Citation: *R.* v. *Reeves*, 2009 YKTC 25

Date: 20081218
Docket: 08-00266A
Registry: Whitehorse

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

REGINA

v.

RONALD EDWARD REEVES

Appearances:
Noel Sinclair — Counsel for Crown
André Roothman — Counsel for Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): Ronald Edward Reeves is charged with having committed the offences of assault with a weapon contrary to s. 267(a) of the *Criminal Code of Canada*, assault contrary to s. 266 and uttering a threat to cause death contrary to s. 264.1(1)(a).

[2] The alleged victim is Tabetha Barnett, Mr. Reeves' common-law spouse within an approximately ten-year relationship. Mr. Reeves is 41 and Ms. Barnett is 38.

[3] The Crown called Ms. Barnett and Corporal Cluney. Ms. Barnett denied in her testimony that Mr. Reeves had assaulted and threatened her, claiming that it was in fact a girl named Rose that she had been drinking and doing crack cocaine with at the time,

and that she had in fact been in a fight with on the evening in question. She stated that she was angry at Mr. Reeves for not giving her money to buy cocaine and as a result told the RCMP that it was he that had assaulted and threatened her. Corporal Cluney responded to the 9-1-1 call, and took an audio and video-taped statement from Ms. Barnett, in which Ms. Barnett stated that Mr. Reeves was the offender.

[4] Defence counsel called Norman Shorty, who is Mr. Reeves' cousin, to provide alibi evidence that Mr. Reeves was at his residence at the time of the assault. This alibi evidence was disclosed to Crown counsel on the day of trial, although from what I understand of the circumstances of the disclosure, through no fault of defence counsel. Mr. Reeves did not testify.

[5] At the conclusion of a *voir dire*, I allowed the application of Crown counsel to have the transcribed audio and video-taped statement of Ms. Barnett admitted as evidence in the trial for the truth of its contents. By consent of both counsel all the evidence heard in the *voir dire* was admitted into evidence at trial.

[6] The main issue to be resolved is whether Ms. Barnett's evidence in the statement to Corporal Cluney, when coupled with the observations made by Corporal Cluney of the residence where the alleged assault happened, is sufficiently reliable to prove beyond a reasonable doubt that Mr. Reeves is guilty of the offences with which he has been charged.

[7] The second issue is whether the alibi evidence of Mr. Shorty raises a reasonable doubt when considered in light of the remainder of the evidence.

THE EVIDENCE

[8] Ms. Barnett testified that on July 19, 2008, she and Mr. Reeves had been out four-wheeling. They had been drinking alcohol. They returned to their residence, where they later got into an argument. Ms. Barnett wanted to go and get some cocaine but Mr. Reeves did not. He left on the four-wheeler and Ms. Barnett went downtown where she met a girlfriend named Rose. Together they pitched in to obtain some cocaine and beer, and then returned to Ms. Barnett's residence.

[9] They smoked $100 worth of crack cocaine and Ms. Barnett drank perhaps 15 beer. Ms. Barnett placed her level of intoxication as being an eight on a scale of ten, with ten being the most intoxicated.

[10] Ms. Barnett and Rose then got into an argument over something Rose said about Mr. Reeves. A physical altercation ensued, during which Ms. Barnett's glass coffee table got broken. The physical altercation ended, although a verbal dispute continued. Rose was talking to someone on a cell phone and Ms. Barnett called 9-1-1. By the time Corporal Cluney of the RCMP arrived, Rose had been picked up by a friend.

[11] Crown counsel brought an application to cross-examine Ms. Barnett under s. 9(2) of the *Canada Evidence Act*. During defence counsel's cross-examination on the 9(2) application, Ms. Barnett testified that she had been using crack cocaine since she was 20 years old. When she was under the influence of crack cocaine she would become paranoid and have hallucinations. She testified on some of these occasions she had gone to neighbours, as well as Mr. Shorty's residence, and falsely accused Mr. Reeves of assaulting her. On this occasion, she falsely accused Mr. Reeves because she was

mad at him because he would not go with her to buy cocaine and alcohol. She testified that within two days of providing her statement to Corporal Cluney she attempted to contact her to say that what she had said in her statement was wrong.

[12] Defence counsel conceded that the Crown should be allowed to cross-examine Ms. Barnett under s. 9(2) of the *Canada Evidence Act*. Under examination by Crown counsel, Ms. Barnett was consistent in her evidence that her statement to the RCMP was false, that Mr. Reeves did not assault or threaten her, and that she had been in the physical altercation with Rose.

[13] Crown counsel brought what is commonly known as a *KGB* application after the Supreme Court of Canada case of *R.* v*. B. (K.G.),* [1993] S.C.J. No. 22, to have the statement to Corporal Cluney admitted into evidence for the truth of its contents. The statement was played, and during the statement Ms. Barnett provided evidence of the assaults and threats, which I summarize as follows.

[14] Mr. Reeves was angry because a friend named Al had called her. Mr. Reeves called her derogatory names like whore and slut. He punched her in the head more than ten times with his right hand and at least once with his left with a closed fist, kicked her in the face, pinned her down with his knee on her face and said twice when she was pinned that he was going to "fucking kill her": “I’ll kill you, you fucking bitch.”

[15] On the video Ms. Barnett demonstrated the punches as being with considerable force, the first of which snapped her head back and drove her into the closet. She also demonstrated a very forceful kick by Mr. Reeves with his right leg to her when she was bent over in a sitting position. Ms. Barnett is seen on the video to be touching under her

left eye with her right hand, I believe it was, in reference to the kick. Corporal Cluney then asked her whether the kick was in the face. Now, this is marked as inaudible in the transcript but clearly decipherable. Ms. Barnett responds, again touching under her left eye, that this is where she thinks that "good one" came from. Again, "came from" is marked inaudible in the transcript but was clearly decipherable.

[16] In cross-examination by defence counsel in the *voir dire*, Ms. Barnett again stated that she must have been hallucinating when she gave the statement, pointing to the fact that she mentioned on two occasions a brother that she does not have, as evidence of her state of mind.

[17] Corporal Cluney testified on the *KGB voir dire*. She stated that at the time of the taking of the statement she would assess Ms. Barnett's state of sobriety as being a two on a scale of ten and that in her opinion Ms. Barnett was not intoxicated. She did not believe that Ms. Barnett had any problems understanding what was going on. She did not observe anything that would have caused her to believe that Ms. Barnett was under the influence of cocaine, such as agitation, pupil dilation, fidgeting and scratching, things she had been trained to look for. She noted Ms. Barnett to be very upset, crying, to have a red face and have some bruising and swelling to her face, as well as a lump on the back of her head. Ms. Barnett had no open wounds.

[18] Corporal Cluney took three photographs of Ms. Barnett's facial area. These photographs are of limited assistance as the digital colour quality makes it somewhat difficult to pick out the injuries observed by Corporal Cluney.

[19] Corporal Cluney also entered Ms. Barnett's residence and noted that it was in

disarray. There was a broken glass coffee table, chairs were strewn around and upside down, all of which caused her to believe that there had been a physical altercation.

[20] I indicated at the conclusion of the *voir dire* that I would admit the out-of-court statement of Ms. Barnett and include reasons why in this decision.

[21] Two recent cases of the Supreme Court of Canada have established the present state of the law regarding the rules governing the admissibility of hearsay evidence, these being *R.* v. *Khelawon*, [2006] S.C.J. No. 57, and *R.* v. *Blackman*, [2008] S.C.J. No. 38, from 2006 and 2008. I will provide a brief summary of the principles from these cases and others that are of application in the case before me.

[22] We start, of course, from the premise that hearsay evidence is presumptively inadmissible unless the evidence can be brought either within a traditional exception to the hearsay rule or the principled exception to the hearsay rule. The defining features of hearsay evidence are that the out-of-court statement is intended to be relied upon for the truth of its contents and that there had not been a contemporaneous opportunity to cross-examine the maker of the statement. The underlying rationale for the exclusion of such evidence is that it may be given more weight by the trier of fact than it deserves.

[23] The first requirement for admissibility is that the hearsay evidence be relevant to a point in issue and capable of assisting the trier of fact in reaching a decision on the issue. As Ms. Barnett was clearly providing a completely different version of events as to who she was involved in the physical altercation with during her testimony at trial, this evidence is relevant to a point in issue.

[24] In order for hearsay evidence to be admissible under the principled approach to hearsay, the Crown bears the burden of proof on a balance of probabilities to show that this evidence is both necessary and reliable. At the admissibility stage, the Court is dealing with the threshold reliability of the hearsay evidence. The ultimate weight to be placed upon this evidence is to be assessed with all the other admissible evidence and its ultimate reliability determined by the trier of fact. All evidence relevant to the issue of threshold reliability may be considered by the trial judge in the *voir dire.*

[25] The relevance of the truthfulness of an out-of-court statement at the admissibility stage has been altered by the Supreme Court of Canada in *Khelawon* and *Blackman* from the earlier *R.* v. *Starr*, [2000] S.C.J. No. 40, and *K.G.B.* cases, quoting:

> When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. [The] question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not ….
>
> … whether certain factors will only go to ultimate reliability will depend on the context. (*Khelawon*, para. 92).

[26] The hearsay issue arises here because Ms. Barnett's testimony at trial was a categorical denial that her assailant was the same person that she said it was in her statement to Corporal Cluney. Therefore, the Crown is seeking to adduce the out-of-court statement for the truth of its contents as proof of who the assailant was, and asked me, as the trier of fact, to rely on the out-of-court statement over the sworn testimony of the witness on the stand.

[27] Now, while Ms. Barnett was available for cross-examination during the trial, she was not available for cross-examination at the time the out-of-court statement was made, thus reducing the opportunity for a meaningful testing of its truth and accuracy. In the end, it must be remembered that it is the unavailability of the evidence that is the issue, not the unavailability of the witness.

[28] On necessity, defence counsel does not contest Crown's counsel's submission that the out-of-court statement meets the necessity criteria, and, as was stated by Trafford J. in *R.* v. *Scotland*, [2007] O.J. No. 5303: "The criterion of necessity is established where a witness recants a prior statement."

[29] On reliability, the stricter approach to reliability as established in *K.G.B.* looks particularly for the circumstances surrounding the making of the statement that are akin to the safeguards found in the trial process, such as oaths, accurate recording, et cetera.

[30] The more flexible and functional approach as set out in subsequent cases, and clarified in *Khelawon* and *Blackman* 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.

(*Scotland* at para. 24.)

[31] The functional approach focuses on particular dangers raised by the hearsay evidence sought to be adduced, and on those attributes of the circumstances relied upon by the proponent to overcome those dangers. Some, but not an exhaustive list, of the factors that arise when considering the reliability of a statement, not all of which are applicable in the case at bar, 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.
- oaths, solemn declarations, or warnings and promises to tell the truth;
- 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;
- intoxication of either the declarant or the recipient of the statement;
- ability of the declarant to communicate;
- the declarant's state of mind at the time of making the statement;
- acknowledgement of the declarant of the accuracy of the statement at the time the statement is made, such as by reading and signing the statement;
- contemporaneousness of the statement to the events in question, as the closer in time the more likely there is an increase in the reliability;
- the relationship between the declarant and the accused;
- the motive or absence of motive for the declarant or recipient to lie;

- consistency within the statement;
- presence or absence of ambiguity within the statement;
- spontaneity of the statement;
- acknowledgement of the declarant of the importance of telling the truth;
- leading or non-leading questions by the recipient of the statement;
- pressure by the questioner upon the declarant;
- whether there is corroborating evidence for the statement; and,
- whether the recipient of the statement believes the declarant is telling the truth.

[32] I am satisfied that on a consideration of the above criteria there is sufficient indicia of reliability for the out-of-court statement to meet the threshold reliability test. While Ms. Barnett appeared to possibly be under the influence of alcohol or some other intoxicant, she did appear to be able to communicate and demonstrate physically what took place that night, in accordance with her description of events.

[33] Just looking at some of these indicia: We had her here for cross-examination during trial. There were oaths, declarations and warnings. There was video-taping.

[34] On this issue, I will say that the audio/video tape was done in a manner that allowed for an assessment of her demeanour. I have some residual concerns about the distance of the camera from her face as it does not allow for as full and complete an assessment of demeanour as it would be if we had a second camera that was positioned in a way so that we could get a closer-up view of the person that is providing the statement. I note that the use of the single, highly-placed camera appears to be the

norm for the RCMP in the Yukon and, although it is generally adequate, there may occasions where it would be of some benefit to have a second camera in place.

[35] I also note that the statement was taken by a police officer who had a duty to take an accurate statement and to assess the ability of Ms. Barnett to be capable of providing a statement, and she was able to communicate. This statement was taken contemporaneously, and there was the physical evidence in the residence that confirmed the fact that some form of physical altercation had taken place there.

[36] Defence counsel did raise during this application the issue of motive to fabricate, being Ms. Barnett's anger at Mr. Reeves. I do not consider that this potential motive has any significant bearing on the test for reliability at this point, given the other indicia of reliability that are present. I have some concerns about the injuries not being necessarily consistent with what Ms. Barnett described Mr. Reeves' actions were but believe that this is a consideration better left for the assessment of the ultimate reliability of the statement, which is to be decided at a later stage.

[37] I also considered the reference to the brother, and Ms. Barnett's testifying about that and pointing to her obviously hallucinating under the influence of crack cocaine, but given the other evidence and that of Corporal Cluney, I did not consider that to be relevant at the threshold reliability stage.

[38] Finally, defence counsel did not strenuously argue against the admission of the out-of-court statement for the truth of its contents, recognizing that the test for threshold reliability had likely been met in this case.

[39] So based upon my consideration of all the above evidence and applicable law and factors, I am satisfied that the out-of-court statement of Ms. Barnett is relevant, necessary and sufficiently reliable to be admitted into trial for the truth of its contents.

FINDINGS

[40] The defence called evidence. The rule in *R.* v. *W. (D.)*, [1991] S.C.J. No. 26, applies in this case. Given that this is alibi evidence, if I believe the alibi evidence, I must acquit; if I do not believe it but I am left in a reasonable doubt by it, I must acquit; and, if I am not left in doubt by it, I still must ask myself whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[41] Mr. Shorty testified that Mr. Reeves had come to his house early in the evening of July 19, 2008, and stayed there overnight, leaving for only 20 minutes. I note that the residence was said to be about one hour away by four-wheeler from where the incident allegedly took place. Mr. Reeves told Mr. Shorty that he came over because Ms. Barnett wanted to do her own thing.

[42] Mr. Shorty testified that Mr. Reeves contacted him by telephone two to three days after he had come over to Mr. Shorty's house in July, and told him that he had been charged with these offences. He further testified that Mr. Reeves had only come to his house once in July, thus apparently linking the date of the alleged offences to a specific visit that would have placed Mr. Reeves at a place other than with Ms. Barnett at the time she was allegedly assaulted.

[43] I have, however, some concerns about his alibi evidence. Defence counsel only

became aware of the possible existence of this evidence several weeks before trial and well after the events of July 19, 2008. It seems improbable that Mr. Shorty would have stood silently by and allowed Mr. Reeves, his cousin and friend, to sit in custody for a number of days and then wait several months for trial without contacting the authorities to explain to them that Mr. Reeves could not have committed the offences with which he had been charged.

[44] Notwithstanding Mr. Shorty's evidence as to the visit by Mr. Reeves occurring on July 19th, I find on a consideration of the whole of his evidence that his ability to link the visit to this specific date is questionable. Mr. Reeves and he apparently communicated and spent time together quite regularly, and perhaps Mr. Shorty may have confused this evening with another night.

[45] In the end, I find that the evidence of Mr. Shorty, standing alone, is insufficient to raise a reasonable doubt.

[46] We are then left with the evidence of Ms. Barnett in her out-of-court statement, the evidence of the observations of Corporal Cluney, and the contrary evidence of Ms. Barnett during her testimony at trial.

[47] I find the evidence given by Ms. Barnett at trial to be somewhat unreliable. I say this recognizing that she is, due to ongoing medical treatment, no longer using cocaine or drinking. I also note that she was not agitated, confrontational or evasive while giving her evidence.

[48] My concerns arise from several factors. I find that the story of Rose being her

assailant is, while perhaps possible, a little hard to accept. There was no mention of this Rose to Corporal Cluney on July 19th. Ms. Barnett did not provide a last name for Rose or apparently make any efforts to locate her and identify her to the RCMP, even though she took steps within days of July 19th to advise the RCMP that her statement to Corporal Cluney was false.

[49] Her motive to fabricate the allegations against Mr. Reeves is also suspect. It seems improbable that she would have been angry enough at him several hours after she stated he refused to go get cocaine with her to make up these accusations against him, particularly when she had obtained the alcohol and cocaine. It would have made more sense if the discussion that she and Rose apparently had, which Ms. Barnett testified may have involved Rose stating that Mr. Reeves had slept with her, made her angry enough at Mr. Reeves for cheating on her to accuse him. This, however, was not offered as a reason for her anger.

[50] I also find that her evidence of being eight out of ten on an intoxication scale as being grossly exaggerated. From my observations of her during the audio and video taped statement, she was fairly functional, both in respect of her ability to verbally communicate and demonstrate physical actions. I find her evidence of hallucinating while on cocaine to be somewhat of a convenient explanation.

[51] Now, this motive to fabricate has to be set against the possibility of a motive during her testimony at trial to recant her out-of-court statement accusing Mr. Reeves of assaulting and threatening her. Ms. Barnett provided evidence that she and Mr. Reeves, who was regularly employed, generally split the bills prior to his arrest. Since

that time she has been required to accept full responsibility for these bills. It is apparent that she wants him back in her life. Such a recantation in circumstances such as these is not at all unusual in cases of domestic violence and is a large part of the reason why police officers make efforts on a regular basis to obtain statements that can be proffered as evidence at trial, such as in the case at bar.

[52] As such, I find that her evidence at trial, standing alone, does not raise a reasonable doubt as to the guilt of Mr. Reeves.

[53] Ms. Barnett's evidence during the out-of-court statement does cause me some concern. I have considerable difficulty reconciling her version of the nature of the assault she suffered at the hands and feet of Mr. Reeves with the level of injuries she apparently received. I say this taking into account that the best evidence of the injuries is that of Corporal Cluney and her actual observations of some bruising and swelling to the face area and a lump on Ms. Barnett's head, rather than the photographs, which themselves show little.

[54] Ms. Barnett describes, with physical demonstration, punches which were delivered by Mr. Reeves with considerable force, one hard enough to knock her back into a closet. While there is evidence that Mr. Reeves was apparently a skilled boxer, this evidence is not particularly determinant of any issue, as it is the actual measure of force used that matters, not the capacity to deliver that measure of force. This said, in the absence of any evidence that Ms. Barnett had blocked most of these punches, I would have expected to hear or see evidence of injuries more consistent with the amount of punches delivered and force used.

[55] Ms. Barnett also demonstrated a kick to her face area by Mr. Reeves that was a full-out and forceful kick. While her hands may have been in front of her face, given the position she demonstrated she was in at the time she was struck, she has no clearly apparent injuries to either hand and she did state that she was struck in her face, under her left eye, by this kick; again, not so much in the words that you read, but in the words in combination with what she was showing on the tape at the same time. Again, while it may be that the kick did not make direct contact, Ms. Barnett does not state that she blocked or deflected this kick.

[56] There is also no mention or demonstration in the statement of the glass coffee table being broken or of chairs being thrown around. The only time the glass coffee table is mentioned is in respect of the individual called Rose, although that is not of great significance.

[57] Of lesser concern is the apparent, perhaps slight, intoxication of Ms. Barnett while she was providing the statement. While intoxication is clearly a factor that is relevant to determining the ultimate reliability of an out-of-court statement, the fact that someone is intoxicated to a certain degree is not necessarily determinative of the issue of reliability. There may be other evidence that supports the reliability of the statement, notwithstanding that the individual providing the statement is under the influence of intoxicating substances. Obviously, considerable care must be used when determining the reliability of such a statement, but the practical reality is that offences often occur in situations where the victim is under the influence of an intoxicant, and such a victim is not automatically to be precluded from providing a statement contemporaneous to the time of the events underlying the taking of the statement.

[58] The entirety of the evidence needs to be included in such a determination. That said, clearly and if at all possible, and I know that sometimes it is not, police officers should be encouraged to make every effort to take a statement from a witness when the witness is not under the influence of intoxicating substances. In the present case, Ms. Barnett's condition is not of particular concern but remains a factor to be considered in the context of all of the other evidence.

[59] Ms. Barnett also mentioned that Mr. Reeves' yelling took place while she was on the 9-1-1 call and he could probably be heard. The tape or transcript of the 9-1-1 call were not introduced into evidence at trial, and little can be inferred from this, as the tape could have been unavailable for reasons from technical difficulty to otherwise not having it proffered as it did not provide any evidence of probative value. The speculation of Ms. Barnett that he may have been heard was purely that by her: speculation.

[60] Set against these concerns is the apparent motive in the statement, being that of Al calling and Mr. Reeves being upset over this, for Mr. Reeves to be angry at Ms. Barnett, thus assaulting and threatening her. Ms. Barnett was clearly upset at times when the statement was taken, and Corporal Cluney made observations as well as to Ms. Barnett being upset. There is nothing in how Ms. Barnett provided that statement to indicate that she was fabricating her story.

[61] As Crown counsel points out, it is clear that something happened on July 19th that resulted in Corporal Cluney responding to a 9-1-1 call. The house was in disarray with clear signs of a physical altercation. Ms. Barnett told Corporal Cluney when she arrived, and in her statement taken shortly afterwards, that Mr. Reeves had assaulted

and threatened her, and there is physical evidence in the injuries observed by Corporal Cluney that Ms. Barnett had been struck by something or someone.

[62] Again, in *R.* v. *W. (D.), supra*, the third criteria is that even if you are not left in doubt by the evidence of the accused, you must ask yourself whether on the basis of the evidence which you do accept you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[63] I find that, although I do not accept Ms. Barnett's version of events given during her testimony at trial and although I do not accept the evidence of Mr. Shorty together as raising a reasonable doubt as to the guilt of Mr. Reeves, I am not satisfied beyond a reasonable doubt, on a consideration of the whole of the evidence, particularly when I consider the difficulties I have with aspects of the out-of-court statement of Ms. Barnett, that Mr. Reeves is guilty of the offences with which he has been charged.

[64] Ms. Barnett was clearly struck in the face and head by someone or something that night, and it may well have been Mr. Reeves, and much of the evidence points towards this being the logical conclusion that I could reach. That is not the test, however, and despite my concerns on the evidence, Mr. Reeves is acquitted of the charges against him.

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COZENS T.C.J.