

CANADA / JUDGMENT

R. v. Tait

2020 BCSC 1627

COURT

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tait,

2020 BCSC 1627

Date: 20201029

Docket: 25830

Registry: Nelson

Between:

Regina

v.

Jason Tait

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Corrected Judgment: The text of this judgment was corrected to anonymize the witness, which changes were made on November 13, 2020.

Before: The Honourable Madam Justice Murray

Reasons for Judgment re: Admissibility of Proposed Defence Evidence and Crown Rebuttal Evidence

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Place and Date of Hearing:

Nelson, B.C.

October 27-28, 2020

Place and Date of Judgment:

Nelson, B.C.

October 29, 2020

Introduction

- [1] This ruling involves two separate applications heard on a blended voir dire:
- a) the admissibility of proposed defence evidence; and
 - b) the admissibility of proposed Crown rebuttal evidence should the proposed defence evidence be ruled admissible.
- [2] Both applications arise from my ruling, indexed at 2020 BCSC 1603, in which I held that the defence should be permitted to call evidence of Mr. Edey's animosity toward police subject to it being ruled admissible. This voir dire deals with the admissibility of that evidence.
- [3] The common issue on these two voir dires is the admissibility of hearsay evidence. There is a secondary issue on the voir dire involving proposed Crown rebuttal evidence: general admissibility.
- [4] With respect to the hearsay evidence, both Crown and defence seek to have it admitted under the principled exception to the hearsay rule.
- [5] In order to be admissible under the principled exception, the hearsay evidence must be both necessary and reliable: *R. v. Khelawon*, 2006 SCC 57, at para. 47. Necessity refers to the reasonable necessity of the hearsay evidence which would otherwise be unavailable to prove a fact in issue. Reliability refers to the probability of the inherent trustworthiness of the statements.
- [6] In *R. v. Bradshaw*, 2017 SCC 35, Karakatsanis J. explained the distinction between threshold reliability and ultimate reliability as follows:

39 The distinction between threshold and ultimate reliability, while "a source of confusion", is crucial (Khelawon, at para. 50). Threshold reliability concerns admissibility, whereas ultimate reliability concerns reliance (Khelawon, at para. 3). When threshold reliability is based on the inherent trustworthiness of the statement, the trial judge and the trier of fact may both assess the trustworthiness of the hearsay statement. However, they do so for different purposes (Khelawon, at paras. 3 and 50). In assessing ultimate reliability, the trier of fact determines whether, and to what degree, the statement should be believed, and thus relied on to decide issues in the case (Khelawon, at para. 50; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 35-36). This determination is made "in the context of the entirety of the evidence" including [page885] evidence that corroborates the accused's guilt or the declarant's overall credibility (Khelawon, at para. 3).

40 In contrast, in assessing threshold reliability, the trial judge's preoccupation is whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process (Khelawon, at para. 49; see also H. Stewart, "Khelawon: The Principled Approach to Hearsay Revisited" (2008), 12 Can. Crim. L.R. 95, at p. 106). At the threshold stage, the trial judge must decide on the availability of competing explanations (substantive reliability) and whether the trier of fact will be in a position to choose between them by means of adequate substitutes for contemporaneous cross-examination (procedural reliability). For this reason, where procedural reliability is concerned with whether there is a satisfactory basis to rationally evaluate the statement, substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy.

41 In short, in the hearsay context, the difference between threshold and ultimate reliability is qualitative, and not a matter of degree, because the trial judge's inquiry serves a distinct purpose. In assessing substantive reliability, the trial judge does not usurp the trier of fact's role. Only the trier of fact assesses whether the hearsay statement should ultimately be relied on and its probative value.

[7] In a criminal context, necessity and reliability take on a constitutional dimension. It is a principle of fundamental justice that an innocent person must not be convicted. To allow the Crown to introduce unreliable hearsay evidence against an accused would compromise trial fairness and raise the spectre of wrongful convictions: *R. v. Starr*, [2000] 2 S.C.R. 144, at para. 200. For this reason, it is well established that the trial judge may relax the strict rules of admissibility where it is necessary to prevent a miscarriage of justice.

[8] I will start by considering the admissibility of the defence evidence. If I determine that the proposed defence evidence is admissible I will then turn to consider the proposed Crown rebuttal evidence.

Admissibility of the Proposed Defence Evidence

[9] It is common ground that necessity is not in issue. The issue is threshold reliability.

- [10] The proposed defence witness, T.E.M. testified in the voir dire. She worked with Mr. Edey from about mid-November, 2013 to mid-July, 2014. She was his journeyman electrician; he her apprentice. She was training him. They spent long days together, often working in close quarters shoulder to shoulder. While there were difficulties working together in that Mr. Edey, according to T.E.M., liked to do things his own way and did not follow her direction, they formed a bond. T.E.M. came to think of Mr. Edey as a son. She talked to him a lot. She learned that he was married and divorced. He had children that he really loved. He was living in Yahk with another woman.
- [11] Mr. Edey told T.E.M. that he did not have a drivers licence, yet he continued to drive. She learned that he stayed in a motel in Beaver Falls when he was working and went home to Yahk on days off.
- [12] T.E.M. learned that he did not have a driver's licence because he had "too many DUIs" (impaired driving convictions). Mr. Edey told T.E.M. that he drank and that he loved his alcohol. He sometimes showed up at work smelling of alcohol. She talked to him about his drinking.
- [13] The crux of the evidence is this. T.E.M. testified that Mr. Edey told her that he "hated cops." He said that "cops serve no purpose, that they're useless, and that they're always stopping him". He said that "he was going to go out in a blaze of glory in a gun fight with the cops". Although it is unclear how many times Mr. Edey said this, T.E.M. testified that he said it a few times when she tried to talk to him about it. His attitude and "absolute hatred" of police concerned her. The first time Mr. Edey said it she asked if he was joking. He replied that he was not joking at all. Sometimes when she tried to talk about it with him he would not want to talk and would try to ignore her.
- [14] Crown counsel called a number of witnesses on the voir dire in an effort to cast doubt on the threshold reliability of the proposed evidence.
- [15] Some evidence was led to challenge T.E.M.'s assertion that she and Mr. Edey had the type of relationship in which he would discuss these things with her. T.E.M. described the relationship as "more like a mother or big sister". Deborah Edey, Mr. Edey's mother, testified that once, after a week at work Mr. Edey returned to Yahk complaining about his female supervisor, "the bitch from hell". He told his mother he did not want anything to do with her and did not like working with her. Cass Edey, Mr. Edey's brother, gave evidence that Mr. Edey would talk about having a problem with a person he worked with at Teck; that they would "butt heads".
- [16] Other evidence was introduced to negate the premise that Mr. Edey hated police and had murderous thoughts about them. Deborah Edey testified that she never heard Mr. Edey say anything about hating police. Cass Edey testified that sometimes Mr. Edey called police names like "asshole," but when he did so he was not mad. Cass Edey said his brother never said anything about "wanting to hurt (police) or anything."

- [17] Miranda Tedesco, Mr. Edey's former spouse, met Mr. Edey in October 2010. They married in 2012 and separated in October 2013. Although they were separated at the time of his death, Ms. Tedesco said that she and Mr. Edey still talked every day, saw each other regularly and were working on their relationship. She gave evidence that when she first met Mr. Edey in 2010 he had a view "instilled in him" that police were heavy-handed and unfair. But that changed in 2011 after he served an intermittent sentence on weekends in the cells at the Trail RCMP detachment. With her help, Ms. Tedesco said that Mr. Edey's views toward police changed. He started to see police as people that were just trying to do a job. Before his weekends in the Trail cells, Mr. Edey had never felt that he had been dealt with by police with respect. In addition, according to Ms. Tedesco, Mr. Edey was grateful that the police kept her safe while she performed her child protection job.
- [18] Evidence was led to negate the proposition that Mr. Edey wanted to kill himself. Deborah and Cass Edey and Ms. Tedesco all denied that Mr. Edey had suicidal thoughts. Cass Edey testified that Mr. Edey was happy in the months before his death.
- [19] Finally, Crown called a witness to cast doubt on the accuracy and reliability of T.E.M.'s evidence. Mr. Keen was the business manager of the union to which both T.E.M. and Mr. Edey belonged and knew both of them. In her evidence T.E.M. stated that she learned of Mr. Edey's death when Mr. Keen called her the morning after it happened to tell her. She said that Mr. Keen knew that she and Mr. Edey were friends, that she cared about his welfare and that she had been his journey person. T.E.M. stated that while Mr. Edey was her apprentice, she had talked to Mr. Keen about Mr. Edey's drinking problem and whether they could get him help. Mr. Keen testified that although he heard about the incident the day after, he did not learn that it was Mr. Edey that had been killed for days. He denied calling T.E.M. He further testified that he had never talked to T.E.M. about Mr. Edey. In fact, he did not know that they had worked together.
- [20] Defence submits that there are facts that corroborate much of T.E.M.'s evidence. T.E.M. knew about Mr. Edey's personal life, that he was prohibited from driving and yet persisted to do so, that he had a drinking problem and that he was stopped by police numerous times for drinking and driving. All of that fits with the known evidence. Plus, defence argue that Crown counsel never challenged T.E.M. on her evidence, and if evidence is not challenged it can be taken as true. As such, defence argues that threshold reliability is satisfied.
- [21] While I agree that many of the peripheral facts given by T.E.M. are corroborated, I am not satisfied that the material aspect of her evidence is.
- [22] The importance of corroboration in assessing threshold reliability was made clear in Bradshaw:

44 In my view, the rationale for the rule against hearsay and the jurisprudence of this Court make clear that not all evidence that corroborates the declarant's credibility, the accused's guilt, or one party's theory of the case, is of assistance in assessing threshold reliability. A trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a

whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. If the hearsay danger relates to the declarant's sincerity, truthfulness will be the issue. If the hearsay danger is memory, narration, or perception, accuracy will be the issue.

45 First, corroborative evidence must go to the truthfulness or accuracy of the material aspects of the hearsay statement (see Couture, at paras. 83-84; Blackman, at para. 57). Hearsay is tendered for the truth of its contents and corroborative evidence must go to the truthfulness or accuracy of the content of the hearsay statement that the moving party seeks to rely on. Because threshold reliability is about admissibility of evidence, the focus must be on the aspect of the statement that is tendered for its truth. The function of corroborative evidence at the threshold reliability stage is to mitigate the need for cross-examination, not generally, but on the point that the hearsay is tendered to prove.

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47 Second, at the threshold reliability stage, corroborative evidence must work in conjunction with the circumstances to overcome the specific hearsay dangers raised by the tendered statement. When assessing the admissibility of hearsay evidence, "the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility" (Khelawon, at para. 4). Thus, to overcome the hearsay dangers and establish substantive reliability, corroborative evidence must show that the material aspects of the statement are unlikely to change under cross-examination (Khelawon, at para. 107; Smith, at p. 937). Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement (see U. (F.J.), at para. 40). Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist.

48 In assessing substantive reliability, the trial judge must therefore identify alternative, even speculative, explanations for the hearsay statement (Smith, at pp. 936-37). Corroborative evidence is of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable, if it "eliminate[s] the hypotheses that cause suspicion" (S. Akhtar, "Hearsay: The Denial of Confirmation" (2005), 26 C.R. (6th) 46, at p. 56 (emphasis deleted)). In contrast, corroborative evidence that is "equally consistent" with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance (R. v. R. (D.), [1996] 2 S.C.R. 291, at paras. 34-35). Adding evidence that is supportive of the truth of the statement, but that is also consistent with alternative explanations, does not add to the statement's inherent trustworthiness.

49 While the declarant's truthfulness or accuracy must be more likely than any of the alternative explanations, this is not sufficient. Rather, the fact that the threshold reliability analysis takes place on a balance of probabilities means that, based on the circumstances and any evidence led on voir dire, the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities.

50 To be relied on for the purpose of rejecting alternative hypotheses for the statement, corroborative evidence must itself be trustworthy. Untrustworthy corroborative evidence is therefore not relevant to the substantive reliability inquiry (see *Khelawon*, at para. 108). Trustworthiness concerns are particularly acute when the corroborative evidence is a statement, rather than physical evidence (see *Lacelle*, at p. 390).

[Emphasis added.]

- [23] Given the above, the question I must answer is this: whether on the circumstances and the evidence led on this voir dire I am satisfied on a balance of probabilities that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects; that is, that Mr. Edey wanted to go out in a blaze of glory in a gun fight with a police officer.
- [24] After much deliberation, I am not so satisfied. While I am alive to the fact that the credibility of the Crown witnesses on this voir dire can be attacked, on the evidence taken as a whole, I am still not convinced of threshold reliability to the extent required. The key declaration is inconsistent with the rest of the evidence. The words "I want to go out in a blaze of glory in a gun fight" with police imply suicide by cop and a gun fight. There is no evidence that suggests that Mr. Edey was suicidal. There is no evidence that Mr. Edey sought to draw the police into a confrontation. There was no gun fight.
- [25] In reaching this decision, I am mindful that a judge can relax rules of evidence in favour of the defence where it is necessary to prevent a miscarriage of justice. However, even then the threshold reliability inquiry cannot be abandoned: *R. v. Kimberley* (2001), 56 O.R. (3d) 18 at paras. 80-81.
- [26] Further, even if I were satisfied that threshold reliability was established, I am also mindful that a judge has overarching discretion to exclude otherwise admissible evidence where its prejudicial effect outweighs its probative value.
- [27] Although I stated strongly in my ruling that led to this inquiry that the proposed evidence was required to allow Cst. Tait to make full answer and defence and to ensure him a fair trial, after actually hearing the proposed evidence along with the rest of the evidence on this voir dire, and considering it in the context of the other evidence in this trial, I have reconsidered its probative value. After much deliberation, I am of the view that the statements attributed to Mr. Edey are ambiguous and would serve only to confuse the jury. Once again, there is no evidence suggesting that Mr. Edey was suicidal, or that he sought to violently confront police in a gun fight, and I would have to instruct the jury to that effect.

- [28] While I remain concerned that the Crown will be advancing closing arguments that will by necessary implication suggest that Mr. Edey was fleeing when he was driving directly at Cst. Tait, I am of the view that this proposed evidence would confuse the jury and not be helpful to Cst. Tait. Without the proposed evidence, I am satisfied that there is already ample evidence that supports the defence's position that Mr. Edey, to put it generously, did not like the police.
- [29] Additionally, even on a relaxed standard, after hearing the proposed defence evidence on the voir dire and considering it along with all of the other evidence, I am not satisfied that it meets threshold reliability.
- [30] For those reasons, I find that the proposed defence evidence is inadmissible.
- [31] Having come to that conclusion there is no need to consider the Crown's application to call rebuttal evidence.

"The Honourable Madam Justice Murray"

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