

CANADA / JUDGMENT

R. v. Olson

2022 BCCA 198

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 198 R. v. Olson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Olson,

2022 BCCA 198

Date: 20220608

Docket: CA47262

Between:

Regina

Respondent

And

Jonathan David Olson

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia,
dated August 23, 2019 (conviction) (R. v. Olson and Robinson, 2019 BCSC 1432,
Chilliwack Docket 66670).

Counsel for the Appellant:

(via teleconference)

J.C. LeBlond

Counsel for the Respondent:

J.A. Dickie

Place and Date of Hearing:

Vancouver, British Columbia

May 18, 2022

Place and Date of Judgment with Written Reasons to Follow:

Vancouver, British Columbia

May 18, 2022

Place and Date of Written Reasons:

Vancouver, British Columbia

June 8, 2022

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Frankel

Summary:

Appeal from conviction on assault and firearms-related offences. Propriety of the admission of hearsay evidence pursuant to the principled approach. Held: Appeal dismissed. The judge made no error in admitting portions of the hearsay statements of a victim who professed at trial to have no recollection of the incident or the making of the statements in issue. The admissibility framework in *R. v. Bradshaw* was properly applied. Further, and save for one count, the judge made no use of the hearsay statements in convicting the appellant. If necessary, the curative proviso would be applied.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellant, Jonathan David Olson, was convicted by a Supreme Court judge of six assault and firearms-related offences committed on June 30 and July 1, 2017. He appealed from conviction arguing that the judge erred in principle by admitting hearsay statements made by Dane Miller ("Miller") to the police in the aftermath of the offences.
- [2] The Crown alleged that the appellant and an accomplice, Brodie Robinson ("Robinson"), assaulted Miller outside a Husky gas station in Chilliwack on June 30, 2017; unsuccessfully attempted to kidnap him; pursued him away from the gas station down the highway; and, during the pursuit, discharged a firearm striking Miller with a bullet in the back of the head. The assault and the beginning of the pursuit, but not the attempted kidnapping, were captured by surveillance cameras located outside the gas station.
- [3] Miller's out-of-court statements to the police were taken on June 30, 2017, and July 1, 2017, after he attended at the hospital with a gash over his left eye and a gunshot wound to the back of his head. Those statements implicated the appellant and Robinson in the assault, attempted kidnapping, and shooting.
- [4] Miller, a "Vetrovec" witness [R. v. Vetrovec, [1982] 1 S.C.R. 811; 1982 CanLII 20 (SCC)], was called to give evidence at trial, but professed to have no recollection of the events or making the statements in issue.
- [5] Under the principled approach, hearsay can exceptionally be admitted when the party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities: R. v. Khelawon, 2006 SCC 57 at para. 47 [Khelawon]. It was common ground that Miller's out-of-court statements met the necessity criterion. A voir dire was held to determine whether Miller's hearsay statements were sufficiently reliable to be admitted into evidence.
- [6] Threshold reliability can be established by showing that: (1) there are adequate substitutes for testing truth and accuracy (procedural reliability); or (2) there are sufficient circumstantial guarantees that the hearsay statement is inherently trustworthy (substantive reliability); Khelawon at paras. 61-63. To determine whether a statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement: Khelawon at paras. 4, 62 and 94-100. Substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to reject any plausible alternative explanation for the statement, other than the declarant's likely truthfulness about, or accuracy in respect of, the material aspects of it: R. v. Bradshaw, 2017 SCC 35 at paras. 40 and 57 [Bradshaw].

- [7] The Crown did not rely on procedural reliability as a basis upon which the statements could be admitted because, although audio-recorded, the statements were not video-recorded, Miller was not under oath when they were made, and he was not warned about the consequences of lying.
- [8] The Crown identified the material aspects of Miller's hearsay statements it sought to have admitted for their truth as being: (1) the circumstances of the alleged kidnapping attempt; (2) who fired the shots at Miller's vehicle; and (3) the guns possessed by the appellant and Robinson at the gas station and during the pursuit.
- [9] In her admissibility ruling indexed as 2019 BCSC 1160, the judge determined to admit portions of Miller's out-of-court statements that met the test for threshold substantive reliability set out in Bradshaw, including Miller's statement that he was assaulted at the gas station and that at the time of the assault, the appellant was in possession of a sawed-off shotgun. Applying the same test, she excluded other portions of Miller's statements to the police, including: his version of events relating to the attempted kidnapping allegation; his assertion that Robinson was in possession of a black handgun at the time of the assault; and, his conclusion that Robinson and the appellant committed the shooting.
- [10] The appellant argued on appeal that the judge erred in admitting any portion of Miller's out-of-court statements by: failing to consider whether the statements were sufficiently reliable to overcome the dangers associated with the absence of any meaningful opportunity to test the truthfulness of Miller's account in cross-examination; focusing on whether Miller's out-of-court statements had an "air of reality"; admitting certain portions of the statements while excluding others (the argument being that exclusion of any portion of Miller's statements as insufficiently reliable required exclusion of the whole of the statement, including those portions so thoroughly corroborated as to rule out any explanation for the statement other than that Miller was likely telling the truth); and, failing to appreciate the inherent dangers of accepting hearsay evidence from a Vetovec witness. On this point, the appellant relied on the predictive observation made in Bradshaw (at para. 69) that, while there is no blanket prohibition on the admission of hearsay from an unsavoury declarant, establishing the inherent trustworthiness of an out-of-court statement made by a Vetovec witness will be a challenging task.
- [11] The appeal was dismissed following oral argument with reasons to follow. For reasons set out below, we were not satisfied that the appellant had established any error in principle in the judge's application of the Bradshaw admissibility framework. More to the point, and with one exception, we were not satisfied that the judge made substantive use of the hearsay evidence she determined to admit in convicting the appellant. Accordingly, even assuming error in the admission of Miller's hearsay statements, we were satisfied that the result would necessarily have been the same. I will elaborate on these points below.

II. Background and Analysis

1. The Hearsay Statements Played No Role in the Demonstration of Guilt

[12] I will address this point first.

[13] The appellant was charged jointly with Robinson on the following counts: assaulting Miller with a weapon (Count 1); attempting to kidnap Miller (Count 2); using an imitation firearm while attempting to kidnap Miller (Count 3); and intentionally discharging a firearm while being reckless to the life or safety of Miller (Count 4). These four offences were alleged to have been committed on June 30, 2017, at the gas station and during the vehicle pursuit.

[14] The appellant was individually charged on the same indictment with unlawfully possessing a loaded prohibited firearm: to wit, a shotgun (Count 5); possessing firearms, to wit: a rifle and shotgun while prohibited from doing so (Count 6); possessing stolen property: to wit, a motor vehicle, knowing it to have been obtained by the commission of an indictable offence (Count 7); and resisting a peace officer in the execution of his duty (Count 8). Counts 5, 7 and 8 were alleged to have been committed on July 1, 2017, the date the appellant was arrested. Count 6 was alleged to have been committed between June 30, 2017, and July 1, 2017. These offences arose out of the appellant's arrest on July 1, 2017, after a stolen truck he was driving became stuck in the mud near the Vedder Canal in Chilliwack. The appellant's erratic conduct caused a concerned citizen to call the police. The appellant fled when the police arrived. He was arrested a short distance away. Inside the stolen truck, the police located, among other things, a loaded "Boito" sawed-off shotgun and .44 calibre ammunition suitable for use in it. Miller's DNA was lifted from the barrel of the sawed-off shotgun.

[15] With respect to Count 1, the appellant conceded at the outset of the trial, well before the admissibility voir dire, that the gas station video depicted him striking Miller in the head with an object. Identity was not in issue. When Miller attended at the hospital for treatment, he had a fresh laceration on the left side of his forehead. The type of object used as a weapon in the assault cannot be ascertained from the video, but that is a fact of no relevance to the proof of this count. A .44 caliber round was found on the ground in the area where the assault occurred. In a statement given by Miller to Cst. Link on July 1, 2017, he said, in describing the assault, that Robinson had a pistol and that the other assailant (the appellant) had "a sawed-off rifle". The Crown did not seek the admission of Miller's hearsay statements concerning the circumstances of the assault at the gas station, as the fact of the assault was independently established by the video, Miller's facial injury, and the presence of Miller's DNA on the sawed-off shotgun found in the stolen vehicle used by the appellant the following day. Nevertheless, the judge admitted portions of Miller's statements to Cpl. Rendall (on June 30) and Cst. Link (on July 1) that he was assaulted at the gas station by Robinson and another person he did not know (the appellant), and that the other person was in possession of a sawed-off shotgun at the time of the assault. She noted the abundance of evidence confirming the reliability of Miller's statement that he was assaulted at the gas station by the appellant and Robinson.

- [16] Reasons for conviction are indexed as 2019 BCSC 1432. Based on the video alone, the appellant conceded he was guilty of assaulting Miller with a weapon. The appellant was unable to identify on appeal how any portion of the statements made by Miller admitted on the trial proper were used by the judge in proof of this count.
- [17] While this would have been sufficient to dispose of the appeal as it pertains to Count 1, the appellant suggested in oral argument that the judge erred by admitting Miller's statements concerning the circumstances of the assault because cross-examination may have revealed an alternative, innocent explanation for what is shown on the video; namely, that the appellant was acting in self-defence when he struck Miller.
- [18] This argument is advanced for the first time on appeal. It was not made in the court below, nor was any mention of it made in the appellant's factum. The video depicts the appellant pursuing and striking Miller with an object as Miller was running away. The appellant is then depicted pursuing Miller out of camera range. The appellant is shown returning to the van in which he and Robinson arrived at the gas station, and then pursuing Miller's vehicle out of the gas station parking lot and along the highway. Against this background, there is no merit in the notion that cross-examination of Miller might have laid the seeds for a viable self-defence claim.
- [19] With respect to Counts 2 and 3, Miller told Cpl. Rendall in a post-offence interview conducted at the hospital on June 30, 2017, that the appellant and Robinson pistol whipped him at the gas station and "tried to grab me and throw me in their van." He told Cst. Link that Robinson pulled a gun on him and "was like get in the back" [of the van] and that he "fought [Robinson] off" before he was chased down and assaulted. This incident, if it occurred as Miller described, occurred on the far side of the van. It was not captured on video. The judge refused to admit this portion of Miller's statement, finding that it was uncorroborated, insufficiently reliable, and that other plausible explanations for Miller's statement inconsistent with the truthfulness or accuracy of his account existed, including that Miller may have been attempting to steal something from the van. She held that admission of this portion of the statement would, in the absence of meaningful cross-examination, render the trial unfair. Without Miller's statement on this point, the Crown acknowledged that it could not prove the appellant's guilt on Counts 2 or 3. In the result, the appellant was acquitted of those two counts.
- [20] With respect to Count 4 (discharging a firearm at Miller during the pursuit), Miller said in his statements to Cst. Link that he was pursued by the appellant and Robinson from the gas station to Highway #1, and then off Highway #1 along the No. 3 Road overpass. The video only confirmed the initial portion of the pursuit from the gas station out to and along the highway. Miller said two or three shots were fired at his vehicle while he was on the No. 3 Road overpass. The second shot blew out his back window and hit him in the back of the head. He did not think Robinson was the shooter because he was pretty sure Robinson was driving during the pursuit.

- [21] Miller's claims that he was shot while driving over the No. 3 Road overpass, swerved when this happened and then hit the curb were independently corroborated by a significant body of physical evidence. First, there was damage to the curb area of the No. 3 Road overpass where Miller said the shooting occurred and to the wheels and hubcaps of the vehicle he was driving. The police found broken glass and part of a broken hubcap on the No. 3 Road overpass. The back window of the vehicle Miller was driving was blown out and a bullet was recovered from the headliner. There was independent evidence that the vehicle was in undamaged condition earlier in the day. Miller attended at the hospital later that evening with a gunshot wound to the back of his head. The judge determined to admit Miller's statements to Cst. Link in which he described being shot on the No. 3 Road overpass, swerving into the curb, and attending at the hospital with a bullet wound to the back of the head.
- [22] The judge noted, however, that there was no video corroboration of Miller's account that the appellant and Robinson pursued him from Highway #1 to the No. 3 Road overpass, or that they were responsible for the shooting. She declined to admit the portions of Miller's statement attributing responsibility for the shooting to the appellant and Robinson. She said that to do so would be to fall into the dangers warned against in Bradshaw at paras. 42 and 43. These two paragraphs affirm the importance of keeping the threshold reliability inquiry at the admissibility stage distinct from the determination of the ultimate reliability of a hearsay statement.
- [23] The appellant failed to show how any portion of Miller's hearsay statements admitted at trial played any role in the demonstration of guilt on Count 4. The judge accepted the evidence of an investigating officer, supported by the video and other independent evidence, that the assault at the gas station took place at about 8:23 p.m. Miller was admitted to the hospital at 9:10 p.m. His wounds were fresh and still bleeding. The judge concluded that the events at the gas station took place shortly before the shooting on the No. 3 Road overpass and that Miller attended at the hospital shortly thereafter. She found that a black handgun associated with Robinson was the firearm used in the shooting. Given this closely connected sequence of events and the circumstantial evidence connecting the appellant and Robinson to the assault, pursuit and shooting, the judge concluded that the defence assertion Miller may have been shot by some unknown, third-party perpetrators was pure speculation. Applying *R. v. Villaroman*, 2016 SCC 33, she concluded that, "there is no other reasonable inference than that Mr. Robinson's black handgun was used to fire at Mr. Miller on the overpass as Mr. Robinson and Mr. Olson pursued Mr. Miller across the Number 3 overpass."
- [24] With respect to Count 5, the judge admitted Miller's statement to Cst. Link in which he described the sawed-off shotgun in the appellant's possession at the gas station. She found this portion of the statement to be corroborated by the video, the presence of Miller's DNA on the barrel of the gun seized the following day from the stolen vehicle the appellant was driving, and from the .44 calibre round of ammunition located in the parking lot of the gas station where the fight occurred. The judge did use Miller's out-of-court statement to Cst.

Link that the appellant was in possession of a sawed-off shotgun as a factor in her conclusion that the appellant knew that it was loaded--an element of the offence charged in Count 5. On this point, the judge adopted reasoning advanced by the Crown that the appellant must have known the shotgun was loaded when he was found in possession of it in the stolen vehicle because he had it at the gas station the previous evening, and a .44 calibre round was found in the parking lot at the site where Miller was struck in the head with the object being wielded by the appellant.

- [25] In short, the only contested issue in respect of which Miller's out-of-court declarations were admitted was that the weapon the appellant used to assault him at the gas station was the sawed-off shotgun. Even then, the judge only relied on Miller's hearsay statements to prove knowledge on the part of the appellant that the sawed-off shotgun he possessed was loaded at the time of his arrest.
- [26] Assuming the judge erred in admitting Miller's hearsay declaration that the appellant was in possession of the sawed-off shotgun at the time of the assault, I do not see how her reliance on this evidence could possibly have changed the result. The appellant was guilty of an offence pursuant to s. 95(1) if he was proven to have been in possession of a loaded prohibited firearm or restricted firearm without holding an authorization or a licence to possess the firearm and a registration certificate for the firearm. When the appellant was arrested in possession of the stolen truck, the loaded sawed-off shotgun was retrieved from a backpack on the driver's seat. Also found inside the backpack was a belted pouch containing several .44 calibre rounds of ammunition suitable for use in the sawed-off shotgun. An additional .44 calibre bullet was found underneath the driver seat. A second loaded shotgun was retrieved from the floor of the vehicle between the front and back seats. Even without Miller's statement, the appellant's conviction under s. 95(1) was, in my view, inevitable on the remaining evidence. At minimum, that evidence established the appellant was wilfully blind to the fact that the shotgun was loaded. But even if I am wrong in this conclusion, I am of the view that the judge did not err in admitting Miller's hearsay statement that the appellant was in possession of a sawed-off shotgun during the gas station assault. I address this second issue below.
- [27] To conclude my discussion of the first issue, the appellant also failed to show how Miller's hearsay statements that were admitted by the judge played any role in the demonstration of guilt on Counts 6, 7 or 8.
- [28] On Count 6, the appellant was found to possess firearms on June 30, 2017, and July 1, 2017, while he was prohibited from doing so. That the appellant was in possession of firearms on July 1, 2017, while subject to a prohibition order, were conclusions the judge reached independent of any reliance on the hearsay statements of Miller. Proof of this count did not, of course, turn on whether the appellant was in possession of the same sawed-off shotgun used to assault Miller at the gas station.

- [29] Similarly, the appellant's convictions on Counts 7 and 8 were based on evidence independent of anything said by Miller in his out-of-court statements to the police.
- [30] In the result, and if it were necessary to do so, I would apply the curative proviso on grounds that any error in the admission of this evidence was harmless in the circumstances of this case: *R. v. Khan*, 2001 SCC 86 at paras. 29-31.
2. The Judge Did Not (in any Event) Err in Admitting Portions of Miller's Out-Of-Court Statements
- [31] While this appeal could, in my view, have properly been dismissed through application of the curative proviso--the hearsay statements of Miller not having been shown to have played any role in the demonstration of guilt--I am also of the view that the judge committed no error in principle in concluding that the portions of Miller's statements she determined to admit met the test for threshold reliability.
- [32] In my view, there is no merit in the appellant's assertion that the judge erred in principle in her application of the Bradshaw admissibility framework. The judge carefully considered and applied Bradshaw at the gatekeeping stage.
- [33] More specifically, I do not accept the appellant's assertion that the judge erred by failing to focus on his inability to pursue potentially fruitful areas of cross-examination given Miller's professed inability to recall the events in issue. The judge understood her obligations in this regard. She identified the material aspects of the hearsay statements sought to be adduced with the specific hearsay danger firmly in mind--that Miller, an addict, thief and admitted liar, falsely implicated the appellant and Robinson in the commission of the first four counts on the indictment. As she put it, the narrow issue she was obliged to address at the gatekeeping stage was this: "is there sufficient corroborative evidence to satisfy the court on a balance of probabilities that the statements of Mr. Miller are truthful or accurate to such a degree that contemporaneous cross-examination of Mr. Miller on those statements would add little or nothing to the trial process." The judge engaged in her admissibility analysis with this proposition firmly in mind.
- [34] There is no merit in the appellant's related assertion that the judge erred by considering that her task at the gatekeeping stage was to determine whether Miller's hearsay statements had "an air of reality". The judge never used this language, and a fair reading of her admissibility ruling does not support the appellant's submission on this point. Further, I do not accept the appellant's submission that the judge erred by conflating threshold and ultimate reliability. The appellant did not take us to any portion of the judge's reasons on the admissibility voir dire substantiating his submission on this point. I am satisfied that the judge understood and correctly applied the law on this issue as summarized in Bradshaw at paras. 39-50.

- [35] I also reject the appellant's submission that the judge did not pay sufficient regard to the dangers of admitting hearsay evidence from a Vetrovec witness. The judge acknowledged that Miller was a Vetrovec witness, and that evidence corroborating the material aspects of his account needed to be "closely scrutinized" before a conclusion could be reached that his statements met the threshold reliability test. No error in principle was demonstrated in the judge's approach to this issue.
- [36] Finally, the appellant submitted that the judge erred by admitting any portion of Miller's hearsay statements having concluded that other portions of the same statement had not been sufficiently corroborated to meet the test for threshold reliability. In essence, the appellant argued that a decision not to admit one aspect of a hearsay statement precludes, as a matter of law, the admission of any other material part of the statement, regardless of the extent to which the reliability of that other part is corroborated by evidence addressing the specific hearsay dangers applicable in the case.
- [37] I do not propose addressing this issue in detail. The appellant cited no authority supporting this proposition and identified no principle that would commend the adoption of such a bright-line rule. Indeed, the appellant's position on this point appears to be contrary to the approach taken in *R. v. Short*, 2018 ONCA 1, and inconsistent with both the highly contextualized admissibility inquiry required in this context and the truth-seeking function of a criminal trial. While I am not prepared to accept the appellant's submission on this issue on the rather perfunctory submissions we heard on appeal, I do recognize that there may well be nuances that arise in this context that could impact the admissibility analysis. In my view, discussion of those nuances is best left to another day.
- [38] The judge considered whether the evidence corroborating Miller's out-of-court statements ruled out alternative explanations such that the only remaining likely explanation was that Miller was being truthful about the material aspects of the statements she determined to admit. In detailed reasons for judgment given on the admissibility voir dire, she concluded that the admitted portions of Miller's statements to the police were significantly corroborated and sufficiently reliable to overcome the dangers arising from the inability to test Miller's account through meaningful cross-examination. In the absence of demonstrated error in principle or any material misapprehension of the evidence, her conclusion on this issue is entitled to deference on appellate review: *R. v. Couture*, 2007 SCC 28 at para. 81; *R. v. Blackman*, 2008 SCC 37 at para. 36; *R. v. Youvarajah*, 2013 SCC 41 at para. 31.

III. Disposition

- [39] It is for these reasons we concluded that the appeal should be dismissed.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Frankel"

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