

Citation: *R. v. Hager*, 2021 YKTC 36

Date: 20210831
Docket: 20-00803
Registry: Whitehorse
Heard: Pelly Crossing

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REGINA

v.

JIMMY DARRYL HAGER

Appearances:
Keith D. Parkkari
Amy Steele

Counsel for the Crown
Counsel for the Defence

RULING ON *VOIR DIRE*

[1] COZENS C.J.T.C. (Oral): At the trial, there was argument on the *voir dire*.

Crown counsel sought to have statements made by Ms. Sam to Mackenzie Boyden admitted into evidence for the truth of their contents, both on the basis of the *res gestae* exception to the hearsay rule, and the principled approach, on the basis of necessity and reliability.

[2] The testimony of Mr. Boyden was heard in a *voir dire* as was the testimony of Cst. Rependa.

[3] At the conclusion of the *voir dire*, I allowed the statements that Ms. Sam made to Mr. Boyden to be admitted into the trial proper for the truth of their contents on the basis

of both the *res gestae* exception to the hearsay rule and the principled approach, with reasons to follow. These are those reasons.

Mackenzie Boyden

[4] Mackenzie Boyden testified that on December 30, 2020, he had been working at Pelly Crossing for approximately two and one-half years as a Yukon Government health worker, working at the health centre. He had known Ms. Sam for the period of time he was working at Pelly Crossing, both as a co-employee and as a patient. He lived close to where Ms. Sam lived. He was aware that Ms. Sam and Mr. Hager were in a domestic relationship.

[5] On December 30, 2020, at approximately 9:30 a.m., Mr. Boyden was at the health centre, when he received a call from Ms. Sam. She was calling him from inside his home. She told him that she had had an altercation with Mr. Hager and that she was scared. She had run to his house and, once inside, locked the door. Mr. Boyden described her as being tremulous, breathing rapidly, and speaking in short sentences.

[6] Mr. Boyden went to his residence, where the door was locked. Ms. Sam answered the door and let him in. Mr. Boyden noted her to be breathing rapidly to the point of hyperventilating, shaking, scared, quite afraid, and uncomfortable. He observed dried blood in her nostrils and on the front of her pyjama clothes. She had tears in her eyes. She wanted him to check to make sure no one was there outside the residence.

[7] Mr. Boyden stated that this was unusual behaviour for Ms. Sam based upon his experience with her. She had never come that far into his house before, although he

recalled an incident approximately six months earlier where she had come into his house and yelled to wake him up in the middle of the night.

[8] Mr. Boyden stated that he considered Ms. Sam to be sober. There was no smell of liquor that he could ascertain. She was walking normally and she had clear speech. He stated that in his job he has had hundreds of occasions to estimate the state of sobriety of individuals. He said that he was aware that Ms. Sam had a drinking problem and that he had seen her intoxicated before.

[9] Mr. Boyden stated that Ms. Sam told him that she had been sleeping at home with the door locked when Mr. Hager came to the door, knocking and banging on it, asking to be let in. When she let him in, an altercation started between them. In the course of this altercation, Mr. Hager, who was intoxicated, twisted her left arm and choked her. She was lying on the ground on her stomach while Mr. Hager was striking the back of her head. She said that when Mr. Hager got up off of her, she ran out of the house and went to Mr. Boyden's residence, where she called him.

[10] Mr. Boyden stated that Ms. Sam was taken to the health centre by the RCMP for evaluation. Some soft swelling but no bruising was observed on Ms. Sam.

[11] Mr. Boyden testified that he was recalling the incident from memory as he had taken no notes at the time. He agreed he did not remember exactly the words that Ms. Sam said to him, but that he was remembering as best as he could. He believed that Ms. Sam had called him right after arriving at his residence. He stated that he only asked her questions after she told him what had happened.

Cst. Daniel Rependa

[12] Cst. Rependa testified that he received a call from dispatch at approximately 9:30 a.m. on this date, telling him that Ms. Sam was hiding out at Mr. Boyden's residence after being assaulted by Mr. Hager. He attended at the residence and spoke to Ms. Sam. He observed dried blood on her shirt and under her nose. He observed Ms. Sam to be very concerned and fearful, stating that she was dizzy and that her head hurt. He did not observe any indicia that Ms. Sam was overly intoxicated. He stated that her speech was coherent and she seemed fine. She had no issues with her speech or mobility. He considered her to be sober.

[13] He accompanied Ms. Sam to her residence due to her concerns about going back. She was focused on getting her clothes. He observed blood under her couch and also mixed with vomit on the floor, which Ms. Sam stated had happened while she was being assaulted.

[14] Cst. Rependa stated that Ms. Sam would not provide a formal statement. He stated that Mr. Hager turned himself in to the police on January 3, 2021.

[15] I note that the Crown was not seeking the comments of Ms. Sam to Cst. Rependa to be admitted into the trial proper, but only to form part of the narrative.

Res gestae

[16] The *res gestae* exception to the hearsay rule has been summarized in the case of *R. v. Kapakatoak*, 2018 NWTTC 10:

21 There are exceptions to this rule against hearsay. One such exception is for *res gestae* or spontaneous utterances. There are situations where the circumstances under which the out of court statement is made result in the statement being sufficiently reliable to be admitted for the statement's truth.

22 *R. v. Oliver*, [1996] N.W.T.J. 69 (NWT SC), gives a summary of the meaning of the *res gestae* exception to the rule against hearsay:

12 . . . the *res gestae* rule was summarized in *R. v. Dakin* (1995), 80 O.A.C. 253, quoting from the Ontario Court of Appeal decision in *R. v. Khan* (1988), 27 O.A.C. 142; 42 C.C.C. (3d) 197 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 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. Where the spontaneity of the statement is clear and the danger of fabrication is remote, the evidence should be received.

23 The *res gestae* exception is also consistent with the principled exception to the hearsay rule. In *R. v. Sylvain*, [2014] A.J. No. 444 (Alta. C.A.), the Court stated:

32 The excited utterances exception of the common law is also consistent with the principled exception to the hearsay rule: *R. v. Mackenzie*, 2011 ONSC 6770 at para 10, 2011 CarswellOnt 12578. The reliability of "excited utterances" comes from the absence of an opportunity to concoct a story. It is true that the mere making of a 911 call does not necessarily bring that call within the "excited utterances" exception. The defence might well argue, as it did here, that the fact the call was made is equally consistent with the fact it was concocted. That is why a trial judge must assess all the relevant evidence relating to the call, including the

content, timing and circumstances of a 911 call, and determine whether in light of all the evidence, it properly falls within the "excited utterances" category.

33 As for necessity, where, for some reason, the person making the 911 call is unable to testify, then the necessity branch of the test is clearly met: *R. v. Nicholas* (2004), 184 OAC 139 at paras 90–92, 70 OR (3d) 1 (CA). Where, as here, the caller did testify, the objection to hearsay statements arising from the absence of an opportunity to cross-examine is negated. More fundamentally though, the "excited utterances" exception to the hearsay rule does not arguably contain a necessity requirement. The policy underlying the necessity requirement is rooted in the "best evidence" proposition. Typically, that will be in-court testimony. But as pointed out by Justice David Paciocco in "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013) 17:2 Can Crim L Rev 181 [Paciocco] at 192–193:

. . . [T]he "necessity" component performs a "best evidence" function. It exists to ensure that if it is possible to present "better evidence" in the form of in-court testimony, parties should not be permitted to resort to hearsay proof . . .

. . .

The *res gestae* exceptions do not have a necessity requirement . . . In-court testimony may not be better evidence than "excited utterances" because in-court testimony is not uttered in the pressure of the moment before an opportunity to concoct has arisen . . .

24 The fact that the spontaneous utterance is in response to a question does not, by itself, make the utterance inadmissible. In *R. v. Oliver*, [1996] N.W.T.J. No 69 at para. 31, Schuler J. states that the Court needs to consider the atmosphere in which the questions are asked and whether or not the person responding to the questions is responding to the pressure of the questions or the pressure of the event.

[17] And as stated in *Oliver* in para. 19:

...in some circumstances, a few seconds will be more than enough time to permit concoction and in others, a period of hours will not be too long.

[18] See also **R. v. Porter**, [1996] Y.J. No. 55 (T.C.), a decision of Judge Lilles.

[19] I am satisfied that Ms. Sam did not have the opportunity to concoct the story that she told Mr. Boyden. While I appreciate that it would not take very long for Ms. Sam to have come up with the fairly simple narrative of the assault that she described to Mr. Boyden, the whole of the circumstances need to be considered. The unusual circumstances of Ms. Sam being in Mr. Boyden's residence, and her agitated and upset demeanour as noted by both Mr. Boyden and Cst. Rependa, including the evidence of both as to Ms. Sam's state of sobriety and the recent occurrence of events that she told Mr. Boyden, cause me to accept that what Ms. Sam said about Mr. Hager assaulting her falls within the *res gestae* exception to the hearsay rule.

[20] The principled exception to the hearsay rule relies on the out-of-court statements being both necessary and reliable. Threshold relevance is premised in the statements that are being sought to be admitted being relevant to a point in issue and capable of assisting the trier of fact in reaching a decision. Once threshold relevance is established, the court then considers the necessity and reliability of the out-of-court statements being sought to be admitted into trial.

[21] It is left to the trier of fact so consider the ultimate reliability of the out-of-court statements. I have previously considered the principled exception to the hearsay rule at length in the case of **R. v. Green**, 2009 YKTC 118. Necessity is established when the

evidence is otherwise unavailable. This can be established when a witness has little or no memory of events.

[22] In the present case, Ms. Sam has testified to having some memory problems with respect to what happened in her residence. Although she gave only a partial version of events as compared to what she told Mackenzie Boyden, she had no memory of events that occurred afterward that involved her in contact with Mr. Boyden, Cst. Rependa, and attending the nursing station.

[23] In my opinion, it is necessary to allow for the out-of-court statements to Mr. Boyden to be admitted. I appreciate that Ms. Sam's lack of memory is only partially an issue. She has some memory. However, I am satisfied that the partial lack of memory is sufficient to meet the necessity criteria in these circumstances.

[24] As to reliability, for the same reasons that I find that these out-of-court statements meet the *res gestae* threshold for admittance into the trial proper, I find these statements to be reliable.

[25] In the event that I am wrong on the necessity portion of the principled exception to the hearsay rule, I nonetheless find these statements admissible pursuant to the *res gestae* exception. Therefore, the statements that Ms. Sam said to Mr. Boyden that Mr. Hager twisted her left arm, choked her, and hit her in the back of the head while she was lying on her stomach are admitted in this trial.