Citation: *R. v. Anderson,* 2017 YKTC 50

Date: 20171031
Docket: 16-00348
16-00348A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

DURAN JACOB ANDERSON

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] Duran Anderson was convicted after trial of having committed offences contrary to ss. 268(2), 267(a), 279(2), 349(1), 348(1)(a), 264.1(1)(a) and 430(4) of the *Criminal Code*. Pursuant to the principle in ***R.*** v. ***Kienapple***, [1975] 1 S.C.R. 729, the convictions for the ss. 348(1)(a) and 267(a) offences were conditionally stayed.

[2] During the course of the trial, I ruled that an out-of-court statement made by a Crown witness, J.T., be admitted for the truth of its contents, with reasons to follow.

[3] These are those reasons.

[4] When J.T. was called as a witness by the Crown, he testified to having little to no recollection of the events that he was asked about.

[5] He denied having any recollection of the incident that occurred July 21, 2016 which resulted in the charges against Mr. Anderson, although acknowledging being aware of it having occurred. He remembered having been charged in relation to the incident although not what he was charged with, the date he was charged and the date that the charges were dropped.

[6] He denied any recollection of making a statement to the police in regard to the incident. When he was provided a copy of his statement, he continued to deny any recollection of having made the statement, and testified that his memory of the incident was not refreshed.

[7] He testified that he was drinking the night he gave the statement and that, as a result, he did not remember anything at all from that day.

[8] Crown counsel applied pursuant to s. 9(1) of the *Canada Evidence Act* to cross-examine J.T. I allowed the Crown to do so. In cross-examination J.T. testified that he recalled something about wanting a blanket. While continuing to deny any memory of stating certain things contained in the statement to Cpl. Stewart, he acknowledged that he probably said the things that were attributed to him in the statement.

[9] J.T. denied that his loss of memory was as a result of not wanting to testify against Mr. Anderson. He continued to assert that he simply did not remember the incident or the making of the statement.

[10] In cross-examination by counsel for Mr. Anderson, J.T. recalled seeing his mother arrested, and the circumstances of his own arrest. He also stated that he did go to the residence of the victim, Austin Dickson, that day, in order to find his mother. He said, however, that he blacked out on the way there and doesn't remember being at the residence.

[11] He did not recall why he told the police what he did in the statement he provided.

[12] He did not recall how he felt when making the statement.

[13] He stated that he had no reason to lie when he made the statement.

[14] J.T. stated that he was scared when he was at the police station because of what he witnessed during his mother's arrest. He also stated that he did not remember being at the police station, after the time that he arrived there.

[15] J.T. stated that he is a cousin of Mr. Anderson and that he has known him his whole life, although I did not understand him to say that he and Mr. Anderson were close in any way.

[16] Cpl. Stewart testified that at the time he took the statement from J.T. he considered him to be a suspect in the offences being investigated and had arrested him. He said that he provided J.T. with a verbal caution and then proceeded to read him the caution from the police card, but decided not to continue due to a crowd forming near the police car J.T. and his mother were in at the time.

[17] Prior to taking the statement from J.T. he allowed him the opportunity to speak with a family member. When his grandmother was not available, J.T. asked to speak with his grandfather. He was able to do so privately by telephone from a room in the police detachment. Cpl. Stewart offered J.T. the opportunity to have an adult present with him when he provided his statement, but J.T. declined.

[18] J.T. was then able to speak with legal aid counsel. Prior to J.T. speaking with duty counsel, Cpl. Stewart provided counsel with information regarding the charges J.T. was facing.

[19] Cpl. Stewart noted J.T. to have been drinking prior to his being arrested. In his opinion, however, J.T. was not overly intoxicated. He felt that J.T. did not have any issues with respect to understanding what was taking place.

[20] The statement was audio-recorded and transcribed. It took place at approximately 2:00 a.m. It was not video-recorded as the recording equipment was broken at the time.

[21] In Cpl. Stewart's opinion, J.T. appeared to be sober, not tired, possessing an operating mind, functioning at normal capacity and not fatigued. Cpl. Stewart noted during the statement that J.T. corrected him in regard to the individuals who were present.

[22] At the beginning of the statement, Cpl. Stewart noticed that J.T. was shaking a bit. J.T. said that he was pretty cold. Cpl. Stewart asked J.T. if he wanted a blanket when he was returned to the cell and one was provided to him at that time.

[23] Cpl. Stewart testified that the interview room was at room temperature and he was wearing only a short-sleeved shirt and was not cold.

[24] Cpl. Stewart did not believe J.T. was under duress at the time the statement was taken. To the extent that J.T. may have been shaking when Cpl. Stewart was asked in cross-examination whether J.T. was nervous or anxious, he attributed it to the possibility that J.T. may have been cold rather than nervous.

Law and Analysis

[25] The Supreme Court of Canada recently re-iterated the law in regard to the admissibility of out-of-court statements in ***R.*** v. ***Bradshaw***, 2017 SCC 35.

[26] Hearsay evidence is presumptively inadmissible unless it meets one of the criteria for admissibility. Besides the traditional exceptions to hearsay inadmissibility, a more flexible approach has evolved, known as the principled exception to the hearsay rule. The principled approach to the admissibility of hearsay evidence focuses on whether the out-of-court statement is both necessary and reliable. At the stage of determining admissibility, the court is only concerned with threshold reliability, not ultimate reliability.

[27] Here, the statement of J.T. is relevant. While the Crown relies primarily on the evidence of Mr. Dickson, the testimony of J.T. is potentially corroborative with respect to the presence of Mr. Anderson at the residence of Mr. Dickson and as a participant in the assault of Mr. Dickson.

[28] In the present case, I am satisfied that the necessity criterion is satisfied because, at trial, J.T. testified that he had no recollection of the events that he referred to in his statement or even of the making of the statement itself.

[29] The more difficult question is whether the criteria of threshold reliability has been met. As stated in para. 24 of ***Bradshaw***:

> …In criminal proceedings, the threshold reliability analysis has a constitutional dimension because the difficulties of testing hearsay evidence can threaten the accused's right to a fair trial (*Khelawon*, at paras. 3 and 47) …

[30] The Court in ***Bradshaw*** noted that there are two components to determining threshold reliability: procedural reliability and substantive reliability.

[31] Procedural reliability looks to whether there are adequate safeguards that act as substitutes for testing the evidence. Substantive reliability looks to whether there are adequate circumstantial or evidential guarantees that the statement is inherently trustworthy (para. 27).

[32] For procedural guarantees, a court considers such things as whether the statement was taken under oath, whether it was video and audio-recorded, and whether there was a warning about the consequences associated with making the statement. The ability of counsel to cross-examine the declarant at trial about the statement is also a factor. It is not only procedural guarantees at the time of the making of the statement that are to be considered; safeguards at the time of trial may also be relevant.

[33] In order to determine substantive reliability, the circumstances surrounding the taking of the statement are to be considered, as well as any evidence that corroborates or contradicts the evidence. These circumstances include such factors as the state of sobriety and state of mind of the declarant.

[34] In ***R.*** v. ***Green***, 2009 YKTC 118, I stated as follows in regard to the admissibility of hearsay evidence on the principled basis:

> 43 The party seeking to have the evidence admitted must prove reliability on a balance of probabilities. The stricter approach to reliability as established in ***R. v. K.(G.B.)***, [1993] 1 S.C.R. 740, looks particularly for circumstances surrounding the making of the statement that are akin to the safeguards found in the trial process, such as an oath, an accurate recording, and so on.
>
> 44 However, the more flexible and functional approach as set out in subsequent cases and clarified in ***R. v. Khelawon*** 2006 SCC 57 and ***R. v. Blackman*** 2008 SCC 37, looks to whether there is sufficient indicia of reliability found in all the circumstances surrounding the making of the out-of-court statement to allow for the statement to meet the threshold test for admissibility, keeping in mind that the ultimate test for reliability of the statement rests with the finder of fact. Threshold reliability can be met by "... 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". ***R. v. Scotland***, [2007] O.J. No. 5303 (Sup. Ct. Jus.), at para. 24.
>
> 45 Some, but not an exhaustive, list of the factors that arise when considering the reliability of a statement are as follows:
>
> > *the availability of the declarant for cross-examination. If the declarant is available then the statement may be considered to be more reliable;
> >
> > *whether oaths, solemn declarations, warnings and promises to tell the truth were present at the time the statement was made;

*whether there was adequate video and audio taping of the statement to allow for an assessment to be made of both the accuracy of the statement and the declarant's demeanour;

*whether the recipient of the statement was under a duty to take an accurate statement;

*whether the declarant or the recipient of the statement were intoxicated at the time the statement was made, and, if so, to what degree;

*what was the ability of the declarant to communicate;

*what was the declarant's state of mind at the time of making the statement;

*whether there was an acknowledgement by the declarant of the accuracy of the statement at the time the statement was made, such as by reading and signing the statement;

*whether the statement was taken contemporaneously to the events in question;

*the nature of the relationship between the declarant and the accused;

*whether there was a motive or absence of motive for the declarant or recipient of the statement to lie;

*whether there was consistency within the statement;

*whether there was the presence or absence of ambiguity within the statement;

*the extent of the spontaneity of the statement;

*whether there was an acknowledgement by the declarant of the importance of telling the truth;

*whether the questions by the recipient of the statement were leading or non-leading;

*whether there was pressure by the recipient of the statement upon the declarant;

*whether there was corroborating evidence for the statement; and,

> *did the recipient of the statement believe the declarant is telling the truth.
>
> 46 None of these factors are determinative in and of themselves. Each case requires a careful consideration of the impact on the reliability of the statement of the presence and/or absence of these and any other relevant factors.

[35] I have reviewed the audio-recording and transcript of J.T.'s statement. Certainly an audio/video-recording is preferable to an audio recording alone. However, it is not necessary that a statement be video-recorded. An audio-recording can still sufficiently convey information related to demeanour, state of mind and ability to understand and respond to questions.

[36] In this case I found that the quality and content of the audio-recording was helpful in my ability to assess the reliability of the statement of J.T.

[37] When he gave the statement, J.T. had been arrested and warned of the consequences of saying anything. Cpl. Stewart repeated the police warning to J.T. at the beginning of the statement. He also told J.T. that he did not have to talk to him and that he did not need to worry about any threats, promises or favours. There did not appear to be any pressure exerted on J.T. to make a statement; to the contrary, Cpl. Stewart made it clear that there was no expectation on J.T. that he do so. I accept that there was likely some general pressure existing in the simple reality that J.T., as a 17-year-old youth, had seen his mother being arrested in a physical manner and was himself arrested and detained in custody at the RCMP Detachment. I find that this does not equate to pressure to make a statement.

[38] To the extent that J.T. stated he was cold, I accept that he may have been experiencing some discomfort. While Cpl. Stewart expressed the opinion that J.T. may also have been shaking because he was nervous, in my opinion it would have been prudent to have provided a blanket at that time rather than when J.T. was taken back to cells. However, I find that any discomfort J.T. was experiencing was not so great so as to compromise the circumstances in which the statement was taken.

[39] J.T. spoke both to a trusted family member and to a legal aid lawyer who had been apprised of the jeopardy J.T. was facing.

[40] There was no oath administered or promise given by J.T. to tell the truth. Nor was there a warning of there being any negative consequences in the event a false statement was provided. Nor did J.T. read and sign the statement after providing it.

[41] Cpl. Stewart was under a legal duty to take an accurate statement. The questions he asked were not leading or suggestive of Cpl. Stewart seeking particular answers or working towards proving a pre-conceived version of events. Cpl. Stewart did not express any concerns that J.T. was not being truthful when he provided the statement.

[42] J.T., both in tone and substance, sounded quite calm, lucid and coherent in the audio recording. I have no concerns in regard to his ability to understand and answer the questions that he was asked.

[43] I note that there was nothing that indicates to me that J.T. was impaired to the point that it had any meaningful impact on his ability to provide an accurate statement.

[44] J.T. provided his statement contemporaneous to the events he was talking about.

[45] There were no inconsistencies within the statement or with other evidence. To the extent that J.T. said in the statement that he observed certain events occurring in Mr. Dickson's house, what J.T. described was consistent, or at least not inconsistent, with what Mr. Dickson testified to.

[46] J.T. was responsive to the questions he was asked and did not appear to be evasive in any way. Nor did he appear to be embellishing or minimizing any of the events he said that he witnessed. He provided his statement in what I consider to be an unremarkable manner.

[47] The statement did not appear to be motivated by a need to deflect any responsibility from himself in order to avoid being charged with any offences. Certainly, given that he had also been arrested for having participated in the assault upon Mr. Dickson, there could be said to be a motive to point the finger at others in order to deflect responsibility from himself, but, in my opinion, J.T. did not do so in the statement. He also stated in his testimony that he would have no reason to lie to Cpl. Stewart at the time that he provided the statement.

[48] J.T. was available for cross-examination at trial. Certainly, the ability of counsel for Mr. Anderson to conduct a meaningful cross-examination was negatively impacted by J.T.'s apparent lack of memory in regard to many significant aspects of the events he had previously stated that he had observed. To the extent that he was present, however, there was at least some opportunity to ask questions, as compared to him not being present at trial at all.

[49] In consideration of all the factors referred to above, I find that there is sufficient indicial of reliability to meet the criteria for threshold reliability.

[50] As the criteria of relevance, necessity and threshold reliability have been satisfied, I am allowing the statement of J.T. to be introduced as evidence at trial to be considered for the truth of its contents.

_____

COZENS T.C.J.