Citation: *R.* v. *Becker*, 2010 YKTC 74

Date: 20091216
Docket: 09-00362
Registry: Whitehorse

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

REGINA

v.

ROBERT WILLIAM BECKER

Appearances:
Bonnie Macdonald — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] LUTHER T.C.J. (Oral) Robert William Becker is charged on a four-count Information with two alleged breaches of s. 266 of the *Criminal Code* and two alleged breaches of s. 733.1 of the *Criminal Code.* Counts 1, 3 and 4 are alleged to have occurred on the 5th of August of 2009, and Count 6 [sic] on or about the 6th of August, 2009.

[2] On August the 31st the Crown elected to proceed by indictment, and on September the 21st the accused elected to be tried by a Territorial Court judge and pleaded not guilty to all four counts. The trial started yesterday, December 15, 2009, here in Whitehorse.

[3] On August 6, 2009, between 8:35 p.m. and 9:02 p.m., Pamala Mullin gave a statement to Constable MacQuarrie of the RCMP. The statement was, for the first 16 pages, recorded on a CD and later transcribed. Page 17 was handwritten, verbatim, by Constable MacQuarrie. While the tape malfunctioned a few times, I am satisfied that nothing material was omitted, accidentally or otherwise. The statement was not video-recorded, nor was Pamala Mullin under oath.

[4] The Crown seeks to have this statement admitted into evidence for the truth of its contents on the basis that although hearsay, it is necessary and reliable.

[5] I shall review all relevant portions of the authorities with particular emphasis on *R.* v. *Khelawon*, [2006] 2 S.C.R. at 787. At paragraph 50:

> As stated earlier, the trial judge only decides whether hearsay evidence is admissible. Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence. It is important that the trier of fact's domain not be encroached upon at the admissibility stage. ... If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between "ultimate reliability" and "threshold reliability." Only the latter is inquired into on the admissibility *voir dire*.

[6] As we further review the *Khelawon* case, I am drawn to a number of passages, starting with paragraph 2:

> As a general principle, all relevant evidence is admissible. …the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. …the rule against hearsay is intended to enhance

> the accuracy of the court's findings of fact, not impede its truth-seeking function. ... In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. … 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.

Paragraph 3:

> … In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*.

[7] As to the particulars of the *Khelawon* case, at paragraph 7 it was stated:

> … The circumstances in which it came about did not provide reasonable assurances of inherent reliability. To the contrary, they gave rise to a number of serious issues including: whether Mr. Skupien was mentally competent, whether he understood the consequences of making his statement, whether he was influenced in making the allegations by a disgruntled employee who had been fired by Mr. Khelawon, whether his statement was motivated by a general dissatisfaction about the management of the home, and whether his injuries were caused by a fall rather than the assault.

And then, at paragraph 107, towards the end of the decision, the Supreme Court went over in some detail the concerns they had about Mr. Skupien's evidence:

> … Mr. Skupien was elderly and frail. His mental capacity was at issue -- the medical records contained repeated diagnoses of paranoia and dementia. There was also the possibility that his injuries were caused by a fall rather than an assault -- the medical records revealed a number of complaints of fatigue, weakness and dizziness and the examining physician, Dr. Pietraszek, testified that the injuries could have resulted from a fall…. The evidence of the garbage bags filled with Mr. Skupien's possessions provided little assistance in assessing the likely truth of his statement

> -- he could have filled those bags himself. Ms. Stangrat's obvious motive to discredit Mr. Khelawon presented further difficulties.

And so on. The Supreme Court analyzed the situation quite closely.

[8] If we go for further guidance we proceed to paragraphs 34 and 35:

> The basic rule of evidence is that all relevant evidence is admissible.

I stated that before.

> There are a number of exceptions to this basic rule. One of the main exceptions is the rule against hearsay: absent an exception, hearsay evidence is *not* admissible. Hearsay evidence is not excluded because it is irrelevant -- there is no need for a special rule to exclude irrelevant evidence.

Paragraph 35:

> … Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence.

A very important paragraph, 39:

> … In these circumstances, the trier of fact is asked to accept the out-of-court statement over the sworn testimony of the witness. Given the usual premium placed on the value of in-court testimonial evidence, a serious issue arises as to whether it is at all necessary to introduce the statement. In addition, the reliability of that statement becomes crucial. How trustworthy is it? In what circumstances did W make that statement? Was it made casually to friends at a social function, or rather, to the police as a formal [statement]? Was W aware of the potential consequences of making that statement, did she intend that it be acted upon? Did she

> have a motive to lie? In what condition was W at the time she made the statement?

[9] Now, if we do an analysis of the witness in this particular case, Ms. Mullin, as to the circumstances, this was not made at a social function. In fact, it was made to the police. It was a formal statement given in her own residence and the police officer was in RCMP uniform. The statement was recorded. If we take a look at the introduction to the statement on the first page, the officer starts off:

> So today's date is August 6th. The times 8:35 in the evening. We're at Pam MULLIN's residence here at um and Pam, my name is Kelly. I'm one of the constables here with the Whitehorse RCMP. Okay. We were called here tonight by your friend Serena uh can you tell me what's been going on tonight with you and your, your boyfriend?

And then at the end, that is, on the last page, which was handwritten by the Constable:

> Q3. Is everything you told me the truth today?
> A3. As far as I can remember and to the best of my ability.
> Q4. Is there anything else at all?
> A4. I'll be okay.

[10] As to the potential consequences, the witness was aware of the consequences of speaking to the police and making the statement. For example, at the top of the last page, again, the handwritten page by the Constable:

> A2. I don't know what else to do. He's going to have to go for me to get Codee back. I do love this man but I don't know what else to do.

And then at page 16 there is some other indication that she knows what is going on and the consequences:

> Q: You gotta, yeah, you gotta look after you and Codee first, right?
> A: Yeah.

And then at the end of one of the questions, towards the top of the page:

> Q: …You, have you had enough?
> A: I have. Why can't he be him. I've seen him when he was nice. He's good. Why can't he, what does it take to get them back to that?

[11] There is also a discussion on the same page of the DVTO and how he did at the beginning of the DVTO. And at page 12:

> A: I just want all this to be over. Trying to do what I can you know.

[12] At page 11 there is a discussion about going to Victim Services and seeing Tara, whom she had seen before.

[13] At page 8:

> A: And this is gonna to screw it all up. I've been trying to hard to get him back. This is gonna screw everything up.

And there she was talking about her son, Codee.

[14] So I am satisfied that she was aware of certainly some, if not all, of the potential consequences to making this statement.

[15] With regard to another aspect that was raised in para. 39, the motive to lie, well, obviously, she was a person in great distress at the time and undoubtedly could well be seen as being angry towards the accused, but I do note that there was no time here to concoct or fabricate a story. What happened here happened quickly. Once the police were called by Serena, the accused left quickly and the police and Serena arrived quickly.

[16] The fourth concern that was mentioned here in para. 39 has to do with the condition of the witness, and it is clear that the witness in this case, Ms. Mullin, had been drinking, but it is my view that she was not intoxicated. She had an operating mind; you can tell that from the way the answers were given.

[17] With regard to the defence assertion that her speech may have been slurred and that she was not responding as she should have, Mr. Coffin raised very specifically instances from pages 9, 10, 11 and 13. In listening to the CD, I am not really satisfied that her speech was particularly slurred, nor am I satisfied in any respects that she did not have an operating mind. For the most part, she responded reasonably intelligently and relevantly to the questions that were put to her. The fact that her mood changed throughout the giving of the statement is not surprising, given what she had been through. It was everything from amusement to crying to being normal. That is not surprising, given the circumstances at the time.

[18] If we move on, then, from para. 39 and that analysis, we would go, then, to para. 40:

> In addition, an issue may arise as to whether the prior statement is fully and accurately reproduced.

I have already commented on that. I would say that I do not see that as a problem here, despite the fact that the machine did malfunction a few times. As indicated before, in the judgment, there was nothing material omitted, either accidentally or otherwise.

[19] Paragraph 41:

> As one may readily appreciate, however, the degree of difficulty…may be substantially alleviated in cases where the declarant is available for cross-examination on the earlier statement, particularly where an accurate record of the statement can be tendered in evidence.

And that is certainly the case here. We have an accurate statement; we have the availability of the witness, Ms. Mullin, who in fact has already testified at some great length.

[20] Next, if we move to para. 45:

> … these cases provide guidance -- not fixed categories -- on the application of the principled case-by-case approach by identifying the relevant concerns and the factors to be considered in determining admissibility.

[21] Para. 47 is important. It talks about trial fairness:

> The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms: Dersch* v. *Canada (Attorney General),* [1990] 2 S.C.R. 1505. The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial: *R.* v. *Rose,* [1998] 3. S.C.R. 262.

And in para. 48:

> 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.

And at para. 49:

> The criterion of necessity is founded on society's interest in getting at the truth….The criterion of reliability is about ensuring the integrity of the trial process….In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its…probative value is outweighed by its prejudicial effect.

[22] If we move on to para. 63, there is an important discussion there about reliability:

> Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested…. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.

And in para. 66:

> As we shall see, the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes.

In para. 78:

> As we know, the Court ultimately ruled in *B. (K.G.)*, and the principle is now well established that necessity is not to be equated with the unavailability of the witness. The necessity

> criterion is given a flexible definition. In some cases, such as in *B. (K.G.)* where a witness recants an earlier statement, necessity is based on the unavailability of the *testimony*, not the witness.

[23] In para. 87 talks about investigatory misconduct:

> Again here, Lamer C.J. added the following proviso (at para. 49):
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> > I would also highlight here the proviso I specified in *B. (K.G.)* that the trial judge must be satisfied on the balance of probabilities that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.

And at para. 93:

> …the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers.

[24] As to how the case of *Khelawon* has been used by trial courts, I would just quote a decision from my home Province of Newfoundland. This is the case of *R.* v. *C.R. and C.H.*, a November 9, 2007 decision of the Newfoundland and Labrador Provincial Court. Without belabouring the point, the Court would draw counsel's reference to paras. 16, 25, 26, 31, and 33. In that case, the judge ruled that there was certainly a necessity but he was not satisfied, on the balance of probabilities, that there was reliability and hence the statement given to the police by a young person was excluded from evidence.

[25] Now as we look further into the details of this particular case with these principles in mind, I would state again that there was really little, or no opportunity, for Ms. Mullin to concoct or fabricate. This was a very quick response by the police. The statements to Constable MacQuarrie and the statement to Serena Willis both indicate that she was hit by the accused. Also, we have a statement to Constable Horbachewsky that she could not hold him off any more. These provide some support to the statement that was given by Ms. Mullin to the police. There was no investigatory misconduct here.

[26] The Court rules that there were no promises, there were no threats, there was no extensive leading or suggesting things to the witness. Furthermore, I feel that the physical symptoms of injury were consistent with what was contained in the statement to the police. As to whether they were more consistent with the evidence that she gave under oath involving horse-play and hosing and gardening, and whether the appearance of Ms. Mullin was more consistent with what was stated in the statutory declaration of two weeks after the event is for the ultimate trier of fact, and not for the determination of the admissibility.

[27] Furthermore, the Court rules that Ms. Mullin was well aware of her surroundings. She was in her own house, and the police were there, and her friend. I have already commented on knowing of the consequences and to that I would add the statement that she made to Serena Willis. Serena Willis testified, “I asked, “Shall I call the police?” And Pamala Mullin replied, “Yes,” she said. I want to stop hurting.””

[28] As indicated before, I feel that she knew the importance of telling the truth. I have also commented on the fact of the alcohol being in her body but that she was not intoxicated. The Court notes the comments made by defence counsel as to the police honing in on impaired drivers and looking for signs of impairment, and in this particular case, responding to an alleged victim of domestic assault and not focussing on the impairment or signs of it. Overall, the police are trained observers, period, and I am sure that if she were intoxicated to the degree that she was maintaining, the police would have observed that.

[29] As to Serena Willis' statement that she thought that Pamala was drunk, the Court feels that she felt that Pamala was drunk because of what she was saying and in an emotional sense she was saying things like, "Why can't he love me; why can't he be this, why can't he be that; why does this keep having to happen?" This, in my view, speaks more of an emotional impairment to a considerable and marked degree than it does to her being impaired by alcohol. Quite clearly, she did have alcohol in her body, but my conclusion is that she was not intoxicated and she had an operating mind.

[30] Pamala's assertions that she does not remember talking to the police and to not recognizing her voice on the CD, because she was so drunk, and her maintaining that she was really talking about the previous incident from several months before, point out clearly the necessity of the statement going in for trial fairness and a reasonable effort at getting at the truth, and that answers the question of necessity. The question for reliability I have gone through in some detail.

[31] One thing I would add to that is her, that is, Pamala claiming that Serena Willis pestered her to the point of saying that she was hit by the accused is contrary to what Serena Willis says. Serena Willis appeared in the photo and, in her own testimony, as a comforting friend or, as stated in the statement, the "bestest" friend for 22 years or so. This certainly conjures up a different image than that of a wolverine. Certainly, Serena Willis meant well and was there as a comforting friend at the time.

[32] In conclusion, I will revisit para. 49 of *Khelawon*:

> In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its…probative value is outweighed by its prejudicial effect.

[33] In this particular case, the Court is satisfied that necessity and reliability have been proven on the balance of probabilities, and while I do have a residual discretion to exclude the hearsay evidence, I am not satisfied that the probative value is outweighed by the prejudicial effect. Consequently, the Court rules that this hearsay evidence is admissible and a lot of the points brought up by defence counsel would be well-considered and as the ultimate trier of fact on the weight to be given to the statement to the police and not on the admissibility itself.

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LUTHER T.C.J.