# SUPREME COURT OF YUKON

Citation: *R. v. Grenier*, 2018 YKSC 9

Date: 20180305
S.C. No. 17-01500
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

FRANCOIS GRENIER

Before Mr. Justice L.F. Gower

Appearances:

| | |
|---|---|
| Keith Parkkari | Counsel for the Crown |
| Jennifer Cunningham | Counsel for the Defence |
| Jennifer Budgell | |

**RULING**
**(*Khan* application)**

## INTRODUCTION

[1] This is an application by the Crown to admit the evidence of the complainant, Tammy Meeres, from the preliminary inquiry as evidence in the trial of this matter, for the truth of its contents. Although this evidence would ordinarily be presumptively inadmissible as hearsay, the Crown seeks to have it admitted as an exception to the hearsay rule based on the "principled approach" which focuses on the twin criteria of necessity and reliability as the prerequisites to admission. Because this approach originated in the Supreme Court case of *R. v. Khan*, [1990] 2 S.C.R. 531, this type of

application has since been referred to by that Court as a "*Khan*" application: *R. v. F. (W.J.)*, [1999] 3 S.C.R. 569 ("*F. (W.J.*") (headnote).

[2] The accused, Francois Grenier, is charged with four offences. All are alleged to have occurred in Watson Lake, Yukon on November 24, 2016: aggravated assault, by wounding Ms. Meeres; kidnapping with intent to confine Ms. Meeres; a related break and enter of Ms. Meeres' residence; and a related mischief charge for damaging Ms. Meeres' door. The matter was set to be tried before a judge and jury in Watson Lake commencing on February 26, 2018. Ms. Meeres is the only eyewitness to the offences. She failed to appear for the trial and the Crown brought this *Khan* application.

[3] Because time was of the essence following the *Khan* application, I gave my decision then, denying the application, with written reasons to follow. These are my reasons.

[4] As the Supreme Court noted in *R. v. Khelawon*, 2006 SCC 57, at para. 2, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth seeking function. However, if the proponent of the evidence can satisfy a court that it is reasonably necessary to admit the evidence and that the evidence meets the criteria of "threshold reliability", the evidence may be admitted for the truth of its contents.

[5] The global issue on this application is whether the Crown has satisfied me on a balance of probabilities that the evidence meets the twin criteria of necessity and reliability. More specifically, these break down into two sub- issues:

1) Is it reasonably necessary to admit the evidence, in the sense that reasonable efforts have been made by the police and the Crown to obtain the direct, in-person evidence of Ms. Meeres? ; and
2) Does Ms. Meeres' evidence meet the standard of "threshold reliability"?

**ANALYSIS**

***1) Is it reasonably necessary to admit the evidence, in the sense that reasonable efforts have been made by the police and the Crown to obtain the direct, in-person evidence of Ms. Meeres?***

[6] "Reasonable necessity" does not mean that the evidence is necessary for the prosecution to prove its case; nor is it to be equated with the unavailability of the witness: *R. v. Kopalie*, 2009 NUCJ 8 ("*Kopalie*"); *R. v. Villeneuve*, 2013 NWTTC 21 ("*Villeneuve*"), at paras. 16 to 18; and *R. v. O'Connor* (2002), 62 O.R. (3d) 263 (C.A.) ("*O'Connor*"), at para. 57.

[7] Rather, the Crown must establish on a balance of probabilities that it has taken reasonable steps to procure the attendance of the witness: *Villeneuve*, at para. 17.

[8] In *F. (W.J.)*, cited above, the accused was charged with sexual assaults allegedly committed against a five-year-old victim. The victim was 6½ years old at the date of trial. Her testimony was nonresponsive and at one point she indicated that she did not remember what happened. The Crown then brought a *Khan* application to admit hearsay accounts of her prior statements to relatives and a videotaped statement to the police. Although the focus of the case was on the particular problems arising from

testimony of young children, McLachlin J., as she then was, writing for the majority, made some general comments about the criteria of necessity which are very applicable to the case at bar:

> 44 Underlying the insistence on knowing why the child cannot give meaningful testimony is the concern that if one finds necessity too readily one risks depriving the defence of cross-examination when, with more diligence, it would have been available. A witness cannot be excused from testifying because the witness is not in the mood or is generally fearful of the process, which might create an incentive for witnesses, who would rather not endure the rigors of cross-examination, to "clam up". The simple answer to this concern is that fear or disinclination, without more, do not constitute necessity. In each case the trial judge must determine whether, on the facts and circumstances of the case, necessity has been established. Often that will involve going into the reasons for the problem. Often too, it will involve expert evidence. But not invariably. Sometimes what happened may make it so clear that the witness was truly unable to testify that necessity can be inferred absent evidence as to why the witness cannot testify. This analysis, when applied to children, should take into account the child-sensitivity policies emerging in the law. The ultimate question is whether the evidence is reasonably necessary. When children become distressed, a reasonable course of action might well be to take a brief break. Trial judges have great flexibility in conducting their proceedings, and need not rush to hearsay at the first sign of difficulty. But once having decided that reasonable efforts cannot render the evidence available, little is added by adducing extrinsic evidence to pinpoint the exact source of a child's problem. (my emphasis)

[9] In the case at bar, Ms. Meeres has not been served with a subpoena. The reasons for this will soon become obvious.

[10] The preliminary inquiry was held in Watson Lake on May 4, 2017. Ms. Meeres was permitted to testify by closed circuit television (“CCTV”). Having reviewed the

transcript and an audio recording of her testimony, it is fair to say that she was, at the very least, a difficult witness. Ms. Meeres was unusually dramatic in her testimony and was often non-responsive, particularly to questions in cross-examination. She was frequently sobbing, growling, and refusing to answer questions. At times she was slurring her words. At one point, defence counsel suggested to the court that she may be intoxicated. I think it is also fair to say that she was a reluctant witness, as she repeatedly stated that she wanted her testimony to be done and over with.

[11] Thus, I agree with defence counsel on this application that the Crown and the police should have been alerted to the fact that coordinating the attendance of Ms. Meeres as a Crown witness for the upcoming jury trial could also be a difficult task.

[12] The lead investigator in this matter is RCMP Constable Jean-Michel Sauvé, of the Watson Lake detachment. He became the lead investigator on January 30, 2017, when his predecessor was transferred to another detachment. It was his responsibility to ensure that Ms. Meeres was served with a subpoena to attend as a witness for the trial.

[13] The Crown Witness Coordinator in this matter is Lois Sembsmoen. She was present during Ms. Meeres' testimony at the preliminary inquiry on May 4, 2017.

[14] On May 26, 2017, Ms. Sembsmoen received a phone message from Ms. Meeres indicating that she was no longer in Watson Lake, but that she would be back for the trial. Ms. Sembsmoen was able to obtain the telephone number of Ms. Meeres from her telephone voice messaging system. She testified that she gave the phone number to the Watson Lake RCMP at some point during the next month approximately. There is

no evidence that the RCMP in Watson Lake, or Constable Sauvé in particular, or the Crown for that matter, made any attempt contact Ms. Meeres at that telephone number.

[15] Constable Sauvé testified on this application that he understood Ms. Sembsmoen would be the primary contact person for the Crown with Ms. Meeres, as Ms. Sembsmoen had established a good relationship with Ms. Meeres. That, of course, did not relieve Constable Sauvé of his responsibility to ensure that Ms. Meeres was ultimately served with a subpoena for the trial.

[16] On June 27, 2017, Ms. Meeres called the then-Crown prosecutor on this file, Paul Battin. As he had to leave to attend court, the call was transferred to Ms. Sembsmoen. Ms. Meeres told her that she was in Alberta, but would not disclose her exact location. Ms. Sembsmoen thought that Ms. Meeres was quite emotional and fragile during that telephone conversation.

[17] On July 25, 2017, the trial was confirmed to commence on February 26, 2018, before a judge and jury. It was then scheduled to last for five days. The court records indicate that trial dates were discussed several weeks before between Crown and defence counsel. However, Constable Sauvé testified on this application that he did not learn of the trial dates from the Crown prosecutor until sometime in November 2017. There was no evidence from the Crown to explain this rather lengthy delay on such an important point.

[18] On July 24, 25 and 27, 2017, Ms. Sembsmoen attempted to contact Ms. Meeres by telephone to advise her of the trial dates in this matter. There was no answer to her calls and she left messages asking Ms. Meeres to call her back.

[19] Ms. Sembsmoen testified on this application that she called the Watson Lake RCMP, including Constable Sauvé, from time to time, to update them on the communications that she was having with Ms. Meeres. While she testified that she did not notify the RCMP that Ms. Meeres had left Watson Lake, Constable Sauvé deposed in his affidavit on this application that Watson Lake is a small enough community that it is generally known to the RCMP when someone is living in the community or has not been in their residence for an extended period of time. On that basis, I am prepared to conclude that Constable Sauvé ought to have known that Ms. Meeres was no longer in the community following the preliminary inquiry.

[20] Importantly, on September 29, 2017, Ms. Meeres contacted Ms. Sembsmoen by telephone, explaining that she had been hospitalized as a result of suffering a serious assault. She further stated that she was in Saskatchewan and that the Saskatoon RCMP knew where to locate her in order to subpoena her. Although Ms. Meeres told Ms. Sembsmoen that she was coming back to testify at the trial, she was also in a distraught and heightened emotional state at the time. She failed to provide Ms. Sembsmoen with a current telephone number. Ms. Sembsmoen testified on this application that she discussed this information with Crown prosecutor Battin, although she could not remember what information, if any, she passed on to Constable Sauvé about Ms. Meeres being hospitalized in Saskatoon.

[21] There is no evidence that the Crown or the RCMP took any steps to locate Ms. Meeres in Saskatoon following the telephone call on September 29, 2017. Although Ms. Sembsmoen was unclear about what she had discussed with Constable Sauvé after that call, Constable Sauvé acknowledged in his testimony on this application that he

was aware of Ms. Meeres being in Saskatoon in September 2017. However, strangely, he testified that he did not know why he did not take any steps to serve Ms. Meeres with a subpoena at that time. Rather, he testified that the RCMP were in "standby mode". Equally strange is the fact that Constable Sauvé was not then aware that the trial date had been set. While this may explain his inaction, it does not excuse it.

[22] Further, the information regarding the Saskatchewan assault upon Ms. Meeres should, with reasonable diligence, have been passed along to Constable Sauvé. Armed with that information, Constable Sauvé could have performed a computer search within the RCMP system to obtain further particulars as to Ms. Meeres' whereabouts. He could also have contacted the various hospitals in Saskatoon to confirm that information. Further, Constable Sauvé could have spoken directly with the Saskatoon RCMP, as Ms. Meeres had told Ms. Sembsmoen that they knew where to locate her in order to subpoena her. None of this was done and no explanation was provided for this failure to act.

[23] On October 6, 2017, Ms. Sembsmoen emailed the Watson Lake RCMP advising that she had been trying to touch base with Ms. Meeres regarding the signing of a Medical Consent Release Form, and that the number she was calling was no longer in service. At that time, Ms. Sembsmoen knew that Constable Sauvé was the lead investigator in the case. She testified on this application that she did not know if Constable Sauvé replied to her in any way regarding that email.

[24] On October 23, 2017, Ms. Sembsmoen again unsuccessfully attempted to contact Ms. Meeres using the telephone number that she had originally obtained back on May 26, 2017. The number was no longer in service.

[25] On January 3, 2018, Ms. Meeres spoke on the telephone with Ms. Sembsmoen and Crown prosecutor Battin. Ms. Meeres provided the first name of an outreach worker who had been assisting her in Saskatoon. She also stated that she was heading to stay at a woman's shelter in Grande Prairie, Alberta, known as Odyssey House. She provided her new telephone number. While Ms. Meeres told the Crown that she was ready to come to court, she was also quite emotional and distraught and was crying and breathing heavily.

[26] Further, although defence counsel in this matter had previously indicated that they would consent to Ms. Meeres testifying at the trial by CCTV, the prospect of Ms. Meeres testifying from Grande Prairie by videoconference, rather than having to re-attend in the Yukon for the trial, was not raised with her on January 3 or during any other conversation with Crown officials or the police. Given her apparent fear of the accused and her determination never to reside in Watson Lake or the Yukon again, I think it is reasonable to infer that such an offer may well have been received favourably by Ms. Meeres.

[27] On January 4, 2018, Ms. Meeres spoke again with Ms. Sembsmoen, who confirmed the date and location of the trial, as she had done the day before. Ms. Meeres was again emotional and sobbing during the telephone call. Ms. Sembsmoen stressed the importance of her staying in contact so that arrangements for travel and accommodation could be made to bring her back to Watson Lake for the trial.

[28] Between January 6 and 19, 2018, Constable Sauvé made several phone calls to Ms. Meeres at the cell phone number she had provided to Ms. Sembsmoen on January

3rd. Each of those calls went directly to an automated voicemail message stating "the person you are trying to reach is unable to receive your call".

[29] Between January 18 and February 16, 2018, Ms. Sembsmoen and Constable Sauvé each called Odyssey House, in Grande Prairie, Alberta, a number of times to try to contact Ms. Meeres. The staff at Odyssey House would neither confirm nor deny that Ms. Meeres was a resident there.

[30] Constable Sauvé made no attempt to serve Ms. Meeres with a subpoena at Odyssey House. In his testimony on this application, he explained that his reason for not doing so was essentially that he assumed the staff there would not facilitate such service, or indeed may even impede it, in an attempt to protect Ms. Meeres' privacy. I do not accept that as a reasonable explanation for failing to attempt service at that location.

[31] On February 11, 2018, Constable Sauvé made his first computer search for Ms. Meeres through the RCMP Police Reporting and Occurrence System ("PROS"). As I understand it, this system discloses when individuals have been involved in police investigations, either as complainants, suspects or persons of interest. In this case, the search revealed that Ms. Meeres had been dealt with by the RCMP in Alberta in at least three, and possibly four communities in that province: Grande Prairie; Fox Creek; Olds; and Lethbridge. However, her exact location as of that date was still unknown.

[32] On February 16, 2018, 10 days before the trial, Constable Sauvé placed a notice on the nationwide Canadian Police Information Computer ("CPIC") system that Ms. Meeres was a person of interest and that any police force in Canada having dealings with her should contact him directly.

[33] On February 21 and 22, 2018, Ms. Sembsmoen and Constable Sauvé made a number of other efforts to contact Ms. Meeres through various sources, all of which were unsuccessful.

[34] On February 21, 2018, Constable Sauvé received information through the CPIC system that Ms. Meeres may be in Saskatoon, Saskatchewan. The following day he faxed the Saskatoon Police Services a request to locate and serve a subpoena upon Ms. Meeres. This was his first and only attempt to serve her with a subpoena, only four days before the trial. Obviously, it was unsuccessful.

[35] I agree with defence counsel on this application that efforts to locate Ms. Meeres did not really begin to pick up speed until January 2018, when calls began being placed to Odyssey House. That was very late in the day, especially given that the trial date was set in late July 2017 and that Crown had earlier knowledge of Ms. Meeres' whereabouts as of late September 2017. Further, Constable Sauvé did not make any computer search to locate Ms. Meeres until February 11, 2018, less than two weeks before the commencement of the jury trial. Although there was a flurry of activity in February to try and find Ms. Meeres and serve her with a subpoena, I conclude that that was all "too little too late".

[36] In short, I find that the Crown and the RCMP did not make reasonable efforts to obtain the direct evidence of Ms. Meeres in this trial.

[37] This case has similarities to *R. v. Charles* (1997), 152 Sask. R. 73, decided by the Saskatchewan Court of Appeal. The accused in that case was convicted at trial of assaulting his common-law spouse. Although the complainant failed to appear in court on the day of the trial, the trial judge allowed a *Khan* application and admitted three

hearsay statements the complainant had given to others on three separate previous occasions. The Court of Appeal found that the trial judge erred in that regard and ordered a new trial. In particular, the Court found that the Crown had not met the criterion of "reasonable necessity", in that there was really no explanation at all for the failure of the complainant to attend for the trial. Cameron J.A. put it this way:

> 6 … the trial judge was in no position to find that the complainant was unavailable or unable to testify as a witness by reason of death, as in *R. v. Smith*; or of testimonial incapacity or incompetence, as in *R. v. Khan* and *R. v. Rockey*; or of non-compellability, as in *R. v. Hawkins*. Indeed he could not so much as find she was unavailable or unable to testify, except in the soft sense she was not then present, could not readily be located, and apparently did not wish to appear and testify. And even at that, it was impossible for him to know the reason for this. The reason probably lay in her relationship with the accused, but the reason itself did not emerge. Indeed the evidence did not even lend itself to inference in this regard -- at least not to such specific, singular, and relevant inference as might have formed the basis for a conclusion that she was unavailable or unable to appear and testify for any other reason than that she did not wish to do so. (my emphasis)

[38] In the case at bar, we also do not know precisely why the complainant has failed to appear for the trial. Although there is some evidence from the preliminary inquiry and elsewhere that the complainant fears the accused and is angry with him about the assault, there is also evidence that she simultaneously has loving feelings for him and did not want him to be punished with a penitentiary term for this offence.

***2) Does Ms. Meeres' evidence meet the standard of "threshold reliability"?***

[39] Given my finding that the Crown has not satisfied me on a balance of probabilities that the necessity criterion has been met, technically there is no reason for

me to engage in an analysis of whether the criterion of threshold reliability has also been satisfied. However, in the event of an appeal, I will attempt to do so briefly.

[40] In short, the Crown on this application has argued that threshold reliability has been satisfied because the hearsay dangers can be overcome by: (1) the procedural reliability of the statements arising from the fact that Ms. Meeres' evidence was obtained under oath at a preliminary inquiry, where she was also cross-examined; and (2) the statements' substantive reliability, arising primarily from the corroboration from the photographs and medical records of the complainant's injuries.

[41] Initially, I was inclined to agree with the Crown in this regard, but I have been persuaded on this application by the submissions of defence counsel that there are also significant concerns arising on the issue of threshold reliability.

[42] In terms of procedural reliability, I place significant emphasis on the transcript and the audio-recording of the complainant's hyper-dramatic testimony at the preliminary inquiry. Even if she was not directly under the influence of an intoxicating substance, she clearly appeared to be suffering from some form of mental health issue. Further, many of her answers on cross-examination were totally non-responsive and often irrational. In addition, much of what she said was frequently recorded as "indiscernible" in the prepared transcript. For these reasons, the mere fact that she testified under oath and was subject to cross-examination would not necessarily provide the jury with a satisfactory basis to "rationally evaluate" the truth and accuracy of her hearsay statements: *R. v. Bradshaw,* 2017 SCC, 35, at para. 28. More particularly, it is my view that it would be impossible, without cross-examination, for the jury to accurately assess her perception, memory, narration or sincerity in order to detect any mistakes,

exaggerations or deliberate falsehoods in her evidence: *Khelawon*, cited above, at para. 2.

[43] As for substantive reliability, the photographs and medical records of the complainant's injuries prove that she was seriously injured, but not how or by whom. I disagree with the Crown at the end of the day that the only likely explanation for the complainant's hearsay testimony is her truthfulness that it was the accused who assaulted her. We simply do not know that to be the case. Indeed, the accused has said many times during this application and other pre-trial applications that he intended to raise self-defence and to rely upon evidence showing that the complainant has a history of violence and, indeed, a criminal record for such conduct.

**CONCLUSION**

[44] The Crown's application is denied.

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GOWER J.