

CANADA / JUDGMENT

R. v. Bottomley

2022 BCSC 2047

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2047 R. v. Bottomley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bottomley,

2022 BCSC 2047

Date: 20221123

Docket: X083239

Registry: New Westminster

Rex

v.

Jordan Robert James Bottomley and Munroop Singh Hayer

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Before: The Honourable Madam Justice Devlin

Reasons for Judgment re: Crown Motion for Directions re: Admissibility of Ante Mortem Statements

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Place and Dates of Hearing:

New Westminster, B.C.

November 17, 18, 2022

Place and Date of Ruling given to Parties with Reasons to Follow:

New Westminster, B.C.

November 21, 2022

Place and Date of Judgment:

New Westminster, B.C.

November 23, 2022

Introduction

- [1] On November 11, 2019, Andrew Baldwin was stabbed to death inside a residence in Surrey, BC. Munroop Hayer, Jordan Bottomley, and Jagpal Hothi are charged with the first-degree murder of Mr. Baldwin. A fourth accused, Jasman Basran, is charged with being an accessory after the fact. To date, several pre-trial applications have been heard in this matter. More are scheduled in the months leading up to the jury trial scheduled to commence in April 2023.
- [2] The Crown has applied for an order admitting ante mortem statements of Mr. Baldwin, his brother Keith Baldwin, and his friend John Foran. The hearing to determine the admissibility of these statements is scheduled to commence on November 28, 2022. On this application, the Crown seeks directions as to the format of the admissibility hearing. For the purpose of the application, I will refer to the statements as ante mortem statements. However, as there is significant overlap between the ante mortem statements and the Crown's proposed discreditable conduct evidence, my findings will apply to both.

- [3] The Crown intends to rely on a comprehensive written record consisting of transcripts of and notes concerning the various statements provided by nine proposed witnesses. Counsel for Mr. Hayer and Mr. Bottomley submit it is necessary to hear oral evidence, including cross-examination of the proposed witnesses, to determine the threshold reliability of the statements. Neither Mr. Hothi nor Mr. Basran participated in this application.
- [4] On November 21, 2022, I advised the parties of my decision on this matter, with reasons to follow. These are my reasons.

The Proposed Evidence

- [5] The Crown seeks to rely on a written record consisting of a total of 27 interviews of nine proposed witnesses, as well as one interview of the deceased Mr. Foran.[1] The majority of these interviews were recorded, and the Crown seeks to rely on the content of the interview transcripts. For those interviews that were not recorded, the Crown has included the notes of police officers who conducted the interview. In addition, five of the witnesses also provided K.G.B. statements. Since the prosecution was commenced by direct indictment there are no preliminary inquiry transcripts for any of the proposed witnesses. The will-says and statements filed in support of the application include the following:

- Julie MacDonald: the mother of both Andrew and Keith Baldwin. She provided five statements between October 22, 2019 and September 18, 2022, including a K.G.B. statement on August 16, 2022.
- A.B.: an eyewitness of the murder of Andrew Baldwin, which occurred at A.B.'s residence. He was a close friend of Andrew Baldwin. He provided five statements between November 11, 2019 and July 27, 2022, when he gave a K.G.B. statement. He has a minor and dated criminal record.
- Daniel Griffiths: a close friend of Andrew Baldwin who worked with him in the drug trade. Mr. Griffiths provided three statements between January 25, 2020, and August 11, 2022, when he gave a K.G.B. statement. He has an extensive criminal record dating between 1983 and September 2022.
- Randeep Randhawa: a friend of Andrew Baldwin who worked with him in the drug trade. Mr. Randhawa provided an unrecorded statement on January 25, 2020 and a recorded statement on October 3, 2020.
- Nicole Wagner: Andrew Baldwin's ex-girlfriend and close friend. She provided four statements between November 13, 2019, and September 19, 2022, when she gave a K.G.B. statement.
- Yogendran Nair:[2] a friend, driver, and former landlord of Andrew Baldwin. He was also the former landlord for the accused Mr. Bottomley. He provided four statements between November 13, 2019, and August 4, 2022, when he gave a K.G.B. statement. He has a criminal record dating between 1984 and 2021.

- Doug Lema: a retired Abbotsford Police Department officer who was a friend of Keith Baldwin's. Keith spoke to Mr. Lema about Andrew Baldwin. Mr. Lema provided an unrecorded statement on October 24, 2019, and a recorded statement on March 16, 2022.
- Jason Hambly: involved in the drug trade and associated with Andrew Baldwin. He provided one statement on September 18, 2022. He has an extensive criminal record dating from 2004 to July 2022.
- Jennifer Reid: a neighbour of A.B.'s and knew Andrew Baldwin. She provided one statement on November 12, 2019. She has a criminal record with four convictions between 1997 and 2010.

[6] At the admissibility hearing, in addition to the will-says and witness statements, the Crown also intends to rely on a large body of corroborative evidence. This evidence includes data extracted from electronic devices, phone records, court records, photographs, and cell tower data analysis.

Positions of the Parties

- [7] There is no dispute that the out of court statements made by the deceased that the Crown seeks to tender for the truth of their contents are hearsay and presumptively inadmissible. The presumption can only be displaced where the evidence satisfies the principled hearsay exception or a traditional hearsay exception. For instance, I anticipate that the Crown may seek to have some of the ante mortem statements admitted under the traditional present intention and state of mind hearsay exceptions. With respect to the principled exception, the party tendering the evidence must demonstrate on a balance of probabilities that the evidence meets the "twin criteria of necessity and threshold reliability": *R. v. Bradshaw*, 2017 SCC 35 [Bradshaw] at para. 23.
- [8] Given that the declarants are deceased, my task at the admissibility hearing will be primarily to determine the threshold reliability of the statements by assessing whether they are sufficiently reliable to overcome the specific hearsay dangers they present: *Bradshaw* at para. 32, referencing *R. v. Khelawon*, 2006 SCC 57 at para. 49. Such dangers can be overcome where there are adequate substitutes for testing the hearsay statements' truth and accuracy (i.e., procedural reliability) or sufficient circumstantial or evidentiary guarantees that the statements are inherently trustworthy (i.e., substantive reliability): *Bradshaw* at para. 27.
- [9] Counsel for Mr. Hayer and Mr. Bottomley submit it is essential that the issue of threshold reliability be determined based on witness testimony. In support of their position they identify a number of factors that this Court should consider. First, they submit the declarants and narrators are Vetrovec witnesses and thus inherently unreliable. Second, they submit there are significant inconsistencies within the witness's own statements that can only be clarified through cross-examination. They submit this is particularly important since there was no preliminary inquiry and thus no opportunity for the defence to challenge the purported evidence. Third, the defence submits I should consider the possibility that the statements were "curated" by the Crown and police for the purposes of ensuring their

admissibility. The defence points to the fact that the Crown obtained K.G.B. statements from several of the witnesses but failed to elicit critical details regarding the context in which the ante mortem statements were made and failed to challenge the witnesses on their inconsistencies.

- [10] In sum, counsel for Mr. Hayer and Mr. Bottomley argued with reference to some portions of the written record that the statements lack detail regarding the circumstances in which the statements were made, the condition of the declarant and the narrator at the time, and other factors they say are essential to a determination of threshold reliability. They argued that without the opportunity to cross-examine the witnesses, this Court will be unable to consider the factors relevant to assessing the threshold reliability of the statements as identified in *R. v. Hindessa*, [2009] O.J. No. 3837, 2009 CanLII 48836 (C.J.) [*Hindessa*] at para. 14; see also *Bradshaw and R. v. Blackman*, 2008 SCC 37 [*Blackman*].
- [11] Conversely, the Crown submits that the court will be able to determine the threshold reliability of the ante mortem statements on the written record without the need to hear from the witnesses in a pre-trial voir dire. They do not agree with the defence characterization of both the declarants and witnesses as being inherently unreliable. While many of the witnesses are either drug users or engaged in the drug trade, the Crown emphasizes that the witnesses knew the deceased and are simply recounting what was said to them. Similarly, the Crown disputes the suggestion that the statements were crafted to ensure their admissibility. They say the statements were elicited in a manner that reflects an effort to obtain the best evidence possible. The Crown further submits that it is not unusual for witnesses to provide inconsistent statements to the police. As well, the Crown submits that requiring the witnesses to testify would complicate and lengthen the voir dire, and would cause unnecessary hardship for the witnesses, many of whom are vulnerable. Finally, the Crown says that the submissions filed on behalf of Mr. Hayer demonstrate that counsel are able to identify what they say are deficiencies in the record that go to the assessment of threshold reliability, such that the examination of the witnesses is not necessary.

Analysis

- [12] I begin with a discussion of the general principles that guide my analysis. The parties provided me with a number of authorities dealing with admissibility of hearsay, including *Bradshaw and Blackman*. They also provided me with a number of authorities dealing specifically with the admissibility of ante mortem or discreditable conduct statements, including: *R. v. Aragon*, 2022 ONCA 244 [*Aragon*]; *Hindessa*; *R. v. Bacon*, 2012 BCSC 1114 [*Bacon*]; *R. v. Sipes*, 2008 BCSC 1571; and *R. v. McGenn*, 2018 BCSC 753. Counsel, in their submissions, took me through these cases and several others. I have read and considered these cases, although I will not refer to them all in my discussion.
- [13] As discussed in *Bacon*, the court "has broad discretion to manage the trial process to ensure that it is both efficient and fair to the participants": at para. 11. This discretion extends to "deciding the manner in which a voir dire or pre-trial application will be conducted in order

to achieve these objectives": Bacon at para. 11, referencing *R. v. McLeod*, 2005 ABQB 876 at para. 9. In fact, there is longstanding discretion to require, where practicable, the expeditious presentation of evidence on a pre-trial motion: *R. v. Polimac*, [2006] O.J. No. 4757, 2006 CarswellOnt 7562 (C.J.) [Polimac] at para. 14, citing *R. v. Dietrich*, [1970] 3 O.R. 725, 1970 CanLII 377 (C.A.).

[14] More recently, in *Aragon* the Ontario Court of Appeal, referencing *R. v. Snow* (2004), 73 O.R. (3d) 40, 2004 CanLII 34547 (C.A.), noted that oral evidence is not per se required for hearings on the admissibility of extrinsic discreditable conduct evidence:

[38] Whether or not oral testimony is always required in voluntariness and Charter admissibility voir dire where the underlying facts are contested, this is not the case in extrinsic discreditable conduct admissibility voir dire. In *Snow*, a ground of appeal based on the refusal of the trial judge to require oral evidence in an extrinsic discreditable conduct admissibility voir dire was denied by this court as being without merit.

[Emphasis added.]

[15] The court in *Aragon* also provided trial judges some guidance on how to assess the need for viva voce evidence on an admissibility voir dire. Per the court:

[39] trial judges should take a functional approach to ensure that the record before them enables factual determinations required to determine admissibility to be fairly made, and they should disregard contested information that has been received that cannot fairly be assessed where it is important to do so.

[16] At issue in *Aragon* was the admissibility of two unsupported will-says the Crown tendered at the admissibility voir dire. Paciocco J.A. described the will-says as nothing more than a "wish-list of the testimony the Crown hoped that [the] witnesses would provide": *Aragon* at para. 41. The Crown provided no supporting materials for the proposed evidence of the witnesses, leading the court to characterize the will-says as "bald factual assertions": *Aragon* at para. 34.

[17] Unlike in *Aragon*, the Crown here does not seek to rely on bald assertions with respect to the ante mortem and discreditable conduct evidence. Instead, the Crown's proposed evidence is grounded in transcripts and notes taken from police interviews of its witnesses. It also relies on other corroborative evidence. The defence has not pointed to particular deficiencies in this record that would render parts of it unsupported in a way similar to the will-says in *Aragon*. Accordingly, none of the proposed ante mortem or discreditable conduct evidence can be characterized as 'bald assertions'.

[18] In *Blackman*, unlike here, the parties consented to proceeding on the admissibility voir dire without viva voce evidence from the narrator of the ante mortem statements: at para. 15. However, the case does provide the instructive proposition, among others, that, where the narrator of an ante mortem statement is available for cross-examination at trial, inconsistencies or other credibility concerns are generally best left to the trier of fact:

Blackman at paras. 50-51. The corollary of this holding is that, where the narrator of an ante mortem statement is available for examination at trial, the threshold reliability of the statement should not (generally) be affected by the absence of viva voce evidence on the voir dire, and thus the lack of cross-examination testing the narrator's credibility or consistency.

- [19] Finally, in Bacon arguments akin to those at bar were made before Bernard J. He concluded that witness testimony was not required to fully argue and fairly assess any of the factors that bear on the assessment of the probative value or prejudicial effect of the proposed evidence in that case: Bacon at para. 22. I am similarly not persuaded that cross-examination of the witnesses is required for counsel to challenge the threshold reliability of the Crown's tendered statements. In particular, I note the finding in Bacon--relevant to the defence submissions in this matter--that there is no merit to the suggestion that pre-trial applications can be used as a 'dry-run' of witness testimony to 'compensate' for the absence of a preliminary inquiry: at para. 24. In Bernard J.'s words, "[s]uch arguments wander far afield of the specific and limited purpose" of pre-trial applications "and disregard trial efficiency as a legitimate objective": Bacon at para. 24.
- [20] Ultimately, I agree with the Crown that the defence has demonstrated through their written and oral submissions that the written record provides them a sufficient foundation upon which to challenge the threshold admissibility of the statements. Despite submitting the record is deficient for the admissibility voir dire, to my mind the defence have in fact identified the possible issues in the record that would, if persuasive, support their arguments against the threshold reliability of the statements in this case. In other words, the deficiencies the defence points to are not such that they render the written record insufficient to hear the admissibility voir dire. Instead, they go to whether the Crown has established that the statements should be admitted.
- [21] Accordingly, I am not satisfied that the court should exercise its discretion to require the witnesses to testify, bearing in mind, among other things, the protracted nature of these proceedings, the particular vulnerability of the involved witnesses, and the need for courts, where practicable, to adopt an expeditious pre-trial process.

Conclusion

- [22] I direct that the Crown's application regarding the admissibility of ante mortem statements be argued on the written record.

"Devlin J."

- [1] Mr. Foran was a friend of Andrew Baldwin. He provided one recorded statement to police on January 10, 2020. He was intended as a possible Crown witness but died in December 2021.

- [2] I note that the spelling of Mr. Nair's name is inconsistent in the Crown's materials. For instance, the Crown's written submissions also provide the spelling "Yogendren", while the criminal record of Mr. Nair provided in the Crown's supplemental book of materials provides the spelling "Yougendran".
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