

CANADA / JUDGMENT

R. v. Franz

2000 BCSC 227

COURT

Supreme Court of British Columbia

DECIDED

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Citation:

R. v. Franz

2000 BCSC 227

Date: 20000208

Docket No:

X053198

Registry: NEW WESTMINSTER

IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY the QUEEN

AGAINST

GLENN WALLACE FRANZ

RULING ON VOIR DIRE

OF THE

HONOURABLE MR. JUSTICE E.R.A. EDWARDS

Counsel for the Crown:

Wendy Dawson

Henry Waldock

Counsel for the Accused:

James Bahen

Del Sokol

Dates and Place of Hearing:

January 20, 21, 24-26, 2000

NEW WESTMINSTER, BC

- [1] The accused is charged with the first degree murder of his wife Jodi Franz ["the declarant"].
- [2] The declarant was last seen by any of her relatives or close friends on April 7, 1994.
- [3] Defence counsel says the two issues in the case are "is Jodi Franz dead?" and if so, "did the accused kill her?"
- [4] Crown counsel says the issues include identity of the accused as the killer and the existence of motive and a plan to kill necessary to prove premeditation.
- [5] A voir dire was held to determine the admissibility certain evidence including statements made by the declarant to various of her friends and relatives, her doctor, a lawyer and a legal aid paralegal, social workers and a police officer about the state of her relationship with the accused. There was also testimony from some of these witnesses about their observations of the relationship between the declarant and the accused. This evidence covered the period of their marriage from 1991 but primarily dealt with the period from the time of the couple's separation in May 1993 to April 7, 1994.
- [6] The Crown's position is that the declarant's statements to these witnesses are admissible, for the hearsay purpose, that is the truth of their contents under the "principled exception" to the hearsay rule.
- [7] The Crown says the declarant's statements, including statements about the declarant's state of mind, provide a narrative of events in the relationship of the accused and declarant and show the accused's possessive and controlling conduct. That is they show enmity or animus by the accused towards the declarant tending to prove motive.
- [8] The various witnesses' own observations about the relationship between the accused and the declarant are admissible on the basis of principles referred to in *The King v. Ball & Ball* [1910] A.C. 47 (H.L.) and *Cloutier v. The King* (1939) 73 C.C.C. 1 (S.C.C.).
- [9] In *Cloutier*, evidence was admitted which "could tend to show the nature of the sentiments the accused had for [the murder victim]" and the basis "the existence of such feelings would ... be relevant not merely in respect of intent, but in respect of the fact [the accused killed the victim] as well."
- [10] The testimony of some of the various witnesses disclosed their own observations about the relationship between the accused and the declarant. This evidence showed the sentiments or feelings of the accused towards the declarant. It is admissible. I did not understand defence counsel to contend otherwise.

- [11] Evidence of the nature of the relationship between the accused and the declarant is admissible on the issue of motive alleged by the Crown. Although the evidence reflected obsessiveness on the part of the accused, there were no incidents of violence, so the prejudicial effect of the evidence, in the sense of indicating a predisposition of the accused to domestic violence, is less than would be the case, say, of evidence of a criminal record for violence. See *R. v. Paterson* [1998] 122 C.C.C. (3d) 254 (B.C.C.A.) at paragraphs 109 and 110 and *R. v. D.S.F.* [1999] 132 C.C.C. (3d) 97 (O.C.A.) at paragraphs 23, 24 and 34.
- [12] By far the majority of the evidence under consideration on the voir dire consisted of statements made by the declarant to the various witnesses about her relationship with the accused.
- [13] Under the "principled exception" to the rule against hearsay, these statements are admissible as evidence of their content, if they pass the tests of relevance, necessity and "threshold" reliability, subject to the court's discretion to exclude any statement the prejudicial effect of which outweighs its probative value.
- [14] Just as the evidence of any witness about the sentiment or feelings of the accused toward the declarant in the context of the couple's relationship is relevant to possible enmity and animus and hence to identity of the accused as the perpetrator and to motive, so the declarant's own statements in that regard are generally relevant.
- [15] The unavailability of the declarant as a witness satisfies the requirement of necessity. The fact that the declarant's statements may be corroborated by other evidence does not render them unnecessary. See *R. v. Smith* [1992] 15 C.R. (4th) 133 (S.C.C.) at paragraph 35.
- [16] Determination of threshold reliability involves an examination of the circumstances in which the statements were made by the declarant to the various witnesses to ascertain if, on a balance of probabilities, there are "circumstantial guarantees" of the reliability of the statements.
- [17] In this case many of the statements attributed to the declarant by witnesses are corroborated by the witnesses' own observations or by records. For example, statements by the declarant that the accused harassed her by visiting her residence and with frequent telephone calls are consistent with evidence she had the locks changed on her residence and changed telephone numbers at least twice. Further, the declarant obtained a provincial court "no contact" order and just before April 7, 1994, made a complaint to the police that the accused breached it.
- [18] The general tenor of the relationship between the declarant and accused which emerges from the evidence just cited and from what the declarant told her doctor, lawyer and a paralegal at a legal services office, police and social workers about her marriage, which is reflected in their notes, is consistent with statements made by the declarant to friends and relatives.

- [19] It is true that the declarant was not entirely consistent and therefore perhaps not entirely forthright in everything she told each witness. For example, she initially misled her mother about the fact she had met the accused for four hours to discuss reconciliation a few days before April 7, 1994. She gave various accounts to witnesses about her intention to terminate a relationship with a man accused of abusing her children, but maintained contact with him.
- [20] Defence counsel pointed to aspects of the testimony of this man which suggest it is not reliable about things he said the declarant told him. However, it is the threshold reliability of the declarant's statements not the actual reliability of the witnesses who attribute those statements to the declarant which must be considered on the question of admissibility of the statements.
- [21] The statements attributed to the declarant by her doctor, lawyer, paralegal and the police officer and social workers who testified on the voir dire were all made in circumstances in which there is no reason the declarant would be untruthful or mistaken about the nature of her relationship with the accused.
- [22] She did not mince words and showed exasperation or even ill will towards the accused. For example her doctor remembered she called the accused an "asshole" when she came to see him for a tranquilizer prescription for anxiety she attributed to the accused's conduct. The doctor said her terminology didn't surprise him and was typical of things he heard from patients in situations of domestic discord.
- [23] It is noteworthy that the declarant did not exaggerate her statements about the accused to include allegations of violence toward her by the accused.
- [24] The fact the declarant made inconsistent statements to friends and relatives about aspects of her relationship with the accused may reflect changes in her own attitude towards him and their relationship. The dynamic of her relationship with the accused was complex, particularly after allegations arose that the man she lived with had abused her children.
- [25] Generally, the statements attributed by witnesses to the declarant about her relationship with the accused were made in circumstances where there was no reason for the declarant to fabricate. Her friends and relatives knew the couple had separated, that there were disputes over money before they separated and over child support afterwards, that the accused knew the declarant was romantically involved with other men and that the accused was aware of and reacted to allegations of child abuse by the man the declarant was living with. Independent corroborating evidence indicates the declarant was not fabricating a story of discord between her and the accused.

- [26] I am satisfied that the statements of the declarant about her relationship with the accused are relevant and admissible. There is no evidence about the circumstances in which the statements were made which suggests a motive to fabricate. Animosity about the disintegration of the relationship could have caused the declarant to exaggerate details, but the fact the declarant did not allege the accused had been violent, diminishes the likelihood she did exaggerate.
- [27] I conclude the evidence of the various witnesses of their own observations of the relationship of the accused and the declarant is relevant and admissible. Statements of the declarant are likewise relevant and meet the requirements of necessity and threshold reliability. None of this evidence is so prejudicial to the accused that this consideration outweighs its probative value. Since there is no evidence of violence towards the declarant by the accused and this is not a jury trial there is no risk that this evidence will be misinterpreted as evidence of the accused's bad character or propensity to violence.
- [28] None of the testimony on the voir dire will be excluded from consideration in the trial proper. The weight to be given to specific statements attributed by witnesses to the declarant and the reliability of the various witnesses are matters to be determined in light of all the evidence.

"E. R. A. Edwards, J."

Mr. Justice E. R. A. Edwards

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