
CANADA / JUDGMENT

R. v. Khan

2013 BCSC 303

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 303 R. v. Khan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Khan,

2013 BCSC 303

Date: 20130226

Docket: X70004

Registry: New Westminster

Between:

Regina

v.

Amjad Khan and Naim Saghir

BAN ON PUBLICATION PURSUANT TO

S. 517(1) AND 539(1) OF CRIMINAL CODE

Before: The Honourable Mr. Justice Josephson

Voir Dire Ruling: re Admissibility of Statements of the

Deceased Victim

Counsel for Crown:

D. Ballyk

S. Sidhu

Counsel for Accused Naim Saghir:

S. Buck

Counsel for Accused Amjad Khan

R. Claus

Place and Date of Hearing:

New Westminster, B.C.

January 28 and 29, 2013

Place and Date of Judgment:

New Westminster, B.C.

February 26, 2013

- [1] The Crown seeks to lead evidence of statements made by the deceased victim [hereinafter "the victim" or "the deceased"] to three of her friends shortly before the alleged time of the murder. This is a ruling following a voir dire as to the admissibility of these hearsay statements.

Background Evidence

- [2] Ms. Gibson offered evidence that she had known the victim for five years before the alleged offence. The two would see each other two or three times a week on average. As well, they spoke on the phone at least once per day and up to 10 times per day.
- [3] Both Ms. Gibson and the victim were pregnant at the time. The witness testified that the victim told her the father of the unborn child was "Amjad", but did not provide a surname.
- [4] The witness testified that she and the victim were good friends and would often baby sit for one another. After spending much of the day with the victim on November 18, 2005, she and her boyfriend drove the victim to her residence.
- [5] Saying that she had lost her keys, the victim had the upstairs landlady open the garage door to enable access through the garage to the victim's basement suite. The witness's boyfriend provided light into the garage with his vehicle headlights as there was no light in the garage. The witness testified that the victim "made me" enter the residence with her as the victim did not like to be alone, especially in the dark.
- [6] On November 20, 2005 the victim brought her three year old daughter to the witness's residence to babysit the child as this would allow the victim to go play bingo in the evening. Before departing, the victim phoned "Amjad" to inform him that she was leaving. On leaving, the victim stated that if "Amjad" did not stay with her that night, she would return to watch movies. That was the last contact Ms. Gibson had with the victim.

- [7] Ms. Marson described herself as a friend of the victim, with the two of them speaking with each other nearly every day. The victim told the witness that she was pregnant and that the father was "Amjad". On November 20, 2005, the two arranged to meet at a bingo hall on King George Highway in Surrey. They sat together. The victim said she was very worried as she had lost her house keys a couple of days earlier. The witness stated that the victim used the phone on three or four occasions. With the exception of one occasion where the victim said that she was calling her mother, the victim said she was calling Amjad. The witness offered to drive her the short distance home. On being informed by the victim that Amjad was picking her up at the hall, the witness departed without the victim.
- [8] Ms. Angelis described herself as having been a good friend of the victim; on her account they spoke to each other daily and saw each other at least every other day. On November 18, 2005, the victim stated that she could not find the keys to her suite. The victim stated she was pregnant and that the father was Amjad Khan.
- [9] On November 20, 2005, the witness attended the same bingo game as the victim and Ms. Manson. They sat in different sections as the victim sat in the smoking section. Bingo ended at about 10 pm. The witness offered the victim a ride home, but the victim declined, saying Amjad was coming to pick her up. The victim borrowed the witness's cell phone to call Amjad and ask why he was taking so long. After another wait, she repeated the call for the same purpose.
- [10] They then left the building to sit in the witness's vehicle. The deceased used the phone again, stating afterwards that Amjad would be there shortly. Amjad then arrived and left with the victim.
- [11] As to prior discussions regarding the victim's pregnancy, Ms. Angelis testified that the victim stated that Amjad wanted her to have an abortion and that she didn't want to. That resulted in "huge disagreements" with Amjad stating that he wouldn't be there for her if she had the baby. In response, the victim told Amjad that she would tell his family of the situation as they did not know.

Statements not in Issue

- [12] The defence and the Crown have come to an agreement as to the admissibility of many statements made by the deceased. I thank them for that and will not review the list of agreed upon statements.

Admissibility of Statements in Issue

- [13] The Crown seeks to admit the balance of the statements under: a) the "state of mind" or "present intention" exception to the hearsay rule; or b) pursuant to the principled approach to hearsay, as having satisfied the twin criteria of necessity and reliability.

- [14] Because of time constraints imposed by this trial, these reasons cannot do justice to the submissions I heard. However, in making my findings I will explain the basis for accepting or rejecting the arguments forwarded by each party.
- [15] The two exceptions held out by the Crown are not to be considered separate and distinct, as evidence which meets the "state of mind" or "present intention" exception may still be challenged under the principled approach.
- [16] The current approach to determining admissibility of hearsay was set out in *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, where it was held as follows at para. 42:
- (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
 - (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
 - (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
 - (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.
- [17] The starting point is that hearsay is presumptively inadmissible. In this case, the Crown must establish on a balance of probabilities that the statements either fall under a traditional exception, or failing that, that they meet the requirements of the principled exception. Where a hearsay exception is established, "the party challenging the admissibility of evidence falling within the exception will bear the burden of showing that the statement should nevertheless be inadmissible": *R. v. Starr*, [2000] 2 S.C.R. 144 at para. 214.
- [18] The "state of mind" or "present intentions" exception to the hearsay rule was outlined in *R. v. P. (R.)*, [1990] O.J. 3418 and adopted by the Supreme Court in *R v. Smith*, [1992] 2 S.C.R. 915 and *R. v. Starr*. At para. 24, Doherty J. explained as follows:

An utterance indicating that a deceased had a certain intention or design will afford evidence that the deceased acted in accordance with that stated intention or plan where it is reasonable to infer that the deceased did so. The reasonableness of the inference will depend on a number of variables including the nature of the plan described in the utterance, and the proximity in time between the statement as to the plan and the proposed implementation of the plan.

- [19] That decision restricts the use of the statement as being evidence going to the state of mind of the deceased, not that of a third party: *R. v. P. (R.)* at para. 25; see also *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at paras. 55-58 [Griffin]. As well, this evidence may not be used to show that others acted in accordance with the stated intentions of the deceased.

- [20] In Griffin, the Court relied on the earlier case of R. v. Starr in explaining that, "declarations of present state of mind are admissible under the traditional exception to the hearsay rule where the declarant's state of mind is relevant and the statement is made in a natural manner and not under circumstances of suspicion": Griffin, para. 59.
- [21] As for the principled exception, in R. v. Khelawon Charron J. reviewed the rationale for the requirements of necessity and reliability. It was explained that the inquiry into the admissibility of hearsay may take on a constitutional dimension given the impact the evidence may have on the accused's right to make a full answer in defence. Charron J. also explained that the "concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach": Khelawon, para. 47.
- [22] Even where evidence is clearly needed, hearsay is "inadmissible unless it is sufficiently reliable to overcome the dangers of admitting it": Khelawon at para. 49. There are two non-exclusive grounds upon which the reliability threshold may be met. As outlined at paras. 62-63 of Khelawon:
- [62] One way is to show that there is no real concern about whether the statement is true because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered regardless of its hearsay form.
- ...
- [63] Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in its hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested.
- [23] It goes without saying that the former is the method by which the reliability requirements must be established in this case.
- [24] In determining factors that will assist in determining whether threshold reliability has been established, the Court in R. v. Blackman (2006), 84 O.R. (3d) 292, [2006] O.J. No. 5041 (ONCA), aff'd 2008 SCC 37, [2008] 2 S.C.R. 298, considered the following as factors which may be considered in evaluating whether the hearsay statements are reliable:
- [55]...the presence or absence of any motive of the declarant to lie, the relationship between the declarant and the narrator of the statement, the possibility that the declarant was mistaken, and the state of mind of the declarant at the time that the statement was made. As well, the contents of a declarant's statement may be used for some purposes in determining the admissibility of the statement.
- [25] As to the ability to look to the existence of supporting or contradictory evidence, it was held in Khelawon that in appropriate cases, such evidence may be a factor in determining threshold reliability: see paras. 4 and 98-100.

[26] The defence puts forward the recent BC Court of Appeal case of R. v. R., 2012 BCCA 416 for the proposition that reliability cannot be established by looking to consistencies in the declarant's statements to others. Analogizing to the dangers associated with prior inconsistent statements, defence submits that, "it is important that the Court does not take similar statements by the declarant to others to form a basis for concluding that the impugned statements are reliable".

[27] As I read R. v. R. the Court of Appeal held that in that particular case, the trial judge fell into error because the evidence presented did not establish that there were sufficient circumstantial guarantees of trustworthiness to admit the statements. At para. 37 Finch C.J.B.C. explained:

...counsel for the appellant is correct in asserting that similar statements by the declarant to others form no basis for concluding that the impugned statement was reliable. Similarly, I agree with the appellant's counsel that the daughter's "perceptiveness" should have played no part in the analysis of the declarant's reliability.

[28] However, in that case there was evidence of a motive to lie, in that the deceased tended to exaggerate in order to get her daughter on her side. As such, the Court of Appeal held there were no circumstantial guarantees of trustworthiness to demonstrate that the evidence met the requirements for threshold reliability.

[29] Amongst the statements that are at issue, the Crown and defence submissions categorized the statements differently and used separate referencing systems. Neither party referred me to direct quotations from the witnesses' evidence, but rather provided paraphrases of the evidence. The accuracy of the paraphrased statements was not at issue. For ease of reference, and because this is the Crown's application, I will refer to the various statements with reference to the Crown's submissions.

State of Mind/Present Intentions Exception

[30] The Crown submits that the following statements by the declarant (the deceased) fall squarely within the traditional state of mind/present intention exception to the hearsay rule:

Evidence of Elissa Gibson

Statement 1: That if Amjad wasn't going to stay with her that evening, she would return to Ms. Gibson's residence to watch movies. (from direct examination)

Statement 2: That she expected that Amjad would stay at her place that evening [the 20th of November] but that if he [Amjad] didn't stay she would come back. (from cross-examination)

Evidence of Sandra Marson

Statement 4: That she had an evening planned with Amjad, as related by Ms. Marson. (from cross-examination)

Evidence of Christine Angelis

Statement 6: That Amjad was coming to pick her up, (as related by Ms. Angelis in cross-examination).

Analysis

- [31] In my respectful view, each of these statements (1, 2, 4, and 6) go to the present intentions or state of mind of the deceased at the relevant time. The Crown submissions were clear; relying on *R. v. Griffin* and *R. v. Starr*, the Crown intends to elicit this evidence to establish the state of mind or intentions of the deceased and not any third party. For example, I am mindful that with respect to statements 2 and 4, these statements are not admissible as evidence of Mr. Khan's intentions. In fact, the Crown submits that they intend to demonstrate that Mr. Khan's intentions were not in unity with those of Ms. Rossette because, they say, he intended to kill her.
- [32] As argued by the Crown, each of these statements is relevant to an issue at trial, as the statements provide probative evidence of the state of mind of the deceased which may afford support for the inference that the deceased acted in accordance with her then present intentions. The statements are probative to the issue of whether the accused Khan was with the deceased on November 20, 2005 and whether he had the opportunity to commit the murder. The proximity between the statements as to the plan and the proposed implementation of the plan could hardly be closer. As such, the inference that the deceased acted in accordance with her intention, to have Mr. Khan spend some time with her at her residence that evening, is evidence which may be considered.
- [33] The statements were made in a natural manner and there is no evidence to suggest that the statements were made under suspicious circumstances. These statements were made by the deceased to people she was with at the time, and were as innocuous as relaying her plans for the remainder of the evening. As for statement 6, there is additional independent evidence from Ms. Angelis that Ms. Rossette was in fact picked up by Mr. Khan, in apparent accordance with the stated intentions of the deceased.
- [34] The next question I must consider is whether the defence has established that the statements do not satisfy the requirements of necessity or reliability, or that they should nevertheless be excluded under the trial judge's residual discretion under the principled approach.
- [35] The defence did not take issue with the necessity of these statements. Instead, in the submissions by Ms. Ng on behalf of Mr. Khan, as adopted by Mr. Saghir, she submits that they are insufficiently reliable to meet the requirements of the principled approach.
- [36] The defence provided only speculative evidence as to why the statements were not reliable. As an example, the defence pointed to other evidence that supported the fact that Mr. Khan and the deceased were "not dating" to show the deceased's statements were unreliable. In

my view, this evidence merely exists as evidence of a label as to the relationship between the two, and does not establish that the deceased's statements do not pass the threshold reliability requirements. This is not one of those rare cases where this evidence should nonetheless be excluded under the principled approach. Given the circumstances in which these statements were made, their reliability cannot reasonably be challenged.

Principled Exception to Hearsay

- [37] There are two statements that the Crown admits do not fall within any of the traditional exceptions to hearsay. As such, the Crown bears the onus of establishing that the requirements of necessity and reliability are satisfied under the principled approach to hearsay.
- [38] Necessity is obviously not an issue. It is clear, in light of Ms. Rossette's death, that there is no other means by which the Crown could adduce the evidence, if not through the hearsay evidence of these witnesses. With respect to reliability, in *R. v. Khelawon*, [2006] 2 S.C.R. 787, it was held as follows:
- [49] ...The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it.
- [39] Quoting from the Crown submissions, these statements are:
- Statement 3: The deceased told Ms. Marson that she phoned Amjad to arrange whether Ms. Marson would drive her home, or whether he would pick her up. The deceased told Marson that she told him (Amjad) that the door was unlocked and they could meet at the house, or he could pick her up.
- Statement 5: that the deceased told Ms. Angelis that she had threatened Amjad that she was going to tell his family that she was pregnant with his child. (from direct examination)
- [40] However, it is my respectful view that this statement is admissible at the threshold level under the principled approach as necessary and reliable. Ultimate reliability is an issue at the end of the trial, as is the ultimate credibility of the narrator witness.
- [41] Statement 3, much like the statements falling under the state of mind exception, is circumstantially trustworthy. Ms. Marson was sitting with the deceased at bingo, and the statements merely served as an explanation for the phone calls that the deceased made from the bingo hall. Again, there was no motive for the deceased to lie to her friend in these circumstances. There is no suggestion, for example, that the deceased actually intended to meet up with someone other than Mr. Khan. Furthermore, the evidence of Ms. Marson that she had offered to drive the victim home, and that the deceased declined this offer, adds additional support to the reliability of the statement.

- [42] The portion of the statement referring to the fact that the door was unlocked is circumstantially trustworthy given the independent evidence of Ms. Gibson that she had assisted the her friend in entering her apartment days earlier when the deceased noticed that her keys were missing. I find that statement 3, when viewed in light of the circumstances in which it arose and the relationship between the declarant and the narrator, meets the requirements of threshold reliability.
- [43] Statement 5 is relevant to the issue of motive. On the issue of reliability, I find that there are adequate circumstantial guarantees of trustworthiness to admit the statement. This was a communication to a close friend, in whom she trusted and confided, shortly before the time of the alleged offence in circumstances where there was no evidence to suggest either a motive to lie or to suggest she may have been mistaken. Even speculation could not reasonably lead one to either possibility. It is undisputed that the deceased was pregnant and that she already had one child to care for. The ability of the defence to cross-examine the narrator of the statement provides some alternative means through which the statement can be scrutinized. Overall, I find that evidence meets the criteria for admissibility under the principled approach; furthermore, the probative value of the statement is high and is not outweighed by any prejudicial effect.
- [44] The statements of the deceased in issue are admissible.

"Josephson J."

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