

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

Regina

v.

Michael John Green

Appearances:
Kevin Komosky
Malcolm Campbell

Counsel for Crown
Counsel for Defence

RULING ON VOIR DIRE

Overview

[1] Michael Green has been charged with having assaulted Monique Martin (“Ms. Martin”) contrary to s. 266 of the *Criminal Code*.

[2] Crown counsel seeks to have admitted at trial statements from four witnesses they state were made to them by Ms. Martin.

[3] Ernest Martin and Wendy Martin testified about statements made by Ms. Martin to both of them while they were having a telephone conversation with her on May 17, 2009. The alleged assault occurred during this telephone conversation. The Crown seeks the admission of these statements as *res gestae* exceptions to the hearsay rule.

[4] Sharon Kerr was the nurse who provided medical assistance to Ms. Martin. She testified as to statements made to her by Ms. Martin about the alleged assault. These statements were made while Ms. Martin was receiving medical treatment.

[5] Cst. Faulkner received a statement from Ms. Martin that he recorded in writing.

[6] At the conclusion of the *voir dire* I ruled that the statement made to Cst. Faulkner was admissible under the principled exception to the hearsay rule, but that the remaining statements were inadmissible. These are the reasons for my ruling.

Evidence

Ernest Martin

[7] Mr. Martin testified that his sister, Ms. Martin, telephoned him at about 4:00 p.m. on May 17, 2009. She was calling from Janice Dubois' residence, which was located approximately 100 – 150 feet away from Ms. Martin's residence.

[8] His spouse, Wendy Martin, also was on the telephone call. Mr. Martin testified that Ms. Martin stated words to the effect of:

- "I think somebody's here, I think its Mike"
- "Mike came in"
- "he's kicking in the door"
- "don't punch me in my back"
- "stop pulling my hair"
- "get out of here"
- "leave me alone"

[9] Mr. Martin heard a phone drop, a scuffle, and a bang. He told Ms. Martin to "Get out of there". He did not hear any other voices. He stated that the entire incident lasted three to four minutes.

[10] He testified that he and Wendy Martin drove over to Ms. Dubois' house. On the way, they passed Ms. Martin and Mr. Green driving in Ms. Martin's car, although he didn't know who was driving. In cross-examination, he stated that he didn't know who else was with Ms. Martin, but that she was driving, as she would not let anyone else drive her car.

[11] Mr. Martin then drove back to his house and Ms. Martin showed up a few minutes later. About 25 minutes had passed from the phone call to Ms. Martin arriving at his residence.

[12] Upon her arrival, Ms. Martin appeared tired and breathless. He observed no injuries to her. Ms. Martin phoned the police from his residence and then left after about an hour.

Wendy Martin

[13] Wendy Martin's evidence was that the telephone call with Ms. Martin lasted about 30 seconds. She could not recall exactly what Ms. Martin said. She recalls Ms. Martin stating she was hiding out from Mike and that Mike was knocking on the doors and had kicked in the door. She stated that the phone dropped and went dead, after which she could not hear anymore. She testified as to hearing Ms. Martin say words to the effect of "Ow, ow, please stop, don't".

[14] She testified that she and Mr. Martin drove over to Ms. Dubois' place. Ms. Martin was outside in another neighbour's yard, a "Marianne". This was next door to Ms. Martin's residence, and across from Ms. Dubois' residence. Ms. Martin showed Wendy a cut on her elbow. Wendy cannot recall whether they left Ms. Martin there or whether they took Ms. Martin back to their residence. Regardless, Ms. Martin stayed at Wendy and Ernest Martin's residence for about a week afterwards.

[15] While talking to Ms. Martin at Marianne's place, Wendy Martin saw Mr. Green driving away from Ms. Martin's driveway in Ms. Martin's car. Mr. Green waved as he left. Wendy estimated that approximately 20 minutes passed from the time of the phone call from Ms. Martin, and she and Mr. Martin arriving at Marianne's house.

[16] Wendy Martin stated that Mr. Martin had phoned the police.

Sharon Kerr

[17] Sharon Kerr is the resident nurse at the Destruction Bay Health Centre. She testified that she met Ms. Martin at the Health Centre at approximately 2:40 p.m on May

17, 2009. She stated that Ms. Martin appeared a little dishevelled. She conducted an examination of Ms. Martin's head, trunk and buttock area. She observed the following injuries on Ms. Martin:

- swelling and redness in the middle of her forehead;
- redness at the end of her nose;
- a small abrasion on the inside of her upper left lip;
- bruising from her leg to her left shoulder joint
- swelling and tenderness to the front breastbone;
- bruising and redness from left armpit to hipbone across to lower abdomen.

These bruises were of different colourations. (In cross-examination Ms. Kerr stated that it was her opinion that some of the bruises were old);

- a large bruise and swelling between her left hip and ribs;
- tenderness in all areas over the left lower ribs;

[18] The examination of Ms. Martin was estimated as lasting between 45 minutes to an hour. Ms. Kerr made no mention of a cut on Ms. Martin's elbow and the photographs taken by Ms. Kerr of Ms. Martin did not show either of her elbows.

[19] Ms. Kerr testified that she could not remember exactly what words were stated by Ms. Martin, but she would usually ask a patient what happened. She then testified that Ms. Martin told her that Mr. Green had punched her in the forehead, put his hand on her nose and the left side of her jaw, he punched her left shoulder and flank, and that she had pain to her buttocks.

[20] Ms. Kerr testified that she had received a telephone call earlier from a Sharon Buyck about Ms. Martin being assaulted.

[21] Ms. Kerr testified that Ms. Martin's injuries were consistent with her testimony as to what Ms. Martin told her had happened. She also testified that the injuries were consistent with Ms. Martin falling out of a moving car.

Cst. Faulkner

[22] Cst. Faulkner testified that the telephone call made by Mr. Martin reporting the incident was received by the RCMP between 11:00 and 11:30 a.m. on May 17, 2009. He and Cst. McCarty left Haines Junction approximately 15 minutes after receiving the call, and arrived in Burwash Landing approximately 1 1/4 hours later.

[23] After an initial patrol searching for Mr. Green, they arrived at Mr. Martin's residence. Cst. Faulkner spoke to Ms. Martin, who appeared to be calm, rational, sober and articulate. She lifted her shirt and he observed noticeable bruising of many colourations on her left side. Ms. Martin advised him that Mr. Green had assaulted her. He and Cst. McCarty took Ms. Martin to the Health Centre where they stayed for approximately 20 – 30 minutes.

[24] After returning from the Health Centre, he, Cst. McCarty and Ms. Martin went to the building used by the RCMP as an office, where a statement was provided by Ms. Martin.

[25] The statement was taken essentially verbatim with only non-essential grammatical omissions. Ms. Martin was very cooperative during the taking of the statement.

[26] Cst. Faulkner testified that he made it clear to Ms. Martin that it was important that she tell the truth. This was his usual practice when taking a statement. He did not remember his exact words to Ms. Martin on this point.

[27] After the statement was completed, Ms. Martin reviewed it diligently, making one minor typographical correction which both parties initialled, and signed the statement.

[28] Cst. Faulkner testified that he went to Ms. Dubois' residence. While there he did not notice whether the door had been kicked in. He did not observe any signs of a violent struggle in the residence.

Analysis

Statements to Wendy and Ernest Martin

[29] The general requirement for the admission of a statement under the *res gestae* exception to the hearsay rule is that the statement be spontaneous and in circumstances in which the risk of concoction or distortion is minimal.

[30] In this case, the statements reported to have been made by Ms. Martin were clearly contemporaneous to the event from which the allegation of assault arose. My difficulty, however, is that Mr. Martin and Wendy Martin's recollection of the words purported to have been uttered by Ms. Martin are considerably different, although they were both situated so as to be equally able to have heard what Ms. Martin was saying. Mr. Martin recalls a number of specific phrases, none of which Wendy Martin testified to having heard. Wendy Martin's testimony was much more limited with respect to what she heard.

[31] Based upon a consideration of the whole of the evidence, I have concerns about the recollection of both of these witnesses. There are a number of contradictions in their evidence right from the phone call through to the circumstances in which Ms. Martin found herself staying at their residence.

[32] I also find that Mr. Martin provided his testimony in somewhat of an "off-the-cuff" manner. I say this without intending to be being critical of him, but rather to contrast his testimony to that of a witness who is being careful and thoughtful with respect to all the details of the events that the witness is testifying to.

[33] As such, while the telephone conversation took place in circumstances in which the requirements for the application of the *res gestae* exception to the hearsay rule were met, I find that I am unable to have any confidence that I have before me a reliable recollection of what was actually said. Therefore, I am not allowing into evidence at trial the testimony of Mr. Martin and Wendy Martin regarding what Ms. Martin stated to them on the phone.

[34] That said, I will allow into evidence at trial the fact that there was a disturbance heard by Mr. Martin and Wendy Martin, while Ms. Martin was talking with them on the phone, that caused them to be concerned enough to drive over to Ms. Dubois' residence.

Statements to Ms. Kerr and Cst. Faulkner

Principled Exception to the Hearsay Rule

Burden

[35] In order for hearsay evidence to be admissible under the principled approach to hearsay exceptions, the Crown bears the burden of proof on a balance of probabilities to show that this evidence is both necessary and reliable.

Threshold Relevance

[36] The first requirement for the admission of hearsay evidence under the principled exception to the hearsay rule is that the evidence be relevant to a point in issue and capable of assisting the trier of fact in reaching a decision on this issue. This is known as threshold relevance. In this case, the evidence of what Ms. Martin is purported to have stated to Ms. Kerr and Ms. Martin's statement to Cst. Faulkner surpass the level of threshold relevance.

[37] Next is a determination as to whether the twin criteria of necessity and reliability are met.

Necessity

[38] A flexible approach should be taken when considering whether an out-of-court statement is necessary.

[39] In this case, Ms. Martin failed to attend court in response to a subpoena that had been served on her. I denied the Crown's request for an adjournment of the trial and for the issuance of a witness warrant. My decision was based upon my conclusion that Ms.

Martin had deliberately avoided court on this occasion in order to avoid testifying, and that, even if her attendance at trial on a later date was secured through the execution of a warrant, it would be unlikely that she would provide credible and reliable evidence in any event. In part, this determination was based upon Ms. Martin's evidence at a recent assault trial before me in which she was the complainant and Mr. Green was the alleged assailant. In that case Crown counsel invited me to dismiss the charges after Ms. Martin testified.

[40] Defence counsel argues that the written statement of Ms. Martin to Cst. Faulkner and the statements she is purported to have made to Ms. Kerr are not necessary. Defence counsel relies upon the presence of an eyewitness to the alleged incident, Mark Profeit, who was interviewed by the RCMP. No statement has been obtained from Mr. Profeit and he was not subpoenaed by Crown counsel to be a witness at the trial. Defence counsel's position is that the evidence of what happened could have been obtained from Mr. Profeit, therefore the evidence of Ms. Martin as contained in the statement is not necessary.

[41] With respect, I disagree. Necessity arises because of the unavailability of the evidence, not the unavailability of the witness, or the availability of another witness who can provide his or her version of events. While the other witness can perhaps provide a version of the events, that does not mean this version replaces or can be substituted for the version of events of the unavailable witness.

[42] As such, I find that it is necessary in order to obtain the evidence of Ms. Martin that the statement she made to Cst. Faulkner be admitted into evidence at trial. I will comment on the necessity of admission into evidence at trial the alleged statements made by Ms. Martin to Ms. Kerr later in this decision.

Reliability

[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.

[47] Ms. Martin's statement was made within hours of the time of the alleged assault. It was made to an RCMP officer in the execution of his duty at the office used by the RCMP for such a purpose. Cst. Faulkner testified that Ms. Martin was cooperative and that she was not offered any inducements or promises, or subjected to any threats. Ms. Martin was not intoxicated at the time and was described by Cst. Faulkner at his first meeting with her that day as being calm, rational, sober and articulate. Her statement clearly appears to have been voluntarily given.

[48] Cst. Faulkner testified that he impressed upon Ms. Martin the importance of telling the truth. The statement was recorded in writing verbatim, with the exception of minor grammatical changes. Ms. Martin carefully reviewed the statement and initialled each page, making one minor correction to the statement. The questions were not leading and the statement is internally consistent.

[49] Ms. Martin's description of what occurred is consistent with some of the injuries she was observed to have. It is also somewhat consistent with portions, albeit not the entirety, of the evidence of Ernest and Wendy Martin.

[50] I find upon consideration of the circumstances surrounding the taking of the statement, notwithstanding the absence of other factors, such as the administering of an oath, video and audio taping of the statement, or the availability of Ms. Martin for cross-examination, that the statement meets the criteria of threshold reliability and can be admitted into evidence for the truth of its contents at trial.

[51] This leaves the statements alleged to have been made to Ms. Kerr by Ms. Martin. Firstly, given my ruling on the admissibility of the statement made by Ms. Martin to Cst. Faulkner, it cannot now be said that the statements made to Ms. Kerr are necessary.

[52] In any event, I find that these statements are also insufficiently reliable to be allowed into the trial. Ms. Kerr's primary responsibility was to treat Ms. Martin's medical injuries, not to investigate the possible commission of a criminal offence. Ms. Kerr's recollection of exactly what was said to her by Ms. Martin does not convince me that she is able to provide the court with an accurate recounting of what she heard.

[53] In addition, given that Ms. Kerr testified she had been told earlier by another individual that Mr. Green had assaulted Ms. Martin, I cannot rule out that some of what Ms. Kerr states she heard Ms. Martin say may have been influenced by the earlier information she had received.

[54] These are simply a few of the factors which weigh against the admission of the statements Ms. Kerr testified were made to her by Ms. Martin. This is not at all a criticism of Ms. Kerr's actions or a rejection of her testimony. She treated Ms. Martin's

injuries as she was required to do. It was not her job to ensure that she received a clear version of events from Ms. Martin in order to further a potential criminal investigation.

Conclusion

[55] Therefore, only the statement made by Ms. Martin to Cst. Faulkner is admitted into the trial. All of the remaining evidence from the voir dire, after excluding the testimony of the remaining witnesses about what Ms. Martin told them, is also admitted into the trial. As stated earlier, the fact that Ms. Martin was on the telephone with Ernest and Wendy Martin when there was a disturbance in the residence of Ms. Dubois, which caused Ernest and Wendy Martin to drive over to check that everything was okay, is also admitted into evidence.

Cozens T.C.J.