Citation: *R.* v. *Bradasch*, 2010 YKTC 1

Date: 20091214
Docket: 08-00672
Registry: Whitehorse

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

REGINA

v.

BRENT GARRY BRADASCH

Appearances:
Kevin Komosky — Counsel for Crown
Gordon Coffin — Counsel for Defence

RULING ON *VOIR DIRE*

[1] LUTHER T.C.J. (Oral): Brent Garry Bradasch is charged with committing an assault on Tahirih Schinkel causing bodily harm to her between the 4th and 5th of January 2009, here in Whitehorse, Yukon, contrary to s. 267(b) of the *Criminal Code*.

[2] It looks like the first appearance was in August, and it was explained in evidence how that came to be, that there was a warrant out for the arrest of the accused, which was executed in that month and he appeared in Court. The Crown proceeded by indictment. The accused elected trial by this Court on September 1st. A trial date was set for today. This is the first day that was set.

[3] The Crown sought an adjournment and the defence was adamantly opposed to the adjournment. Normally, the Court is quite understanding of the first request for a postponement, whether it be from the Crown or the defence, but in this particular situation, the Court was not of the view that a postponement should be granted. The Court was certainly not satisfied with reasons two and three put forward by the Crown and with regard to the first reason, it was determined that the witness Tina Joe, although in some physical discomfort, was going to be able to testify.

[4] If we take a look at the case of *HMTQ* v. *Van Puyenbroek*, 2005 CanLII 3367 (ON.S.C.) from the Ontario Superior Court of Justice, a decision of Mr. Justice Gordon from February of 2005, at paragraph 17, he talks about:

> Threshold reliability requires circumstances which provide sufficient guarantees of trustworthiness so as to afford the trier with a satisfactory basis for evaluating the truth of the statement.

And then, back at paragraph 12, a quote from *R.* v. *Nicholas* (2004), 182 C.C.C. (3d) 393 (Ont. C.A.), a case from 2004 of the Ontario Court of Appeal and, of course, the definition of *res gestae* set out in *R.* v. *Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.) and there, at page 207, said:

> A spontaneous statement made under the stress or pressure of a dramatic or startling act or event and relating to such an occasion may be admissible as an exception to the hearsay rule. The stress or pressure of the act or event must be such that the possibility of concoction or deception can be safely discounted. The statement need not be made strictly contemporaneous to the occurrence so long as the stress or pressure created by it is ongoing and the statement is made before there has been time to contrive and misrepresent. The admissibility of such statements is dependent on the possibility of concoction and fabrication. Where the

> spontaneity of the statement is clear and the danger of fabrication is remote, the evidence should be received.

And then if we also look at this case from the Ontario Superior Court, paragraphs 18 and 20:

> The ultimate reliability and the weight to be attached are reserved for considerations in the final verdict.
>
> As previously set out, right to cross-examine and observe demeanour are not of great significance since the accused has the right to call the witness and examine her.

[5] If we take a look at *R.* v. *Simpson*, [1999] N.W.T.J. No. 20, which was sitting as an appeal court hearing a summary conviction appeal, Mr. Justice Schuler, at paragraph 13, used the phrase “approximately contemporaneous.”

[6] At paragraph 13 of the *Van Puyenbroek, supra*, case, they are talking about a timeframe of about two to two and a half hours. Similarly here, we are dealing with a timeframe of two and a half hours or so from the alleged incident to the discussion with the neighbour. Of course, the time in question is not in any way conclusive of whether or not the test in *Khan*, *supra,* is made out because we have to take a look at all the circumstances, and here we are dealing with an alleged assault by a boyfriend, perhaps a live-in boyfriend, and we have the woman, Tahirih Schinkel, bolting out and coming over to her neighbour’s house and engaging in a discussion with the neighbour. Now, the Court is well aware of the fact that she was under the influence and that she was tired, but it can in no way be said that the neighbour, that is Ms. Joe, was in any way leading her or putting thoughts into her head. Ms. Joe was attempting to keep her awake until such time as the ambulance attendants got there.

[7] I am of the view that there was absolutely no possibility of concoction and fabrication. We had a woman who was in distress, goes to the sanctuary of her neighbour's house, engages in limited discussion with the neighbour, and there's no concoction, no deception. This is very straightforward. Clearly, it was a pressure-filled time for her and as the case said, the stress or pressure created by it is ongoing and the statement has been made before there has been time to contrive and misrepresent. The concluding sentence of that paragraph, "where the spontaneity of the statement is clear and the danger of fabrication is remote, the evidence should be received," that, to my mind, is straightforward and I have no hesitation whatsoever in accepting the evidence of the discussion with Tahirih Schinkel and Tina Joe as part of the *res gestae.*

[8] I do have some concerns, however, with the statement made to the police officer some time after 5:00 p.m. the same day. I have not seen a case where there was a 12-hour time limit, but as I already indicated in this ruling, time itself is not determinative. What we have to take into account here are the intervening factors: She was hospitalized for approximately seven hours; she had been put on medications; she was drifting in and out of consciousness during the afternoon. We have no idea who, if anyone at all, may have contacted her, other than medical personnel. Clearly, there were questions of a suggestive or leading nature put by the police officer; the police officer had no notes. I am satisfied that this does not qualify under the *res gestae* rule, nor under the principled approach.

[9] The police officer, Constable Hannigan, meant well, and, I believe, was truthful. However, she, in my view, mishandled the aspect of off-the-record. I do not feel that an off-the-record remark to a police officer by a witness would necessarily be inadmissible

in a *voir dire* or a trial, but I do believe that there should have been a specific mention of these details in the Crown brief and subject to disclosure. At the very least there should have been discussions with her superiors and the Crown attorney as to how to handle this delicate situation. Such was not the case, and while I do believe that the police officer meant well and was not misleading the Court, we are heading down a slippery slope if we go about admitting this sort of evidence in.

[10] The Court is not satisfied that it meets the test as set out in *Khan*, nor am I satisfied that it falls under the aspect of the principled approach.

[11] In summary, the evidence as between Tahirih Schinkel and Tina Joe is in. The evidence in that discussion with the police officer after five o'clock is out.

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LUTHER T.C.J.