SUPREME COURT OF YUKON

Citation: *R. v. M.T.L.*, 2014 YKSC 77

Date: 20141205
S.C. No. 14-01503
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

M.T.L.

Before: Mr. Justice L.F. Gower

Publication of information that could disclose the identity of the complainant or witnesses has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code.*

Appearances:
Jennifer Grandy — Counsel for the Crown
André Roothman — Counsel for the Defence

RULING RE ADMISSIBILITY OF AMBULATORY CARE FORM DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is my ruling on the admissibility of the hospital ambulatory care form.

[2] I am referring here to Allan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed., (Markham: LexisNexis Canada Inc., 2009). That text, at p. 1123, makes the point that "refreshing memory":

> ... has traditionally included a witness who has no revived independent memory of an event, but can point to a written document prepared contemporaneously with the event as being an accurate rendition of the event past recollection recorded.
> ...
> In cases of past recollection recorded, where a witness has no present memory, he or she may testify at trial from:
> (1) a writing made by the witness at or near the time of the occurrence of the event or matter recorded.
> ...
> Accordingly, for past recollection recorded, there is no requirement for the witness to have a present memory of the event.

[3] The record which the witness is allowed to consult must have been made or verified by the witness at or near the time that the matters recorded were observed by the witness. For past recollections recorded it is not essential that the witness have any independent recollection of the events recorded.

[4] In the case of *R. v. R.(J.)* , [2003] O.J. No. 3215 (Ont. C.A.), the Ontario Court of Appeal reviewed the four essential conditions of admissibility:

1. a reliable record, in the sense that the witness had prepared the record personally;
2. timeliness, in the sense that the record was made while the matter was sufficiently fresh in the witness' mind;
3. absence of memory, in the sense that the witness has no present recollection of the recorded events; and
4. the witness has vouched as to the accuracy of the record.

[5] The next question which arises is whether the document itself, which is referred to by the witness, can be admitted as an exhibit in evidence. The above text indicates that in Canada there are cases going in both directions, but the authors state, at p. 1129, that:

> The arguments in favour of making the writing evidence is that it makes little sense to treat the assertions of the witness as evidence when the witness adds little to what is stated in the writing. ...

[6] In this case we have evidence from Dr. MacDonald that the notes were made at the time of, or shortly after, her examination of the complainant, that the notes are accurate, and that the details of what is recorded by the doctor in the notes are not something that she was able to recall specifically in the sense of having her memory refreshed. The only thing that the notes did in terms of refreshing her memory was allow her to recall, in general terms, the fact that she examined the complainant on that particular day. However, none of the details of the notes recorded by the doctor could be recalled by her and she is relying entirely on the written record for those details.

[7] In the case of past recollection recorded, the Ontario Court of Appeal has indicated that the document is the evidence and, if the proper foundation is made, it may be marked as an exhibit. Three cases are footnoted in that regard: *Fleming v. Toronto Railway* (1911), 25 O.L.R 317, [1911] O.J. No. 40 (Ont. C.A.); *R. v. Salutin* (1979) 11 C.R. (Ed) 284, [1979] O.J. No. 806 (Ont. C.A.); and *R. v. B. (K.G.)* (1998), 125 C.C.C. (3d) 61, at 67, [1998] O.J. No. 1859 (Ont. C.A.). I am satisfied that the proper foundation has been laid for the document to be admitted as an exhibit.

[8] I also turn here to D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Carswell, 2014) at p. 211, ("*Watt's*"), where it is noted that:

> It is common to divide refreshment of memory into two categories:
>
> i. *present* recollection *revived*; and
> ii. *past* recollection *recorded*.

[9] The text continues that:

> In cases of *past recollection recorded*, the witness asserts *no* present recollection of the relevant event, apart perhaps from having recorded it at a particular place or in a particular document. The recollection of the event is what has previously been recorded, ... The document must have been made at or within a *reasonable* time of the event recorded when the witness' memory of it was fresh. Where the original document is *not* available, a copy may be received if it is proven to be accurate ... It is also necessary that the witness' memory be exhausted preliminary to introduction of evidence of past recollection recorded.

[10] Again, I am satisfied that all of those preconditions have been met in this case.

[11] The next issue which arises is the extent to which I can refer to what the doctor recorded about what the complainant allegedly said to her about the alleged sexual assault, in terms of the history before the examination by the doctor. The Crown indicated that this was hearsay. I refer again to *Watt's*, at p. 352, where a traditional formulation of the hearsay is provided as follows:

> Evidence of a *statement* made to a *recipient* by a *declarant*, who is not a witness in the proceedings, may or may not be hearsay. It is *hearsay* and presumptively inadmissible, when the *purpose* of the evidence is to establish the truth of the *contents* of the *statement*. It is *not* hearsay, hence *not* inadmissible under the rule, where the *purpose* of the evidence is *not* to establish the truth of the contents of the statement, rather, only to *prove* that the statement was made. Hearsay also includes an out-of-court statement made by a witness who testifies in court, if the statement is offered to prove the truth of its contents.

[12] Now, in this case the complainant was asked in cross-examination whether she had provided any details of the alleged sexual assault to the doctor. She indicated that

she had not done so and had only nodded her head affirmatively in answer to a question of that nature by the doctor. So, this evidence is tendered by the accused to indicate that the complainant did say certain things to the doctor about the alleged sexual assault. I am admitting those statements not for the purpose of establishing the truth of their contents, but simply to establish that these things were said by the complainant to the doctor, and to allow the defence to argue that there is an inconsistency, therefore, between the complainant's testimony and what she told the doctor.

[13] With respect to notes made by the nurse in the first part of the form as to the details of the alleged sexual assault, that individual has not been called as a witness. The document is not tendered as a business record. Notice has not been given to the Crown of an intention by the defence to tender the document as a business record. It is not, therefore, admissible as past recollection recorded and I will ignore the contents of that portion of the report.

[14] That is my ruling.

_____

GOWER J.