
CANADA / JUDGMENT

R. v. Balbar

2014 BCSC 2628

COURT

Supreme Court of British Columbia

DECIDED

22 October 2014

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2014 BCSC 2628 R. v. Balbar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Balbar,

2014 BCSC 2628

Date: 20141022

Docket: 84027-9

Registry: Kamloops

Regina

v.

Robert Donald Balbar

Ban of Publication made pursuant to s. 486.5(1) and s. 486.5(9) regarding any information identifying police undercover operators

Ban of Publication made pursuant to s. 648(1) of voir dire evidence heard in the absence of the jury

Before: The Honourable Madam Justice Arnold-Bailey

Oral Ruling on Voir Dire #2

Counsel for Crown:

Iain Currie

Kathryn E. Bouchard

Counsel for Defence:

Joseph J. Blazina

Place and Date of Hearing:

Kamloops, B.C.

October 22, 2014

Place and Date of Judgment:

Kamloops, B.C.

October 22, 2014

- [1] THE COURT: This is my oral ruling in relation to the recent voir dire. I reserve the right to edit it as I consider appropriate, but obviously the result will not change.
- [2] During the lengthy Mr. Big voir dire currently being held in this case, a voir dire was held to determine the admissibility of certain comments that the now deceased Heather Hamill apparently made to her close friend, C.I., in the summer of 2003. The Crown seeks the admission of these statements for their truth in the Mr. Big voir dire, based on the principled exception to the hearsay rule as articulated in *R. v. Khelawon*, 2006 SCC 57. The Crown also relies upon *R. v. Pasqualino*, 2008 ONCA 554.
- [3] The defence is opposed to the admission of this evidence on the basis that there are insufficient indicia of reliability.
- [4] Ms. C.I. testified on September 9, 2014, which was the second day of the Mr. Big voir dire. I will provide a summary of C.I.'s evidence on this voir dire.
- [5] C.I. knew Heather Hamill well, as they had been best friends since the age of 15. She also knew Mr. Balbar through other friends since they were young and from the streets.
- [6] During the summer of 2003, C.I. saw Ms. Hamill quite often and sometimes daily. Ms. Hamill was living with Mr. Balbar in his apartment at the Oak Street Apartments in Kamloops. C.I. said she never saw either of them being violent to the other. However, according to C.I., Ms. Hamill did tell C.I. that Ms. Hamill and Mr. Balbar had "scuffles". She told C.I. that Mr. Balbar grabbed her arms causing bruises, and he stole her false tooth from her and hid it. C.I. testified that she saw bruises on Ms. Hamill's arms in the summer of 2003, but she did not know exactly when. The bruises were on both of Ms. Hamill's forearms, and they looked like Ms. Hamill had been grabbed as they were finger-like in shape. C.I. also said that Ms. Hamill told her that she gave Smiley, referring to Mr. Balbar, a black eye. C.I. said that Ms. Hamill did not tell her anything else about that incident, and that she did not see Mr. Balbar with a black eye that summer. C.I. also said that Ms. Hamill did not tell her about any other scuffles that she and Mr. Balbar had that summer.

- [7] On cross-examination, part of C.I.'s prior statement to the police was put to her. She agreed she had reviewed her statement before coming to court and that her statement was videotaped. She could not recall whether she was sworn to tell the truth. She also agreed that she had testified at the prior trial in this case and then swore to tell the truth.
- [8] In her statement to the police C.I. had stated that Ms. Hamill was a heavy drug user and that she was using crystal meth and crack cocaine. At that time C.I. said that she was not sure whether Ms. Hamill was using methadone, but she did consume alcohol. Continuing in cross-examination, C.I. said that Ms. Hamill was normal when she was high, but that alcohol affected her most. She agreed that Ms. Hamill would get mouthy and verbally aggressive when drinking. She also indicated that as of the summer of 2003, Ms. Hamill's drug use had escalated, that she had lost weight, would sleep all day and then go out to work, referring to Ms. Hamill's work in the sex trade as a prostitute.
- [9] C.I. agreed that Ms. Hamill was in trouble that summer too, and that she had a reputation that she would steal from people. C.I. agreed that Ms. Hamill was in trouble for stealing credit cards. She said that she thought Ms. Hamill might steal from her, but that never stopped her from opening the door to her friend. C.I. agreed that unfortunately Ms. Hamill was not trustworthy.
- [10] C.I. agreed that she did not know Ms. Hamill and Mr. Balbar to be violent with each other, insofar as they presented as a couple that got along. C.I. knew that a man named Dennis Dam was upset with Ms. Hamill. She said that if there were others she did not know about them. C.I. indicated that Ms. Hamill was working the Tranquille Stroll, which was risky, and agreed that people can get hurt. In re-examination, C.I. confirmed that Ms. Hamill referred to getting the bruises that C.I. saw in a scuffle with Smiley, referring to Mr. Balbar, and that Ms. Hamill said that she had given Mr. Balbar a black eye.
- [11] This summarizes the evidence for the Crown on this voir dire. The defence did not call evidence.
- [12] Crown submits that the Court should admit the statements made by Ms. Hamill contained in the evidence of C.I., as these statements were made by Ms. Hamill to her long-time and close friend, C.I., and that the criterion of necessity is clearly met by virtue of Ms. Hamill's death. The Crown further submits that the statements as related by C.I. are sufficiently reliable to be admitted for the truth of their contents, as the bruises Ms. Hamill had on her arms were seen by C.I. and contribute to their overall reliability. Furthermore, C.I. was cross-examined about what she saw and what Ms. Hamill said to her, and C.I.'s testimony was unshaken on these matters.
- [13] The defence takes no issue with the criterion of necessity, but defence counsel submits that this evidence is insufficiently reliable to make the threshold test for admission for the truth of its contents. He reminded the court that this type of evidence is presumptively inadmissible, and that the evidence at issue is really inadmissible evidence of bad character.

[14] Turning briefly to several portions of the guiding authorities, I note the comments of Chief Justice Lamer, as he then was, in *R. v. Smith*, [1992] 2 S.C.R. 915 as referred to at para. 70 of *Khelawon*:

70 After ruling that the state of mind, or "present intentions" exception did not apply to the phone calls, Lamer C.J. went on to elaborate on and then apply the approach outlined in *Khan*. After quoting extensively from *Wigmore* on the underlying rationale for the hearsay rule and its exceptions, he elaborated on the reliability prong of the principled analysis and stated as follows (at p. 933):

If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established.

[Emphasis added in the original.]

[15] I also note Chief Justice Lamer's comments in *R. v. Hawkins*, [1996] 3 S.C.R. 1043 as referred to at para. 90 of the *Khelawon* decision:

90 After determining that the necessity criterion was met, Lamer C.J. and Iacobucci J. (Gonthier and Cory JJ. concurring) addressed reliability. In the circumstances of this case, it could hardly be said that the complainant's testimony was inherently trustworthy. She had given contradictory versions, all under oath. Rather, the Court looked for the presence of a satisfactory basis for evaluating the truth of the statement, stating as follows, at para. 75:

The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact.

[Emphasis removed from the original.]

[16] I will now turn to the present case to consider the indicia of reliability. In essence, they are that Ms. Hamill made these comments about having scuffles with Mr. Balbar to her long-time and good friend, C.I.; one scuffle in particular when he had hid her false tooth and grabbed her arms, bruising them, and that she had bruises on her arms that appeared to C.I. to be consistent with being grabbed with someone's fingers.

- [17] There is no clear indication of when their conversation took place, what the surrounding conversation was, or when this particular scuffle was to have occurred. Details are scant. If there was such a scuffle between Mr. Balbar and Ms. Hamill, did it occur in jest or was Mr. Balbar intent on hurting Ms. Hamill? There is no reliable evidence either way, and Ms. Hamill is not available for cross-examination.
- [18] Around the time the comments were made Ms. Hamill had a serious drug habit and was working the Tranquille Stroll in Kamloops in the sex trade. She was seriously drug addicted, according to her friend, and abusing various substances, including, meth, cocaine and also alcohol. Her good friend C.I. considered her to be untrustworthy but still kept her door open to her.
- [19] There are a number of reasons that Ms. Hamill may have been less than truthful in talking to C.I. about a scuffle with Smiley that apparently resulted in the bruises. In my view, it is just as likely in my view that Ms. Hamill may have sought to downplay the risks she faced working in the sex trade to her close friend, who was likely concerned about her overall welfare, and it may have been face-saving for Ms. Hamill to attribute the bruises to Mr. Balbar as opposed to the johns that she may have encountered in the sex trade. Mr. Balbar may indeed have taken her false tooth and hid it on her, and they may have scuffled over that. However, Ms. Hamill's memory of what happened to her and how she got the bruises may also have been compromised by her active drug addiction, including her consumption of meth and cocaine. C.I. did not see evidence of the black eye that Mr. Balbar apparently received in the same scuffle, and this was not explored.
- [20] Were Ms. Hamill's bruises really related to the scuffle with Mr. Balbar? The Court will never know. There is simply an insufficient context in which to assess this evidence, and a number of good reasons why what Ms. Hamill said to C.I. may be untrue or inaccurate.
- [21] In my view this case is clearly distinguishable from Pasqualino insofar as in that case there was a great deal of evidence from multiple sources to permit the judge to come to a different conclusion in relation to some of the impugned evidence. In the present case, the evidence does not contain sufficient indicia of reliability so as to provide a satisfactory basis for evaluating its truth, and therefore for these reasons I find that it is not admissible.

"Arnold-Bailey J."

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