Citation: *R. v. Kane*, 2014 YKTC 11

Date: 20140310
Docket: 13-00525
Registry: Whitehorse

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

REGINA

v.

KEISHA JAYLENE ROSE KANE

Appearances:
Christiana Lavidas — Counsel for the Crown
Melissa Atkinson — Counsel for the Defence

REASONS FOR JUDGMENT
ON VOIR DIRE

[1] COZENS C.J.T.C. (Oral): Keisha Kane has been charged with having committed the offence of assault, contrary to s. 266 of the *Criminal Code*. The alleged victim is Ms. Kane's partner, Cynthia Quash.

[2] A witness, Brad Philpott, testified at trial that at approximately 6:20 a.m. on September 4, 2013, he was driving down Two Mile Hill towards downtown. At the intersection of the Alaska Highway, he observed two females and a male. The male was restraining one female who was attempting to hit the other female, who was curled up on the ground. He stated that he believes the female who was being restrained struck the other three times, twice hitting her in the head.

[3] At the request of the male, he called the police. As they were arriving, the female who was being restrained walked away from the scene.

[4] Ms. Quash testified. In short, during both direct and cross-examination she claimed to have no recollection of the assault. She also claimed to have no recollection of making a statement that morning to the RCMP. She stated that reviewing the statement did not refresh her memory and that it was "totally bogus". She attributed her lack of memory to her being extremely intoxicated at the time. The extent of her memory was having been drinking alcohol at some point at a house party in McIntyre. She stated that she did not wish to be in court and was there because she had been told to come.

[5] I understand from a review of the court file that she had failed to attend for trial on January 27, 2014, and a witness warrant was issued. Ms. Quash was arrested on a witness warrant and a new trial date of February 19, 2014 was set.

[6] Crown counsel seeks to have an audio- and videotaped statement that Ms. Quash provided to Constable Ellis in his police cruiser that morning admitted as the evidence of Ms. Quash. She also seeks to have the initial comments Ms. Quash made to Constable Ellis at the scene regarding her having been assaulted by Ms. Kane admitted. Counsel for Ms. Kane opposes the admission of these statements. She says that they are hearsay and inadmissible under the principled approach.

[7] A *voir dire* was entered into and the only witness on the *voir dire* was Constable Ellis. Constable Ellis testified that when he arrived at the scene, he spoke to Ms. Quash. She told him that Ms. Kane had assaulted her, and pointed to Ms. Kane,

who was running away from the scene on the hillside just southwest of the intersection. She told Constable Ellis that she had been hit in the head.

[8] Constable Ellis noted Ms. Quash to be intoxicated but able to stand up. He assessed her as being a five on a scale of one to ten with respect to her level of intoxication. She told him at that time that she did not want to make a statement. She just wanted Ms. Kane to leave her alone.

[9] Constable Ellis offered Ms. Quash a ride to her house in Riverdale. She accepted the ride and said she wanted to remove her possessions from the house. Constable Ellis took her to the residence that she shared with Ms. Kane, waited while she retrieved her possessions, and then, at her request, took her to her uncle's house in McIntyre.

[10] While inside Ms. Quash's residence, Constable Ellis told her that it was important for her safety to obtain a statement and it was hard to investigate what had occurred without one. He stated that Ms. Quash reluctantly agreed to provide a statement. He stated that he told her it would be audio- and videotaped.

[11] Ms. Quash sat in the rear seat of the police cruiser that was parked in front of her residence and provided an audio-recorded statement through the open window between the front and rear seats. This audio statement was somehow deleted from Constable Ellis' computer, however, both the audio and video of Ms. Quash's statement were recorded on the police cruiser's VICS system. An audio and video copy of the statement was filed as an exhibit in the *voir dire,* as was a transcript. The discussion

between Constable Ellis and Ms. Quash prior to the audio/video statement was not recorded.

[12] In Constable Ellis' opinion, Ms. Quash's overall demeanour was "pretty good". While she was clearly somewhat intoxicated, she was level-headed and not "super upset or angry". He considered her to be somewhat concerned about her safety and fearful of retribution from Ms. Kane. He testified that, while reluctant, Ms. Quash understood what he was asking her and answered the questions she was asked intelligibly.

[13] Constable Ellis did not administer an oath or say anything to Ms. Quash about the importance of telling the truth. He stated that, as she was not a suspect for the commission of any crime, he did not feel that he needed to provide her a police warning. He agreed that he could have asked her how much alcohol she had consumed and that may have been of assistance in assessing her level of intoxication.

[14] While Constable Ellis agreed that Ms. Quash could not get out of the police cruiser's rear seat unless he opened the door from the outside, he stated that she was not under arrest and that she never asked to get out while she was travelling with him.

[15] After taking the statement, Constable Ellis dropped Ms. Quash off at her uncle's residence as she had requested he do.

[16] Constable Ellis was unsuccessful on attempting to follow up further with Ms. Quash until sometime later at the WCC, after he had arrested Ms. Kane and while both she and Ms. Quash were in custody on other matters.

[17] In Ms. Quash's statement taken by Constable Ellis, she states that she was assaulted that morning by Ms. Kane while they were on their way down from McIntyre Drive. She stated that she was hit in the face a couple of times with a fist. She also provided information regarding prior incidents in which Ms. Kane had assaulted her, and information regarding an incident in which she, Ms. Quash, had assaulted a former boyfriend.

Position of Counsel

[18] Crown counsel argues that the statement of Ms. Quash should be admitted into evidence on the basis of the principled approach to the admissibility of hearsay evidence. She submits that the admission of the statement is necessary due to the lack of memory of Ms. Quash, and that it is sufficiently reliable to meet the threshold requirement for admissibility.

[19] Counsel also submits that the initial comments Ms. Quash made at the scene to Constable Ellis, regarding her having been assaulted by Ms. Kane, should be admitted into evidence on the same basis.

[20] Crown counsel submits that Ms. Quash's lack of memory was likely not genuine and, rather, that Ms. Quash was choosing to withhold evidence and thus was an unhelpful witness.

[21] Defence counsel made no submissions on the issue of necessity. Defence counsel argues, however, that the statement is not reliable due to the overall context in which the statement was taken. She submits that Constable Ellis did not do everything he could have to ensure reliability, such as taking the statement at the RCMP

Detachment, either administering an oath to Ms. Quash or advising her of the importance of telling the truth, and by not taking detailed notes of the entirety of his interaction with her. She also points to Ms. Quash's level of intoxication.

Analysis

[22] I do not intend to review in great detail the law or the development of the law regarding the application of the principled approach to the admissibility of hearsay evidence. The Supreme Court of Canada clarified the development of the principled approach to the admissibility of hearsay evidence in the cases of *R. v. Khelawon*, 2006 SCC 57, *R. v. Couture*, 2007 SCC 28 and has reaffirmed this approach in *R. v. Baldree*, 2013 SCC 35. Numerous other cases have explained in considerable detail what the Supreme Court of Canada stated in *Khelawon*, in varying contexts.

[23] Hearsay evidence is presumptively inadmissible. The underlying issue behind this presumption of inadmissibility is the difficulty of testing hearsay evidence.

[24] It is clear that the Court must maintain a flexible approach to the admissibility of hearsay evidence under the principled approach, keeping in mind that the truthfulness of the out-of-court statement is not being determined at this stage. The issue regarding ultimate reliability of the out-of-court statement will be determined at trial in the context of all the other evidence.

[25] Trial fairness is ultimately the goal when considering the admissibility of out-of-court statements, both with respect to the right of an accused to make full answer and defence and to society's interest in getting to the truth of a matter, therefore sometimes requiring that evidence be accepted in the best form available rather than not accepted

at all (see *R. v. Couture,* at para. 79). Such evidence may be necessary "to enable all relevant and reliable information to be placed before the court so justice may be done" (see *R. v. W.J.F.*, [1999] 3 S.C.R. 569), where McLachlin J., as she then was, stated at para. 31:

> …The witness's incapacity, for whatever reason, to produce meaningful evidence, faced the court with the spectre of either receiving her out-of-court statements without the test of cross-examination, or of leaving her potentially reliable and clearly relevant knowledge of the crimes with which the accused was charged altogether unutilized.

Necessity and Reliability

[26] On an admissibility *voir dire*, the court is concerned with the issues of necessity and reliability. Is the admission of the out-of-court statement reasonably necessary to ensure the integrity of the trial process, and is the statement sufficiently reliable to overcome problems such as a lack of testing by cross-examination? (*Khelawon, supra,* at para. 49).

[27] It is important at this stage to remember that it is only threshold reliability that is being assessed at the admissibility stage. The issue of the ultimate reliability of the statement is a matter for the trier of fact who considers the statement in the context of all the other evidence.

[28] The burden of proof rests with the party seeking to adduce the evidence and is on a balance of probabilities.

Necessity

[29] Necessity is established when the evidence is reasonably necessary to the trial process and is otherwise unavailable. Where a witness cannot remember what occurred, necessity is established. This is true even where the court is satisfied that the loss of memory is feigned.

[30] In *R. v. Thomas*, 2009 MBCA 85, the Court upheld the decision of the trial judge to allow into evidence the previously videotaped statement of a witness who allegedly did not recall the events as a result of memory loss arising from meningitis. The statement was made to police following a preliminary interview and was sworn. A doctor called by the defence testified that he could find no medical reason for the witness' claim of memory loss. Nonetheless, at para. 29, the trial judge and the Court of Appeal found the necessity criteria was met:

> I have little hesitancy in stating that in the circumstances of this case, the judge was correct in finding that necessity to adduce Bishop's videotaped statement had been established and that is whether his lack of memory was feigned or not. I am satisfied that on the issue of necessity itself, not much turns on whether or not Bishop was feigning memory loss. The result remains the same inasfar as the trial process is concerned; the evidence was not available. What was important is the fact that the evidence was highly relevant and was out of reach of the court.

(See also *R. v. Scotland*, [2007] O.J. No. 5303, (S.C), at para. 29, and *R. v. Persaud*, [1999], 123 O.A.C. 392.)

[31] The issue is the unavailability of the evidence and an entirely unhelpful witness who is dishonestly feigning memory loss creates a situation where necessity is established.

[32] I am satisfied that the necessity requirement is met in this case. While some of the evidence of Ms. Quash is available through other witnesses, some is not.

[33] I am not satisfied that Ms. Quash's loss of memory is genuine, and I find that she is simply testifying that she has no memory in order to avoid implicating Ms. Kane. I viewed the audio/video statement provided by Ms. Quash. It is quite apparent that Ms. Quash had been drinking, evidenced by some slight slurring of her words, but it is also apparent that she was responsive to the questions she was being asked. Her level of intoxication appears to be far below what I would expect to find if her loss of memory is to be attributed to intoxication alone, as she now claims.

[34] It was clear when she testified that Ms. Quash was not going to be helpful to either Crown or defence counsel, nor to the Court. Her evidence was unavailable in any substantive or meaningful way at the trial and, it was clear to me, would have continued to be unavailable at trial regardless of any efforts made to obtain it through examination or cross-examination. As such, I find that the evidence in her audio and video statement to Constable Ellis is necessary to the trial process.

[35] I also consider the oral statement she made to Constable Ellis to meet the necessity criteria. While these are, to some extent, repeated in the audio/video statement, and thus perhaps not entirely necessary in the narrowest sense, I view these statements as being part of the context that contributed to the taking of the audio and videotaped statement, and provided valuable evidence on the issue of identity and location.

[36] I am mindful of the following comment in *R. v. James*, [2008] O.J. No. 5747 (S.C.), where the Court stated at para. 38:

> …Where, as here, a series of statements is tendered, the subsequent statements do not meet the necessity criterion if they add nothing to the initial, or prior, statement(s). … (citations omitted)

I distinguish this from the present circumstances. The initial statements at the scene provided the context to which the subsequent audio/video statement was taken. There is a contemporaneous link between these statements and the subsequent statement that was taken. The two go hand-in-hand.

Reliability

[37] The reliability criterion will usually be met either by showing that the statement is trustworthy because of the way in which it came about, or by showing that, in the circumstances, the ultimate trier of fact will be in a position to sufficiently assess its worth (*Couture, supra*, at para. 80; *R. v. Blackman*, 2008 SCC 37, at para. 35).

[38] Generally, the requirement of reliability is met by evidence establishing the inherent trustworthiness of the circumstances surrounding the declaration or, alternatively, a means of testing the reliability of the declaration other than contemporaneous cross-examination. These alternatives are not mutually exclusive.

[39] The lack of any meaningful opportunity to cross-examine the witness is a major concern. As Justice Charron stated in *Khelawon*, *supra*, at para. 35:

> …The general exclusionary rule is a recognition of the difficulty for a trier of 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 lack of ability to cross-examine the witness is not fatal to admissibility. As Charron J. also stated in *Khelawon,* at para. 48:

> …The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must also be assessed in the light of broader societal concerns: see *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 69-76. In the context of an admissibility inquiry, society's interest in having the trial process arrive at the truth is one such concern.

[40] Since the principled approach requires sufficient indicia of the necessity and reliability of the hearsay evidence for admission, the lack of cross-examination will go to weight, not admissibility (*R. v. Smith*, [1992] 2 S.C.R. 915 at p. 935). Credibility concerns can be addressed by submissions as to the weight to be accorded to the evidence in light of any corroborative, inconsistent or contradictory corroborating evidence, as well as proper caution to the jury (*R. v. Khan,* [1990] 2 S.C.R. 531 at p. 547).

[41] As Charron J. stated in *R. v. Couture, supra*, at para. 80:

> Since the central underlying concern about hearsay is the inability to test the truth and accuracy of the statement, the reliability requirement is aimed at identifying those cases where this concern is sufficiently overcome to justify receiving the evidence regardless of this difficulty. As explained in *Khelawon*, the criterion of reliability is usually met either because of the way in which the statement came about, its contents are trustworthy, or where circumstances permit the ultimate trier of fact to sufficiently assess its worth. These two ways of demonstrating sufficient reliability are not mutually exclusive and factors relevant to one can complement the other. …

[42] Finally, if even the hearsay evidence meets the two criteria of necessity and reliability, the trial judge still has the discretion to exclude it where the probative value is outweighed by the prejudicial effect (*Khelawon*, at para. 49).

[43] When I turn to the issue of reliability in this case, I agree that many of the indicia of reliability are not present in the statements:

- There was no oath administered;
- There was no warning regarding the potential consequences of making a false statement;
- There was no promise made by Ms. Quash to tell the truth;
- Ms. Quash was not sober; in fact, she was clearly intoxicated.

However, there is no requirement that any or all of the factors that contribute to a finding of threshold reliability be present in any given case. Each case must be dealt with in consideration of its own set of circumstances. Otherwise, what is intended to be a flexible and adaptable process becomes inflexible and constrained.

[44] In the present case, I find that the requirements for threshold reliability of the statements of Ms. Quash have been met.

[45] Firstly, after reviewing the DVD of the audio and video statement, I find that Ms. Quash's level of intoxication was not such as would weigh against the reliability of her statement when considering threshold reliability. She was clearly generally responsive, coherent, and clear in what she stated.

[46] Ms. Quash clearly appeared to be providing both her statements voluntarily, without any pressure, either coercive or threatening. Her comments at the scene were in quick response to a simple question by Constable Ellis.

[47] Her initial reluctance outside her residence to provide the audio/video statement was met with what I consider to be a gentle form of persuasion that was fairly low-key in nature; that being the difficulty to investigate and the safety factor. This persuasion did not affect the voluntariness of the statement.

[48] The evidence of Mr. Philpott corroborates, to a limited extent, what Ms. Quash said to Constable Ellis in both her verbal and audio/video statements about being hit in the head by Ms. Kane.

[49] Ms. Quash did not appear to have a motive to lie, and, as stated, was in fact reluctant to provide the audio/video statement. She said that she simply wanted Ms. Kane to leave her alone. She was not interested in having Ms. Kane charged with having assaulted her.

[50] While there are no adequate substitutes for testing the evidence, I find that there is sufficient trustworthiness in the statements that were made by Ms. Quash, in the circumstances in which they were made, to pass the test for threshold reliability.

[51] I find that the probative value of these statements outweighs any prejudicial effect. Therefore, the statements made by Ms. Quash to Constable Ellis are admitted into evidence at trial, as is all the other evidence heard in the *voir dire*.

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COZENS C.J.T.C.