
CANADA / JUDGMENT

R. v. Powers

2016 BCSC 2605

COURT

Supreme Court of British Columbia

DECIDED

31 August 2016

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Powers,

2016 BCSC 2605

Date: 20160831

Docket: 39609-5

Registry: Courtenay

Regina

v.

Jeremy John Powers

Restriction on Publication:

Pursuant to s. 539 of the Criminal Code of Canada

Before: The Honourable Madam Justice S. Griffin

Oral Reasons re Admissibility of 911 Recording

Counsel for the Crown:

Richard L. Ellsay

Counsel for the Accused:

Bobak Movassaghi

Place and Date of Hearing:

Courtenay, B.C.

August 31, 2016

Place and Date of Judgment:

Courtenay, B.C.

August 31, 2016

- [1] THE COURT: The Crown seeks to tender evidence of a 911 call made by an important witness, and the defence objects. This ruling follows a voir dire to address the admissibility of the 911 call recording.
- [2] The accused is charged with a number of counts, including break and entering a place and committing an indictable offence therein. The incident took place at the home of the accused's ex-spouse, Ms. Cunningham, where she was living with her current domestic partner, Mr. Routley, and the two children of Ms. Cunningham and the accused.
- [3] The evidence of Mr. Routley is that he and Ms. Cunningham saw the accused trying to break in and that he was carrying a gun. Mr. Routley's evidence is that Ms. Cunningham phoned 911 while it was happening. Mr. Routley's evidence is that the accused broke in and entered the house carrying the gun and as he did so, the call to 911 ended. Ms. Cunningham is also expected to give evidence.
- [4] The defence objects to the evidence on the basis that the recording is unnecessary and prejudicial. The defence says that it will not be an issue that Mr. Powers broke into the house. The issue is what he did in the house and whether he brought the gun into the house, and that the 911 recording sheds no light on this issue.
- [5] The case law establishes several grounds for admissibility of a 911 call made during the unfolding of events or close in time to them:
 - 1. First, it is admissible as a spontaneous, contemporaneous statement under the traditional *res gestae* exception to the inadmissibility of hearsay: see *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (O.N. C.A.) at p. 207, *aff'd* on other grounds [1990] 2 S.C.R. 531; and *R. v. Rahmanzadeh*, [2005] O.J. No. 925 (O.N. S.C.) at para.10.
 - 2. Second, to the extent the accused's position in the case suggested immediately after the incident or at trial a complainant fabricated her version of events, the 911 statement is admissible to rebut this allegation: see *R. v. Stapleton*, 2003 BCCA 444.
 - 3. Third, it is admissible under the principled approach to the admissibility of hearsay statements on the basis that it meets the twin tests of necessity and reliability: see *R. v. Khelawon*, 2006 SCC 57 at para. 2.

4. Fourth, it is admissible for the purposes of providing narrative context to assist the trier of fact in the assessment of truthfulness or credibility: see *R. v. Dinardo*, 2008 SCC 24 at para. 37.
- [6] The defence submits that even if a 911 recording is normally admissible, it can be determined in any particular case that it should be excluded because its prejudicial effect outweighs its probative value, as happened in the case of *R. v. Hamilton*, 2011 NSSC 305. However, in that case the court found that the 911 call would not provide any material evidence not already available from the complainant's testimony. In that case, the 911 call was not made during the incident but was made immediately afterwards, although the complainant was probably still going through the stress of the incident.
- [7] Here, I find that the 911 recording will provide relevant evidence that goes beyond the testimony that can be offered by Ms. Cunningham, or even by the evidence of the other witness to events, Mr. Routley. That is because the 911 call was made as the incident was unfolding and very clearly records the demeanour of Ms. Cunningham and what she was saying.
- [8] The fact that Ms. Cunningham will be a witness does not mean that the evidence is irrelevant. The court cannot expect to receive evidence of the same quality as the 911 call simply by having Ms. Cunningham testify. The 911 recording is the best evidence of Ms. Cunningham's emotional state at the very time of the incident. The chance of concoction is reduced by the contemporaneous nature of the call plus the fact that it was made to a public authority for which there could be serious consequences if it was made falsely. These points were made by the Ontario Superior Court in *R. v. Vincent*, [2001] O.J. No. 4737 at paras. 14-17.
- [9] I find that the recording of the 911 call is relevant to show Ms. Cunningham's demeanour and emotional state and the narrative context of events as they unfolded. I disagree with the defence that these things are not relevant.
- [10] The 911 recording is also real evidence of what, in fact, Ms. Cunningham was saying. For example, "please leave, please get out, please go, you're really making me afraid" and "please stop". It is evidence of the fact she was stating these things at the time. On the break and enter offence, this goes to the question of whether the accused was invited into the house or was denied entry into the house and forced his way in. It is not enough for the defence to submit that if the accused testifies, he is unlikely to take issue with the fact that he broke into the house. The Crown is permitted to prove this necessary element as part of its case.
- [11] The only real prejudice identified by the defence is that the call is inflammatory. The point of this complaint seems to be that it in real time illustrates how upset Ms. Cunningham was as events unfolded, but the fact it captures events as they unfolded as opposed to being a description of the events after the fact is why it is so probative. In my view, the probative value of the evidence outweighs any prejudicial effect.

- [12] I leave open the question of the final jury instruction regarding the weight to give the evidence. In this regard I will expect submissions from counsel after the parties have closed their cases and before the jury is charged. For example, to the extent Ms. Cunningham's credibility might be challenged by the defence, the evidence might be of assistance to the trier of fact in assessing her credibility when giving evidence at trial about the events.
- [13] As for the exhibits to be tendered, I do not consider the transcript of the call to be of much use, as it did not appear to me to be complete and it may, therefore, mislead or distract the jury. I therefore do not see the need to put the transcript before the jury.
- [14] The audio recording of the 911 call may be played in court and the DVD and admissions of fact regarding the call can be admitted as evidence.
- [15] That concludes the ruling.

"The Honourable Madam Justice S. Griffin"

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