SUPREME COURT OF YUKON

Citation: *R. v. C.F.N.*, 2018 YKSC 19

Date: 20180417
S.C. No. 17-01502
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT

AND

C.F.N.

RESPONDENT

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*.

Before: Mr. Justice L.F. Gower

Appearances:

Leo Lane	Counsel for the Applicant
André Roothman	Counsel for the Respondent

RULING
(*Khan* application)

INTRODUCTION

[1] This is an application to admit into evidence prior inconsistent statements, made by the Crown's witness, R.N., in three Facebook postings on November 25, 2016, through a joint account she held with her husband, the accused. The *voir dire* was held during the accused's trial on a charge of sexual assault, which took place the week of March 12, 2018. R. began her testimony on March 13, 2018. Part-way through that testimony, the Crown made a successful application, under s. 9(2) of the *Canada*

Evidence Act, R.S.C., 1985, c. C-5, to cross-examine R. on these Facebook postings. However, after attempting to impeach the witness in this regard, Crown counsel then sought to have the Facebook postings admitted for the truth of their contents. This required a second *voir dire*, because the previous inconsistent statements are hearsay. Because time was of the essence, on March 14, 2018, I made my oral ruling admitting the Facebook postings for the truth of their contents, with my written reasons to follow. These are those reasons.

[2] The issue on the sexual assault trial was whether the accused had non-consensual sexual intercourse with J.B. ("J."), who was a mutual friend of both the accused and R.. The offence was alleged to have occurred at the residence of the accused and R. on November 25, 2016, following an evening of heavy drinking by all three individuals, which carried through into the early morning hours of the 25th. At one point, R. and J. had consensual sex with each other in the master bedroom. The accused joined the two women briefly and a threesome was discussed but rejected by R. because she was too jealous about her husband having sexual contact with J.. R. was then briefly indisposed in the en suite bathroom of the master bedroom, where she vomited a couple of times. R. then walked into the living room and discovered the accused and J. having sexual intercourse on the couch. In her trial testimony, R. said that J. was awake and enthusiastically participating in the sexual intercourse. In her Facebook postings to both the accused and a mutual friend of the couple, D.M. ("D."), later that morning, R. accused her husband of having had non-consensual intercourse with J., including the statement that he had been "fucking my friend when she was passed out".

ISSUE

[3] The main issue on this *voir dire* is whether the Crown has established, on a balance of probabilities, that R.'s Facebook postings, which are potentially inculpatory of the accused, have sufficient threshold liability to be admitted for the truth of their contents.

ANALYSIS

[4] This application turns on the admissibility of hearsay statements under the principled case-by-case exception to the hearsay rule based on necessity and reliability. This principled exception was first considered by the Supreme Court in *R. v. Khan*, [1990] 2 S.C.R. 531, ("*Khan*"), which is why I have referred to this matter as a *Khan* application. However, the law has subsequently developed in several other cases decided by the Supreme Court, such as: *R. v. Smith*, [1992] 2 S.C.R. 915, ("*Smith*"); *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740; *R. v. U.(F.J.)*, [1995] 3 S.C.R. 764, ("*U.(F.J.)*"); *R. v. Hawkins*, [1996] 3 S.C.R. 1043, ("*Hawkins*"); *R. v. Khelawon*, 2006 SCC 57, ("*Khelawon*"); *R. v. Youvarajah*, 2013 SCC 41, ("*Youvarajah*"); and *R. v. Bradshaw*, 2017 SCC 35, ("*Bradshaw*").

[5] To set the general context for the issue on this application, I can do no better than quote from Charron J. in *Khelawon*:

> 2 As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, 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, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. … If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder. (my emphasis)

[6] In the case at bar, R. has obviously been called as a witness. Nevertheless, her out-of-court statements in the Facebook postings are tendered by the Crown to prove the truth of their contents. Accordingly, they are still considered hearsay. *Khelawon* states that the traditional law of hearsay also extends to out-of-court statements made by a witness who testifies in court, when that out-of-court statement is tendered to prove the truth of its contents (para. 37): see also *Watt's Manual of Criminal Evidence, 2017*, Thomson Reuters, at p. 364.

[7] The Crown submits that necessity is not at issue in this application, because R.'s trial testimony essentially amounts to a recantation of what she said in her Facebook postings. Three Supreme Court authorities have stated that where a witness recants from a prior statement, necessity is established: *Khelawon*, at para. 78; *U. (F.J.)*, at para. 46; and *Youvarajah*, at para. 22. This is because necessity is based on the unavailability of the testimony, and not the witness. Defence counsel did not argue against the Crown's submission on this point.

[8] The criterion of reliability is concerned with threshold reliability and not ultimate reliability. The *voir dire* judge is limited to determining whether the particular hearsay statement has sufficient *indicia* of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement: *Hawkins*, at para. 75. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact made in the context of the entirety of the evidence at the end of the trial: *Bradshaw*, cited above, at para. 39.

[9] Threshold reliability has two components: (1) procedural reliability, i.e. whether there are adequate substitutes for testing truth and accuracy, for example, where the declarant is not called as a witness, but the declarant's out-of-court statement was taken under oath and subject to cross-examination at a preliminary inquiry; and (2) substantive reliability, i.e. whether there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy, for example, where the declarant's statement is made under circumstances which substantially negate the possibility that he or she was untruthful or mistaken. See also *Bradshaw*, at paras. 26 through 32. These two approaches to establishing threshold reliability may also work together and they are not mutually exclusive. In other words, factors relevant to one can complement the other.

[10] In the case at bar, R. has been called as a witness both in the trial and on the *Khan* application and has been cross-examined by both Crown and defence counsel. Accordingly, her evidence about her Facebook postings has been tested and defence counsel takes no issue that the Crown has established the criterion of procedural reliability.

[11] Rather, what defence counsel says is at issue is the substantive reliability of the Facebook postings.

[12] Before turning to the submissions of Crown and defence counsel on this issue it may be helpful to set out the actual Facebook postings. The uncontentious evidentiary context is that after R. discovered the accused and J. having sexual intercourse in the living room, she started yelling at the accused, as well as striking and hitting him in the head and face area. R. then told both J. and the accused to leave the house. J. complied, but the accused did not. Rather, he went down into the basement, where he apparently began to communicate with his friend D. via the joint Facebook account that he used with R.. In one of his initial messages he referred to his wife as a “bithch”, which was an obvious typographical error for bitch. R.N. noticed these communications on her phone and then posted the following messages with D., although it is obvious from the text that she is also directing some of her communications towards the accused:

> Actually I’m not being a bitch, I’m being nice, I just caught him fucking my friend when she was passed out, and I’m not calling the cops! And this is not my first time catching him he is actually in the middle of a pardon because of jail time sexual assault! He did 8 mths, you want me to be a bitch [C.] [the accused]? I’m being nice authorities or the husband has not been contacted right now, but don’t be an ass to me and at the very least talk to my kids so o [as written] guess your [as written] right the wife is being a bitch when a couple hours ago I just caught you fucking my friend on my couch while she was passed out!
>
> …
>
> I’m sorry [D.], has nothing to do with you but just truth being told he has sexual assault jail time under his belt and I just caught him again, but if your [as written] cool with that, my

> heart is fucking broken, I'm sorry u are even brought into this but being called a bitch and a cunt! Fuck [D.]!
>
> I'm sorry

[13] It is also uncontentious that at some point prior to the accused's arrest at about 10 a.m. morning of November 25, 2016, while he was in the basement of his home, J.'s intimate partner, R.G., came over to the accused's home, went down into the basement and effectively alleged that the accused had raped J. The accused denied that he had done anything wrong.

[14] The other important evidentiary piece here is that there were also text messages exchanged between J. and R. during the morning of November 25th, commencing with J. initiating the conversation at 7:53 a.m. I referred to these in part in my reasons for judgment on the trial proper, which is cited as *R. v. C.F.N.*, 2018 YKSC 15. These texts begin with J. stating that she is scared of her partner, R.G., and that she is freaking out. R. then replied "I was nice to you remember that! And I still am". J. then indicated that she had told her family what had happened. R. then replied "[R.G.] just came here!", and continued by describing what she had seen in the living room as consensual sex, although she did not know how it had started.

[15] I will attempt to summarize the Crown's rather lengthy submissions on this *voir dire*. First, the Crown submits that the logical reason R. directed most, if not all, of her anger towards the accused after discovering him and J. having intercourse in the living room, was because J. was in fact passed out, and therefore could not be faulted for being part of the intercourse. The Crown also says that explains why R. said in her text to J. "I was nice to you". The Crown also submits that because R.'s initial Facebook posting said that "the husband has not been contacted right now", that must have been

posted by R. before R.G. came over to her home to confront the accused. The Crown further states that there is nothing in any of the Facebook postings that would have worked in the R.'s favour. On the contrary, she was potentially exposing her husband to criminal liability by describing what was essentially a rape. In this sense, he argued that the communications are analogous to an admission against interest, which bolsters their credibility. Then, once R. found out that J. had told her family she had effectively been raped and that the accused had been confronted by R.G., she changed her tune and began to describe the sexual intercourse as consensual in the subsequent texts, in order to lay the groundwork for a potential defence for her husband. In these circumstances, the Crown says that there are several *indicia* of substantive reliability pointing towards the truthfulness of the Facebook postings.

[16] Defence counsel points to R.'s evidence on the *voir dire* explaining why she posted the Facebook messages. He submits these explanations show that the content of the messages should not be considered reliable. Essentially, R. testified that she posted what she did because she was furious with the accused, that she knew how to hurt him, having been with him for 14 years, and that her intention in describing the sexual intercourse as a rape was to do exactly that. She also explained: that she still had a lot of alcohol in her system (she admitted in the trial to consuming 15 to 18 beers that evening and early morning); that she had not had any sleep to that point; that her heart was broken; that it did not appear as though the accused wanted to fight to preserve their marriage after she asked him to leave; that she was so upset that she had assaulted her husband; and that when he called her a bitch and a cunt, this triggered her to write the hurtful messages.

[17] I begin my assessment by noting, as Karakatsanis J. did in *Youvarajah*, at para. 35, that the most important factor supporting the admissibility of a prior inconsistent statement of a non-accused witness, for the truth of its contents, is the availability of the non-accused witness for cross-examination. In the case at bar, both sides have had a full opportunity to cross-examine R.

[18] Second, I must bear in mind that my task here is simply to assess "threshold" and not "ultimate" reliability. In doing so I perform a gatekeeper function, which is limited to determining whether the particular hearsay statements exhibits sufficient *indicia* of reliability so as to afford me, at the end of the trial, a satisfactory basis for evaluating the truth of the statements: *Youvarajah,* at para. 24. Finally, I remind myself that my ultimate assessment of the reliability of the Facebook postings will take place at the end of the trial in the context of the entirety of the evidence.

[19] In short, I find the Crown's arguments about the substantive reliability of the Facebook postings, at this interim stage, to be sufficiently persuasive to justify the admission of the evidence in the trial. However, what use I ultimately make of the postings will depend on the entirety of the evidence at the close of the trial.

CONCLUSION

[20] The Crown's application is granted and R.'s Facebook postings are admitted into evidence for an eventual assessment of the truth of their contents.

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GOWER J.