SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Howe*, 2016 NSSC 328

Date: 20161128
Docket: CRH No. 441632
Registry: Halifax

Between:

Her Majesty the Queen

v.

Duayne Jamie Howe, Patrick Michael James, and
David John Pearce

Restriction on Publication: Section 486.5

Judge:	The Honourable Justice Peter Rosinski
Heard:	November 28, 2016, in Halifax, Nova Scotia
Written decision:	December 7, 2016 (oral decision rendered November 28, 2016)
Counsel:	Glen Scheuer, for the Crown Patrick Atherton for the Defence Trevor McGuigan for the Defence Patrick MacEwen for the Defence

By the Court:

Introduction

[1] The defendants are charged personally, and as members of the Bacchus Motorcycle Club, with offences of threats, intimidation, harassment and extortion as against R.M. during January 1 – September 14, 2012. Mr. James is primarily implicated in the time period January 1 – August 27, 2012, in relation to R.M.'s wish to start a three-piece patch Motorcycle Club. Messrs. Howe and Pearce are implicated in relation to September 14, 2012, when at a "Bikers Down" charity event, they allegedly committed offences in relation to R.M. in person.

[2] As a direct result of what happened on September 14, 2012, R.M. contacted the RCMP, and provided an audiotaped [reduced to a 90 pages typewritten and transcribed] statement to the police on September 16, 2012.

[3] The defence has commenced its cross examination of R.M. It proposes to confront him with portions of his audiotaped statement he made December 5, 2013 to Private Investigator, Eric Mott, retained by the defendants. The defence suggests its purpose will be to contradict his testimony at trial. The defence

suggests portions of that statement put to R.M. will reveal that he has made statements therein that are inconsistent with his witness testimony.

[4] The defence accepts that the proper procedure is set out in Section 10 of the *Canada Evidence Act*. It says it does not have to provide the statement of December 5, 2013, or a portion thereof, unless it intends the court to make substantive use of that statement. – i.e. if the defence makes a *Khelawon* application to have it admitted for the truth of its contents, or I presume by their reasoning, if the defence attempts to establish any portion of the statement as past recollection recorded, which effectively deems that portion of the previous statement of R.M. to be adopted as the present testimony of the witness.

[5] The Crown argues that once the defence makes any use of the December 5, 2013 statement, it is required, by law, or upon the exercise of discretion of the court to order it, to disclose immediately a true copy of that statement. The defence has not to date provided a copy of that lengthy transcribed statement to the crown.

[6] Because it arose briefly during argument I will comment on the issue of litigation privilege as well. This topic was recently canvassed by the Supreme Court of Canada in *R. v. Lizotte,* 2016 SCC 52. Litigation privilege is a class privilege. It "has long been recognized by the courts and has been considered to

entail a presumption of immunity from disclosure once the conditions for its application have been met [citations omitted]… This means that any document that meets the conditions for the application of litigation privilege will be protected by immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the "public interests" that are at issue…" [paras. 34 – 37].

[7] A well-settled exception to litigation privilege is when the privilege is waived during litigation – i.e. when a party relies upon the document in question in open court. See for example, *R. v. Dunn*, 2012 ONSC 2748, paras. 76-91.

[8] In my view, any privilege herein is thereby anticipated to be waived by all defendants.

Analysis

[9] As with any witness, R.M. may be asked to refresh his memory based on a previous statement (e.g. see *R. v. Muise*, 2013 NSCA 81). The procedure involves the examiner attempting to establish the following: the previous statement was made by the witness; the witness then is asked to confirm the making of the statement by identifying the date, time and place, and who it was provided to;

asked to confirm his or her signature and/or initials if any, on a written statement; asked to read the statement, and whether he or she was being truthful when the statement was made; and lastly, asked the questions again.

[10] Once the preconditions have been met, the question may be asked: "You provided a statement to an investigator in relation to this matter on December 5, 2013? At that time were the events of 2012 fresher in your memory? Would it assist you to refresh your present memory from that statement?" [Leave is requested to show the statement to the witness] once the witness identifies the statement or portion thereof and it is read to themselves, the examiner can ask: "Does the review of your statement refresh your present recollection of the event/matter referred to in the statement?" If it does not, that is the end of the matter. If it does, then the witness may state what is their present recollection of the matter.

[11] If the refreshed present recollection of the witness is different from their testimony in direct at trial, the effect will be to cause their credibility to be brought into question.

[12] If the witness has no present memory of the event, it is open to the examiner to establish from the statement that, with the assistance of the prior statement, the

witness recalls: an event occurred, and that they made a truthful statement in relation to that event at the time the statement was given – the so-called "past recollection recorded" rule [see *R. v. Fliss*, 2002 SCC 16]; *R. v. Wilks*, 2005 MBCA 99, at para. 22].

[13] Effectively, thereby, the witness adopts as their testimony that portion of their prior statement.

[14] In addition, Section 10 of the *Canada Evidence Act* provides a procedure for an opposite party to cross-examine a witness upon a previous statement. In part, Section 10 reads:

> [1] On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing… relative to the subject matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the videotape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

[15] There was some question here as to whether the specific portion of the statement to be referred to by defence must be shown to the witness before the witness can be asked about the statement's contents. That is not necessarily so. In my view, therefore, in this case the proper procedure entails:

[16] Initially, the witness does not have to be shown their previous statement. However, once it is intended to contradict the witness, the witness's attention must be called to those parts that are relied upon by the defence to contradict the witness. [The witness should read over the portions in issue to themselves/the witness should be given the opportunity to explain any contradictions, even admit them, before the statement is proved through the witness or otherwise].

[17] Because it is cross-examination by an opposite party, the court need not rule on whether there is an "inconsistency" before allowing the witness to be asked about that portion of their statement.

[18] If there is a material inconsistency, the witness's credibility may suffer.

[19] It is always open to the defence to seek to introduce for the truth of its contents the entire statement or any portion thereof, pursuant to *R. v. Khelawon*, [2006] 2 S.C.R. 787; and specifically, as referred to in *R. v. Eisenhauer*, (1998) 123 CCC (3d) 37 (NSCA) - leave to Supreme Court of Canada refused, 126 C.C.C. (3d) vi.

What obligation in such circumstances is there on the defence to disclose the entire statement given by a R.M. on December 5, 2013?

[20] The court is well aware that accused persons have constitutional rights, as enshrined in, and then developed by jurisprudence flowing from the common law and the Charter of Rights. The defence is not required by law to provide "disclosure" of its investigations, etc., in the same way that the Crown is obligated to provide disclosure – see *R. v. Stinchcombe,* [1991] 3 S.C.R. 32; *R. v. McNeil,* [2009] 1 S.C.R. 66, their progeny, and other cases in that respect.

[21] Nevertheless, accused persons are not entitled to a perfectly fair trial, but only a fundamentally fair trial - *R. v. Lyons*, [1987] 2 S.C.R. 309. Moreover, the jurisprudence is clear that the Crown is also entitled to a fair trial.

[22] I note that in relation to the provision of expert reports in Section 657.3 *Criminal Code*, strict guidelines require the Crown to produce its experts reports by virtue of that section and its disclosure obligations , whereas the defence need only, within 30 days before commencement of the trial or within any other period fixed by a judge, give notice to the Crown or other parties of their intention to present an expert witness, referencing the name of the proposed witness, a description of the area of expertise of the proposed witness and a statement of qualifications of the witness.

[23] While arguments may be made as to the precise timing of when the defence in such situations must disclose their expert report to the Crown, when it intends to rely thereon at trial, it is clear that to allow the Crown to properly scrutinize the expert opinion evidence, it must have had it disclosed to it before the witness testifies.

[24] In my view, this is sensible, and the reasoning thread here, in my view, is also applicable to the present circumstances of an ordinary witness like R.M .

[25] The defence has cited no persuasive reasoning, or case law that is binding upon, or persuasive to this court, regarding their position that in circumstances such as these, there is no obligation on the defence to produce the statement of December 5, 2013, to the Crown.

Conclusion

[26] The stated purpose for the defence wishing to refer R.M. to his statement of December 5, 2013 is to show that he provided a prior inconsistent statement at that time.

[27] When a witness refreshes their memory, their present recollection is the evidence. When a witness has no present memory and adopts a statement

qualifying as past recollection recorded, that adoption of that portion of the statement becomes their evidence. When a witness is confronted with a prior inconsistent statement, unless adopted, or perhaps explained sufficiently, (*R. v. Luk*, 2016 BCCA 403) that statement may merely bring into question their credibility.

[28] Whether the defence intends to merely have R.M. acknowledge he made a previous inconsistent statement, or that he adopted it as past recollection recorded, or should they wish to engage a *Khelawon* application - in each of those circumstances, and particularly in relation to the latter two - as a matter of fundamental fairness, the Crown ought to be put in a position to allow it to effectively ask redirect questions of R.M., arising from the introduction on cross-examination by the defence, of his December 5, 2013, statement.

[29] It would be unfair to place the Crown in the position of being unable to ask cogent questions of the complainant in redirect, as a result of it not having the December 5, 2013 statement of R.M.

[30] Much like the rule in *Browne v. Dunn*, (see references in *R. v. Quansah*, 2015 ONCA 237, at paras. 75-86) the right to recall witnesses for omitted questions, and other examples of fairness accorded to both the Crown and defence,

in my view it would be unfair to not require the defence to disclose to the Crown the December 5, 2013 statement of R.M.

[31] I have not lost sight that this is an exercise of discretion on my part, and that I should consider the differing positions of the Crown and accuseds here. Greater flexibility is accorded to ensuring the defendants have a fair trial, than the Crown. Nevertheless, having reviewed the matter, it is appropriate that the defence disclose to the Crown the statement of R.M. in its entirety, if it intends to put any portion of that statement to R.M. during their cross-examination.

Rosinski, J.