarcerated within those institutions. The offender can respond, and the response is recorded.

[26] The records contain information about relevant events that happened within the institution. Important decisions related to the safety and security of the institution, like security classification, cell assignment or inmate privileges, are made based on those records.

> These hearsay records are not to be accepted in evidence merely to avoid the inconvenience of identifying a witness or because many witnesses would be involved, or even because otherwise no evidence would be available. Rather, they can be admitted only if they have come into existence under circumstances which makes them inherently trustworthy. Where an established system in a business or other organization produces records which are regarded as reliable and

> customarily accepted by those affected by them, they should be admitted as prima facie evidence. (*R. v. Monkhouse*, [1987] A.J. No. 1031 (C.A.), at para. 25)

[27] As Justice Rosinski noted in *R. v. Melvin*, 2019 NSSC 334, at para. 49, Section 30(10)(a)(i) may preclude the admissibility of police synopses, but it does not apply to CSC records. The Supreme Court of Canada in *Ewert v. Canada*, 2018 SCC 30, commented on the statutory obligations that apply to the CSC. The CSC must base its decisions on sound information, and they are required to take all reasonable steps to ensure that information about offenders is as accurate, up-to-date and complete as possible. That obligation applies to any information about the offender that the CSC uses, so it was intended to have broad application. The Supreme Court noted that it included information relating to the inmate's potential for violent behaviour and the accuracy of the psychological or actuarial tests that it uses. The court found that the requirement was for more than "simply good record keeping".

[28] The CSC records and provincial institutional records are made according to the established practices of those organizations. They are used and relied upon. Once again, however, it is critical to note that this rule provides for the admissibility of the records. It does not assign the ultimate weight to be given to them. The court must consider the nature of the records and the kinds of information contained in them. They are admissible. How much weight they are given is another matter entirely.

Ares v. Venner

[29] *Ares v. Venner*, [1970] S.C.R. 608, sets out the criteria for admission of a document through the business record exception to the hearsay rule. The record must be an original entry that was made when the event took place. It must have been made in the routine course of business. It must have been by a person with personal knowledge of what was recorded as a result of having done or observed or formulated it. That person must have had a duty to make the record, and no motive to misrepresent.

[30] The records put forward by the Crown are copies of original entries. They were made contemporaneously by employees directly involved in what was recorded and may be used as evidence of what was within their personal knowledge. The records are made as a matter of routine procedure. They are maintained by the institutions. The records are reviewed by officials who as part of their job responsibilities respond to the incidents that are recorded. Any

disagreement with what is recorded is also recorded. There is no evidence that the people who made the records within the various institutions had a motive to misrepresent what they had recorded.

Conclusion

[31] My colleague Justice Peter Rosinski issued a comprehensive decision in a dangerous offender application in *R. v. Melvin*. Justice Rosinski referred extensively to the decision of Judge Derrick (as she then was) in *R. v. Shea*. The *Shea* decision was overturned on appeal, but the Court of Appeal came to its conclusions using the same evidence that was admitted in the application. In that case Mr. Shea's records from the Correctional Service of Canada and provincial jails were entered by consent. Judge Derrick noted that she would not accept that they were admissible under the more "elastic rules" of evidence for sentencing hearings permitting hearsay evidence, set out in Section 723(4) of the *Criminal Code*. She did find that they were admissible on several bases including the principled exception to the hearsay rule. She noted that as in *Gregoire*, it was the job of correctional staff to document Mr. Shea's behaviour and make reports about him for purposes of prison discipline.

[32] Whether it be through those more elastic rules of evidence on sentencing, or through the principled exception to the hearsay rule, Section 30 of the *Canada Evidence Act* or *Ares v. Venner*, the documents are admissible.

[33] As Judge Derrick noted, and as I have noted several times, but feel compelled to note once again, institutional records must be examined carefully to determine what they establish. The quality and detail of those records must be considered. In some cases, as in *Shea*, records are prepared on the basis of observations made by correctional officers witnessing events or viewing CCTV footage. That can be contrasted with evidence based on reports from named or unnamed third parties that are then recorded by correctional officers. This is an application to determine admissibility of evidence, it is not an application to provide a preliminary or provisional assessment of the weight to be given that evidence if it is admitted.

[34] The records filed by the Crown are admissible.

Campbell, J.