

CANADA / JUDGMENT

R. v. Cuthbert

2024 BCSC 2204

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cuthbert,

2024 BCSC 2204

Date: 20241118

Docket: 17211-4

Registry: Powell River

Rex

v.

Raymond Wade Cuthbert, Clinton Denny Heikel and Jason Dirk Simms

Before: The Honourable Justice Mayer

Oral Reasons for Judgment

Voir Dire No. 1 Re: Admissibility of the Statement of Tyrell Northrup

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Appearing as agent

(September 23-24, 2024)

D.M. Melville

(September 25-27, 2024)

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Place and Date of Trial/Hearing:

Powel River , B.C.

September 23-25, 2024

Place and Date of Judgment:

Powel River, B.C.

November 18, 2024

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Introduction

- [1] There are two related applications which are the subject of these voir dire reasons.
- [2] The first is the Crown application in which an order was sought admitting the warned statement of Tyrell Northrup made to Powel River RCMP on June 23, 2022. Mr. Northrup was interviewed concerning the circumstances of the alleged unlawful detention and robbery of Ms. Young and Mr. Haacke, assault of Mr. Haacke and aggravated assault and sexual assault of Ms. Young on June 4, 2022, in a shed located behind a Powell River homeless shelter. The defendants Mr. Cuthbert, Mr. Heikel and Mr. Simms oppose the admission of Mr. Northrup's statement for use by the Crown on the basis that it does not meet the test for admissibility

set out by the Supreme Court of Canada in *R. v. Bradshaw*, 2017 SCC 35.

- [3] In the second application, Mr. Heikel sought an order that he be entitled to rely upon Mr. Northrup's statement as exculpatory evidence in respect of his alleged guilt, on the basis that a relaxed standard of admissibility is applied in respect of exculpatory evidence.
- [4] On September 25, 2024, mid-trial, I ruled that Mr. Northrup's statement was not admissible as evidence for the Crown and on September 27, 2024, during closing argument, I ruled that the statement was not admissible for use by Mr. Heikel as exculpatory evidence - with reasons to follow. These are my reasons.

Evidence Called on Voir Dire 1

- [5] In the first phase of the voir dire the Crown called evidence from members of the Powell River RCMP involved in the arrest and interview of Mr. Northrup, Constable Jesse Hewitt and Constable Ronald Palmquist and from Ms. Young, video and a written transcript of Mr. Northrup's June 23, 2022 statement to police were tendered and marked as exhibits.
- [6] In the second phase of the voir dire, counsel for Mr. Heikel made submissions during closing argument, seeking to admit the statement for his benefit, as exculpatory evidence.

Legal Overview

- [7] Mr. Northrup died of a drug overdose before trial. Mr. Northrup's statement is an out of court statement sought to be admitted for the truth of its contents and is therefore hearsay and prima facie inadmissible. The Crown submits that the statement is admissible under the principled exception to the hearsay rule, being that admission of the statement is necessary and the statement is reliable: see *Bradshaw*, at para. 23.
- [8] As was set out in *Bradshaw* in determining admissibility of a hearsay statement the court's task includes assessing the statement threshold reliability. Threshold reliability is established when the hearsay statement is found to be sufficiently reliable to overcome the dangers in admitting it, which dangers include issues with the declarant's perception, narration, or sincerity. These dangers particularly arise when the declarant is not available for cross examination at trial - as is the case with Mr. Northrup - because their evidence can not be tested: *Bradshaw*, at para. 26.
- [9] Once the court has identified the specific dangers inherent in the statement sought to be admitted the court is to consider whether these dangers can be overcome by showing one of two things: the statement is procedurally reliable, that is, that there are adequate substitutes for the rigours of cross-examination; or, the statement is substantively reliable, that is, there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy: *Bradshaw*, at para. 27.

- [10] Procedural reliability and substantive reliability may work in tandem and are not mutually exclusive and factors relevant to one can complement the other: Bradshaw, at para. 32.

Analysis and Conclusion

- [11] Given that Mr. Northrup died before trial the requirement of necessity is met in this case and in fact, is conceded by the accused. As well, the subject matter of the statement, concerning who was present during the events in the shed on June 4, 2022, is clearly relevant.
- [12] The issue for both the Crown and Mr. Heikel is whether Mr. Northrup's statement has met the requirement for threshold reliability.
- [13] In this case, the hearsay dangers presented in the statement of Mr. Northrup concern his perception, memory, narration and his sincerity. Of particular concern is his sincerity, given his role as a suspect the offences at issue at the time of he was questioned by members of the Powell River RCMP. That is, whether Mr. Northrup had a motive lie to police to downplay his, or others' role in the events of June 4, 2022.

The Crown's Application

- [14] The Crown has the burden of proving, on a balance of probabilities, the threshold reliability of Mr. Northrup's statement, on procedural or substantive grounds or a combination of the two. The Crown submits that procedural steps taken during Mr. Northrup's interview partially establish threshold reliability. In addition, the Crown submits that the statement has been proven to be substantively reliable as a result of Ms. Young's evidence.
- [15] Substitutes for testing evidence absent cross-examination, which may establish procedural reliability, include video recording of a statement, the presence of an oath, and a warning about the consequences of lying. Generally, some form of cross-examination of the declarant, such as preliminary inquiry testimony from the declarant is required: Bradshaw, at para. 28.
- [16] Substantive reliability may be established if the statement is inherently trustworthy considering the circumstances in which the statement was made and the presence of corroborating evidence. Substantive reliability may be found when the circumstances under which a statement is taken substantially negate the possibility that the declarant was mistaken or untrustworthy: Bradshaw, at paras. 30 and 31.

Procedural Reliability

- [17] The Crown submits that procedural reliability is made out in this case although they do not argue that procedural reliability is sufficient on its own to demonstrate threshold reliability.

- [18] The Crown submits that Mr. Northrup's videotaped statement to the RCMP was comprehensive and clear and that although Mr. Northrup was not under oath, during his interview that police advised him of his rights, provided him with access to legal counsel and reminded him that anything he said could be used against him. The Crown submits that it was made clear to Mr. Northrup on more than one occasion during his interview that he was being questioned regarding a serious matter. The Crown submits that this makes the circumstances comparable to one in which a statement is taken under oath. Finally, the Crown submits, that a lack of cross-examination of a declarant does not make the statement inadmissible under the principled exception to the hearsay rule, relying the decision of *R. v. Naicker*, 2007 BCCA 608, at paras. 59-60.
- [19] The defendants concede that there is not a strong argument that Mr. Northrup's statement to the police was induced by, for example, the provision of threats or inducements - thereby impacting an assessment of the voluntariness of his statement and therefore its reliability. In my view, voluntariness is not at issue in these applications. I am satisfied that despite the initial unwillingness to discuss the events in the shed on June 4, 2022, as is apparent from a review of his videotaped interview, that Mr. Northrup voluntarily made his statement to Powell River RCMP.
- [20] Although one significant substitute for the truth-testing benefits of cross-examination is present in this case, being the fact that Mr. Northrup's interview was videotaped, I am not satisfied that a sufficient number of other procedural substitutes were present. I do not accept the Crown's submission that being advised of charter rights, provision of access to counsel or knowledge of the seriousness of the events alleged by Ms. Young and Mr. Haacke is a substitute for Mr. Northrup providing a sworn statement or testimony. The impact of Mr. Northrup lying to police during his interview was a possible obstruction charge and a negative finding on his credibility at trial. Lying in the context of his interview is not as significant as lying under oath- which would constitute perjury. In this case Mr. Northrup was not questioned at a preliminary inquiry and did not swear to tell the truth during his interview or was warned of the consequences of not doing so. Of course, given his death he did not testify at trial.

Substantive Reliability

- [21] Evidence of one accomplice against another is recognized to be potentially motivated by self interest and as a result should be treated with caution, absent corroborating evidence: *R. v. Charles*, 2024 SCC 29 at para. 68. As was set out in *Naicker*, the "inherent unreliability of the statement of an accomplice lies in the concern that an accomplice may seek to evade criminal responsibility by falsely blaming the other participant in a crime either to minimize his own involvement obtain more favourable treatment for himself". Nonetheless, simply because an individual is a possible accomplice, this does not automatically render them untrustworthy: *Naicker*, at para. 24.

- [22] In this case at the time of his interview by members of the Powell River RCMP on June 23, 2022, Mr. Northrup was considered a suspect in the unlawful confinement of Ms. Young and Mr. Haacke, and other offences including robbery, assault, and sexual assault.

As mentioned earlier, the Crown submits that Mr. Northrup's statement is corroborated by the testimony of Ms. Young in this voir dire. As was set out in Bradshaw, in determining whether corroborative evidence is of assistance a trial judge must identify the material aspects of the hearsay statement that are tendered for their truth, identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case, consider alternative explanations for the statement and determine whether the corroborative evidence negates any explanation for the statement other than truthfulness: Bradshaw, at para. 57.

- [23] During submissions the Crown broadly identified the specific material aspects of Mr. Northrup's statement, some 33 transcribed pages, on which it wished to rely. These include the following: the presence of the accused in the tent - that is identity; the injuries sustained by Ms. Young and Mr. Haacke observed by Mr. Northrup; and comments Mr. Northrup heard relating to sexual assault.
- [24] The Crown submits that the hearsay danger it submits is present in this case, sincerity, is effectively ruled out by the evidence of Ms. Young - which the Crown submits is almost entirely consistent with Mr. Northrup's statement.
- [25] In my view, the hearsay dangers present in this case, relevant to the material aspects of Mr. Northrup's statement identified by the Crown include both sincerity and accuracy.
- [26] It is clear that in his statement Mr. Northrup sought to minimize his role in, and knowledge concerning the events of June 4, 2022. His opening comment to police, after being told that serious accusations were being made by Ms. Young and Mr. Haacke was that "I didn't do anything". Initially when asked who was responsible for what happened in the shed he said "I'm not telling. I don't think you're going to help me let me out here." Near the end of his statement Mr. Northrup stated that "No actually Wade [Mr. Cuthbert] did it all " and "[y]eah. I fucking can't stand Wade. I hate that guy. He's a fucking goof to me" and that Mr. Cuthbert probably "put everything together" - which I take to mean the events which occurred in the shed. In my view, Mr. Northrup these statements indicate that Mr. Northrup was a reluctant witness and suggest that he had a motive to lie to police - to protect himself and to harm Mr. Cuthbert.
- [27] The Crown submits that Mr. Northrup identified the same people as Ms. Young as the individuals who entered the shed on June 4, 2022. Having reviewed his statement, I do not find this to be the case and find that the information he provided regarding identity was at times vague or evasive. I will explain why.
- [28] When he was initially asked whether he was present when something happened to Ms. Young and Mr. Haacke he said "I don't know". When he was first asked if the persons present included Mr. Heikel, Mr. Simms and Mr. Cuthbert, he told police that "I don't know about

Denny. I fuck I don't know who went up their first" and "I think there was only fucking two people that went up there first or something. I don't know. I was inside like you see in the video, okay?" Later in his statement when asked who was fighting with Mr. Haacke in the shed Mr. Northrup said "I think he [Mr. Cuthbert] was by himself" and later repeated that it was "[j]ust Shiloh [Mr. Haacke] and Wade [Mr. Cuthbert] fighting. Later he repeated that he didn't see anyone other than "them", I assume Mr. Cuthbert and Mr. Haacke, arguing and pushing each other at the beginning. Later he recalled someone else who he did not know being in the shed at this time.

- [29] Mr. Northrup initially told police that he only saw Mr. Cuthbert going through Ms. Young and Mr. Haacke's possessions, looking for drugs. Later he stated that someone else, who he did not know, was present. He also told police that Mr. Heikel and Mr. Simms were only present at the shed shortly before the shelter opened, which I assume is closer to 9:00 pm, and did not go inside the shed. He also told police that another individual, Lomax, was also present outside the shed at that time and was there until everyone left the shed area, including the accused, Mr. Haacke and Ms. Young . These aspects of Mr. Northrup's statement to police were both internally inconsistent, although not entirely, and not consistent with the testimony of Ms. Young .
- [30] With respect to who directed Mr. Haacke to conduct a cavity search of Ms. Young , Mr. Northrup told police that he was not present inside the shed but heard Mr. Cuthbert direct Mr. Haacke to do so. Mr. Northrup said he then walked away. He told police that it was just Mr. Cuthbert and "the other guy" who were present in the shed at this time. This portion of Mr. Northrup's statement is not consistent with the testimony of Ms. Young .
- [31] With respect to Mr. Northrup's ability to observe relevant events inside the shed, Mr. Northrup told police that he was at the shed when Mr. Cuthbert first went inside the shed, sometime around 4:45 pm, and then went for a drive around 6:30 or 7:00 pm and then came back at dark - which according to other evidence was close to 9:00 pm. That is, Mr. Northrup was not present at the shed for approximately 2.5 hours.
- [32] There are other significant differences between the statement made to police by Mr. Northrup and Ms. Young's testimony at trial. Mr. Northrup did not tell police, as Ms. Young had testified, that he took the drugs obtained from her purse by the accused. Although Mr. Northrup's statement indicates that another unidentified individual was present in the shed Ms. Young did not identify this other person during her testimony at trial. In addition, different than Mr. Northrup's statement, Ms. Young testified that Lomax came into the shed approximately two-thirds of the way through her time there, after her arm was broken and that the accused would not let him leave until just before the cavity search was conducted.

- [33] In my view, Mr. Northrup's statement is not, as the Crown submits substantially similar to the testimony of Ms. Young. It is materially different in some respects and vague in others - especially concerning the presence of the accused at various times. As a result does not assist in overriding the hesitancy of the Court to admitting his statement, the statement of an accomplice, in the absence of cross-examination.
- [34] As well, with respect to truthfulness, as I said earlier, Mr. Northrup's statement suggests strongly that he sought to minimize his role in the events inside the shed on June 4, 2022. He admitted that he did not like Mr. Cuthbert and in my view, it is possible that in his statement he sought to deflect any responsibility for the events which took place to Mr. Cuthbert from him, and perhaps Mr. Heikel and Mr. Simms in order to further buttress his statement that he was not involved in events inside the shed.
- [35] With respect to the accuracy of Mr. Northrup's statements his evidence concerning who was present inside the shed on June 4, 2022 was inconsistent. He initially told police that only Mr. Cuthbert was present and later stated that an unidentified male was present. I again note as well his evidence that he was not present at the shed for approximately 2.5 hours.
- [36] Ultimately, I am not satisfied that the Crown has proven on a balance of probabilities, that Mr. Northrup's statement is either procedurally or substantively reliable. The Crown's application to admit the statement of Mr. Northrup is dismissed.

Mr. Heikel's Application

- [37] As set out earlier, Mr. Heikel seeks to admit Mr. Northrup's statement as evidence on the basis that it contains exculpatory evidence with respect to the charges against him. In particular he seeks to rely on portions of Mr. Northrup's statement that Mr. Heikel was not inside the shed when the offences at issue occurred.
- [38] He submits that a relaxed standard is to be applied in whether to admit the hearsay statement of a co-accused containing exculpatory evidence, to avoid a miscarriage of justice, relying on the decision of the Ontario Court of Appeal in *R. v. Srun*, 2019 ONCA 453 at para. 114.
- [39] As was set out in *Srun* the accused who seeks to rely on a co-accused's out of court statement must establish admissibility under the principled exception to the hearsay rule: *Srun*, at para. 122 referring to *R. v. Waite*, 2014 SCC 17, at para. 4. In this case this means that Mr. Heikel must demonstrate necessity and threshold reliability on either procedural or substantive grounds and failing this, this Court is only able to admit the statement to avoid a miscarriage of justice: *Srun*, at para. 129.
- [40] I have already explained that procedural reliability is not made out in respect of Mr. Northrup's statement.

- [41] With respect to substantive reliability, again as I have already said, the accuracy of Mr. Northrup's statement is questionable. He stated at times during his statement that he did not know who was present inside the shed at various times. Further he stated that he had left the area of the shed for approximately two hours.
- [42] More importantly, there is a significant risk that Mr. Northrup lied about Mr. Heikel and Mr. Simms being outside the shed with him in order to minimize his role in the events which took place inside the shed. As set out at para. 18 of *R. v. Genaille and Richard*, 2022 MBPC 25: Motive to fabricate is also a factor to be considered at the threshold admissibility stage (*R. v. Hall*, 2018 MBCA 122 at para 88 citing *R. v. Blackman*, 2008 SCC 37 at para 42-43). A pre-existing relationship may present a motive to fabricate in certain circumstances (see *R. v. Merz*, 1999 CanLII 1647 (ON CA), [1999] O.J. No. 4309 (leave to appeal S.C.C. dismissed October 5, 2000) and *R. v. Czibulka*, (2004) 2004 CanLII 22985 (ON CA), 189 C.C.C. (3d) 199 at paras 35-54).
- [43] In my view, this factor, that is Mr. Northrup's possible motive to fabricate, militates against admissibility of the statement as exculpatory evidence for Mr. Heikel or Mr. Simms.
- [44] I do not find that it would constitute a miscarriage of justice not to admit the statement of Mr. Northrup. I am not satisfied that the evidence is as Mr. Heikel contends, exculpatory to the extent that it justifies overriding the requirements for threshold reliability in this case. At most it provides some evidence, which is unreliable for the reasons already explained, as to whether Mr. Heikel was in the shed at all times during the events of June 4, 2022.
- [45] For these reasons, I deny Mr. Heikel's application to admit the statement of Mr. Northrup.
- "Mayer J."

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