SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Jones*, 2017 NSSC 140

Date: 20170524
Docket: CRBWT No. 459165
Registry: Bridgewater

Between:

Her Majesty the Queen

Plaintiff / Respondent

v.

David Seaborne Jones

Defendant / Applicant

Restriction on Publication: S. 486.4 CC

Judge: The Honourable Justice Mona M. Lynch

Heard: Voir Dire - May 17, 2017 in Bridgewater, Nova Scotia

Written Decision: May 24, 2017

Counsel: Joshua Nodelman, for the Applicant
Michelle MacDonald, for the Respondent

By the Court:

Background:

[1] David Seaborne Jones, the accused, is charged with sexual assault contrary to section 271 of the *Criminal Code of Canada*, touching for a sexual purpose a person under the age of sixteen years contrary to section 151 of the *Criminal Code* and for a sexual purpose inviting a person under the age of sixteen years to touch contrary to section 152 of the *Criminal Code*. The offences are alleged to have occurred between August 18 and 20, 2015.

[2] The trial is scheduled for October 24 and 25, 2017.

[3] The accused has made application to have the audiotaped statement of a deceased declarant received in evidence for the trial on the basis of the principled exception to the hearsay rule. The statement was taken on October 29, 2015.

[4] The statement sought to be admitted into evidence was taken from the declarant two and a half months prior to his death. It was taken in the parking lot of the R.C.M.P. detachment. The declarant was not physically well enough to enter the detachment. The declarant's common law partner was present for the statement. The common law partner was in the driver's seat of the automobile, the declarant was in the passenger's seat and the police officer asking questions and recording the statement was standing outside of the automobile on the passenger's side of the automobile. The declarant was 81 years old at the time the statement was taken.

[5] At the *voir dire* the common law partner of the declarant testified, the recording of the declarant's statement was played and the transcripts of both the common law partner's statements and the declarant's statement were entered into evidence.

Issue:

[6] Is the audiotaped statement admissible into evidence pursuant to the principled exception to the hearsay rule?

Law:

[7] In **R. v. Khelawon**, 2006 SCC 57 hearsay is defined at para. 35 as:

> The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant.

[8] At para. 3, the court reviews the distinction between threshold and ultimate reliability and reiterates that hearsay is presumptively inadmissible:

> The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively inadmissible. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.

[9] At para. 42 the court sets out the framework for determining whether hearsay evidence is admissible:

> The governing framework, based on Starr, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 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.
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> (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.

> (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*.

[10] The onus is on the person who seeks to adduce the evidence on a balance of probabilities. (para. 47 **Khelawon)**

[11] The evidence sought to be admitted here is defence evidence and what can be described as exculpatory evidence. There has been found to be a relaxed standard of admissibility for defence evidence in **R. v. Post,** 2007 BCCA 123 where it was said at para 85 and 86:

> [85] The appellant submits that Malloway's statements constitute exculpatory evidence, and therefore that a relaxed standard of admissibility should apply to them. Counsel relies on several cases for that proposition, including *R. v. Finta* (1994), 1994 CanLII 129 (SCC), 88 C.C.C. (3d) 417 (S.C.C.). In that case, Cory J. cited with approval the remarks of Martin J.A. in *R. v. Williams* (1985), 1985 CanLII 113 (ON CA), 18 C.C.C. (3d) 356 (Ont. C.A.), where he noted 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 exclusionary rule aims to safeguard does not exist."
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> [86] The trial judge in this case agreed with that proposition and went even further, noting that there might be cases where evidence that is insufficiently reliable to form any part of the basis upon which a trier of fact convicts an accused may nevertheless have sufficient reliability to raise a reasonable doubt.

And later at para 89 and 90:

> [89] As the Crown points out, there is no mention of a relaxed standard in **Khelawon**. The Court says that the party seeking to adduce the evidence must establish necessity and reliability on a balance of probabilities. The Crown says that this indicates that a uniform standard is to be applied, regardless of which party seeks to adduce the hearsay evidence.
>
> [90] I respectfully disagree, and take the Court's remarks to be simply a re-statement of the principled approach to hearsay. I do not interpret anything in **Khelawon** as intended to preclude the application of a relaxed standard in a particular case where the trial fairness requires it, and the avoidance of a miscarriage of justice demands it.

[12] The relaxed standard of admissibility is also outlined in **R. v. Kimberley,** 2001 56 OR (3d) 18 at paras. 80 and 81:

> [80] The appellants also argued that where hearsay evidence is tendered by an accused, the court should take a more relaxed view of the prerequisites to admissibility. It is well established that although the rules of evidence generally apply equally to the Crown and defence, a trial judge can relax those rules in favour of the defence where it is necessary to prevent a miscarriage of justice: *R. v. Williams* (1985), 18 C.C.C. (3d) 356 at 372, 378 (Ont. C.A.); *R. v. Finta* (1992), 73 C.C.C. (3d) 65 at 200-203 (Ont. C.A.), aff'd. (1994), 88 C.C.C. (3d) 417 at 527-28 (S.C.C.); *R. v. Folland* (1999), 132 C.C.C. (3d) 14 at 31-32 (Ont. C.A.). 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 p. 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 in original.]
>
> [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: *R. v. Finta, supra*; *R. v. Folland, supra*. 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.

Analysis:

[13] The accused concedes that the evidence sought to be admitted is hearsay and that none of the traditional exceptions to the hearsay rule apply.

[14] The Crown concedes that the criteria of necessity is met as the declarant whose evidence is sought to be admitted is deceased.

[15] The question to be determined is whether the criteria of threshold reliability has been established by the accused. Ultimate reliability is left to the finder of fact

at the trial. The question is whether the statement exhibits sufficient indicia of reliability so as to afford the trier of a satisfactory basis for evaluating the truth of the statement (**Khelawon** para. 90)

[16] As set out in **Khelawon** above, the court must be mindful that hearsay evidence is presumptively inadmissible and guard against admission of hearsay evidence of which the reliability is neither readily apparent from the trustworthiness of its contents nor capable of being meaningfully tested.

[17] There is no meaningful way to test the evidence of the declarant in this case and so I must examine the trustworthiness of the statement. In paragraph 39 of **Khelawon,** the factors for reliability include: How trustworthy is it?; In what circumstances did the declarant make the statement?; Was it made casually to a friend or to the police as a formal complaint?; Was the declarant aware of the potential consequences of making a statement?; Did the declarant have motive to lie?; In what condition was the declarant when the statement was made? These factors are augmented in **R. v. Morehouse,** 2004 ABQB 97 at para. 53:

> [53] A review of the cases before me demonstrates that Courts have looked at various factors in determining whether hearsay dangers have been overcome. Collectively, these include:
>
> a) the absence of a reason and/or motive to fabricate the statement (non-fabrication);
> b) the timing of the statement in relation to the time of death (timing/remoteness);
> c) the demeanor of the declarant at the time of the making of the statement (demeanor);
> d) the spontaneity of the statement (spontaneity);
> e) the relationship between the declarant and the witness (relationship);
> f) the detail given in the statement (detail);
> g) whether the declarant could be mistaken (mistake); and
> h) "other".

Also in **R. v. J.M**., 2010 ONCA 117 at para. 54:

> [54] The proponent of a hearsay statement who attempts to satisfy the reliability requirement on the basis of the circumstances in which the statement was made does not have the luxury of scrolling down a fixed and exhaustive list of factors. Relevant circumstances include, but are not limited to:
>
> i. the timing of the statement in relation to the event reported;
> ii. the absence of a motive to lie on the part of the declarant;

> iii. the presence or absence of leading questions or other forms of prompting;
> iv. the nature of the event reported;
> v. the likelihood of the declarant's knowledge of the event, apart from its occurrence; and
> vi. confirmation of the event reported by physical evidence.

[18] The circumstances surrounding the taking of the statement were that the declarant was asked to go to the R.C.M.P. detachment with his common law partner to answer questions about the alleged offences. The common law partner gave her statement in an interview room at the R.C.M.P. detachment. The declarant was not physically able to enter the building and the police officer interviewed him while he sat in the motor vehicle in the presence of his common law partner. The declarant was not under oath.

[19] One of the Crown's objections to the admission of the statement was that the statement was taken in the presence of the declarant's common law partner. The Crown suggested that the transcript of the evidence showed that the declarant looked to his common law partner to confirm his evidence, particularly with regard to time. A review of the transcript shows that the declarant did ask his common law partner to confirm the year that something occurred. He asked her for the name of a person when he could not recall. Other times when the common law partner spoke it was more in the nature of confirmatory words when the declarant said "right?" after providing some information. On one occasion it appears that the police officer asked the partner to confirm a date. I do not find that the presence of the common law partner or what she said during the statement diminishes the reliability of the statement. The declarant was clearly answering the questions. At the end of the statement, when the police officer was asking specific questions of the declarant, the common law partner did not participate at all, nor was she asked any questions by the declarant or the police officer.

[20] The statement was made to a police officer which would suggest a higher standard of formality, seriousness and importance. The statement was taken two and a half months before the death of the declarant and a little over two months after the dates of the alleged offences.

[21] There was no evidence of any motive for the declarant to lie to police and provide exculpatory evidence to assist the accused. There was evidence that the declarant was a friend of the accused but there was no evidence of a particularly

close relationship or a business relationship. While the declarant was a friend of the accused, he was a relative of the complainant.

[22] The demeanor of the declarant, as much as it can be determined by the recording, was respectful and balanced. He appeared to be trying to answer each question honestly and completely.

[23] The declarant provided some detailed answers to the police officers questions without prompting. He spoke clearly for the most part.

[24] There was nothing in the statement that would lead me to believe that the declarant was mistaken about the information he provided.

[25] The police officer asked specific questions of the declarant about changes in demeanor, his specific observations and contact with the accused. Some questions were leading but the declarant appeared to answer in an honest and straightforward manner.

[26] The only evidence that I have about the condition of the declarant is from his former common law partner. The common law partner had some trouble remembering the taking of the statements in October of 2015. She was questioned about the declarant's mental health and she provided a statement that was unequivocal. For example she stated: "His mind was good" and "His mental health was good but his physical health…". When asked whether he had mental health issues or competency issues she said he did not. She stated that his hearing was decent. She stated that he did not appear confused and he had no mental restrictions.

[27] The accused submitted that in many cases when the Crown is calling an elderly witness that they get expert evidence as to their competency, however the accused submitted that such evidence was not necessary. The accused relies on the general presumption of competency, the evidence of the common law partner and the declarant's demeanor and answers during the statement. The accused points out that the declarant was not in a long term care home, there was no evidence of dementia or traumatic brain injury.

[28] The Crown points to portions of the statement where the declarant appeared to be non-responsive to questions or answered different questions.

[29] Overall I am satisfied that the declarant's answers to the police officer were clear and cogent. As pointed out by the accused, the police officer started off with

a wide-ranging question and the answers matched the question. I have evidence that he was competent and no evidence to suggest he was suffering from any mental or cognitive deficit. I am satisfied on the evidence that the declarant was competent.

[30] Based on all of the evidence and the circumstances surrounding the taking of the statement, I am satisfied that the statement given by the declarant exhibits sufficient indicia of reliability to afford the trial judge a satisfactory basis for evaluating the truth of the statement.

[31] I have considered the relaxed standard of admissibility for defence evidence to prevent a miscarriage of justice, understanding that the threshold reliability inquiry is not abandoned. This is exculpatory evidence that may raise a reasonable doubt when the ultimate trier or fact considers all of the evidence. Here the circumstances of the statement and of the declarant substantially negate the possibility that the declarant was untruthful or mistaken (**Khelawon,** para 70).

Conclusion:

[32] The statement of the declarant meets the standard necessary for threshold reliability and is admitted into evidence. The trial judge will determine the weight to be given to the statement after hearing all of the evidence.

Lynch, J.