CR 03136

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

BETWEEN:

**JOHN OLIVER**

Appellant

- and -

**HER MAJESTY THE QUEEN**

Respondent

---

**Appeal of conviction for uttering a threat and assault. Appeal dismissed.**

---

**REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE V.A. SCHULER**

Heard at Yellowknife, Northwest Territories
on July 25, 1996

Reasons filed: August 12, 1996

Counsel for the Appellant: Robert Gorin

Counsel for the Respondent: Ulla Arvanetes

CR 03136

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

BETWEEN:

**JOHN OLIVER**

Appellant

- and -

**HER MAJESTY THE QUEEN**

Respondent

**REASONS FOR JUDGMENT**

1 The appellant appeals his convictions for uttering a threat to cause death and assault. The complainant was Linda Franklin, the appellant's common-law spouse. The appeal from sentence was abandoned.

2 The only evidence capable of supporting the convictions was a tape-recorded statement made by the complainant to a police officer. In that statement, in answer to questions by the police officer, the complainant described a threat and an assault on her by the appellant. After a voir dire, the learned Territorial Court Judge admitted the tape-recorded statement on the basis of what is known as the *res gestae* exception to the hearsay rule.

**Evidence on the Voir Dire:**

3 The police received a call from the appellant's neighbour at 3:47 a.m.. They immediately went to the neighbour's house, spoke to her, and upon leaving the house observed the appellant coming from the direction of his house. The appellant was highly

intoxicated. He indicated that he was going to the neighbour's home and when told by the police that he was not welcome there, he pressed the matter, which led to his being arrested for being drunk in a public place. There was a struggle, the accused was handcuffed and pepper spray was used.

4 One of the constables then went to the appellant's home. This was approximately ten minutes after arrival at the neighbour's home. She was met at the door by the complainant. The complainant was crying and very upset, and asked the constable where the appellant was. The constable advised her that he had been placed under arrest and was in the police truck. She asked the complainant what had happened and the complainant briefly described the events of the evening.

5 The officer testified that she began taking the tape-recorded statement of the complainant immediately, at 4:25 a.m.. The tape-recorded statement lasted nine minutes.

6 The police officer described the complainant as having been drinking, but not drunk. The complainant told the officer that she had suffered no injuries and no injuries were observed by the officer.

7 The tape recorded statement was in the form of a question and answer interview. At trial, a transcript of the tape-recorded statement was filed and referred to by the judge. A copy of the questions and answers from the transcript is attached as Schedule "A" hereto. A copy of those portions of the police officer's testimony wherein she corrected certain portions of the transcript is attached as Schedule "B".

8 The tape was played at the hearing of the appeal by agreement of counsel. The complainant can be heard crying at one point on the tape and at other points sniffing or sighing in a manner that may be indicative of crying.

9 The neighbour referred to above was also called as a witness on the voir dire. She testified that between 3:00 and 3:10 on the night in question, the complainant called her and asked her to call the police to remove the appellant from their home. The neighbour then received a series of calls from both the complainant and the appellant. The complainant asked whether she had called the police; the appellant said that everything was alright. At one point he threatened that if the neighbour called the police, he would report her to Social Services and have her children taken away. The neighbour testified that she could hear the complainant yelling at the appellant to give her the phone. She said that the complainant was upset and mad but did not sound intoxicated. She said that the appellant was very intoxicated. The neighbour said that she did call the police at approximately 3:30 a.m.

10 The complainant was also called as a witness on the voir dire. She said that she remembered the police officer coming to her home but she refused to give evidence because, she said, she might perjure herself. She claimed not to remember the police interviewing her or the assault and threat, but did remember many other events of the evening. These were events that occurred both before and after the assault and threat described in the statement and both before and after the interview. She testified that she must have been drunk. She was declared a hostile witness and the Crown was permitted to cross-examine her. At one point the complainant also stated that she was not in the habit of lying to the police.

**Ruling of the Territorial Court Judge:**

11 The Territorial Court Judge admitted the tape-recorded statement as evidence of the truth of its contents on the basis of the *res gestae* exception to the hearsay rule. In doing so, he reviewed the time sequence after the police had received the call from the neighbour, noting that the police officer started speaking to the complainant only ten minutes after the police arrived at the scene. He then ruled as follows:

> Now *res gestae* is something that is said as part and parcel of the act, I suppose. It gains its reliability by the utterance being an instinctive reaction rather than some kind of reasoned reflection. The evidence is clear that Ms. Franklin wanted John Oliver out of her house. It's equally clear that she was upset, and that she had been drinking. That was on the 16th of January. She is still living with him and I don't think she wants to send him to the jail. Her evidence was that she doesn't want to send him to jail particularly, although it's not her that sends him to jail, it's the accused's actions, nothing else that sends him to jail.
>
> I don't have a videotape, I have an audio tape. I don't disagree with the arguments of Mr. Gorin that videotape would be better in terms of body language. The audio tape I thought was pretty straightforward even though of less than perfect quality. I thought, both in the typed transcript, subject to the corrections made by Constable Munn, the story she related was straightforward, she was clearly upset, clearly upset about what had transpired. She had spoken to no one since the events occurred. She used words in the statement that she on the stand said would be typical of her using, if we accept her evidence that she has minimal recollection, such as calling him the devil. She said that's a word she might use. She said that she would never lie to the RCM Police.
>
> She said she was drinking, no question about it. But according to Constable Munn, a constable of some 14 years experience, she wasn't drunk, and I believe Niki Betsina stated that she frankly didn't sound drunk. She didn't sound drunk on the tape, if I am allowed to make that observation, for what it's worth.
>
> I am going to admit the statement as part of the *res gestae*. To me it's close in time, she had no time to concoct, the events were unfolding as the constable arrived with the problems out in the parking lot or in front of the house with Oliver. She was clearly still upset over whatever had transpired, and can be heard crying on the audio tape. In my view at that point in time the possibility of distortion or lying or fabrication is pretty remote. There is nothing on the evidence that she gives today that would detract from it in that, although prodded extensively, she admits to more and more of her recollection. She confesses to total amnesia when it comes to what transpired between her and Mr. Oliver, which is different than saying it didn't happen; she just says she doesn't remember anything happening. I am going to admit the statement.

**The *Res Gestae* Rule:**

12 Counsel agree that the statement was the only evidence upon which the appellant could be convicted. Counsel also submit that the only issue is whether the trial judge was correct in admitting the statement under the *res gestae* exception to the hearsay rule; accordingly, I will not consider whether it was admissible on any other basis.

The *res gestae* rule was summarized in *R. v. Dakin* (1995), 80 O.A.C. 253, quoting from the Ontario Court of Appeal decision in *R. v. Khan* (1988), 27 O.A.C. 142; 42 C.C.C. (3d) 197 as follows:

> "... a spontaneous statement made under the stress or pressure of a dramatic or startling act or event and relating to such an occasion may be admissible as an exception to the hearsay rule. The stress or pressure of the act or event must be such that the possibility of concoction or deception can be safely discounted. The statement need not be made strictly contemporaneous to the occurrence so long as the stress or pressure created by it is ongoing and the statement is made before there has been time to contrive and misrepresent. The admissibility of such statements is dependent on the possibility of concoction or fabrication. Where the spontaneity of the statement is clear and the danger of fabrication is remote, the evidence should be received."

13 The considerations on an application for admission of statements under the doctrine of *res gestae* were detailed by Lord Ackner in *R. v. Andrews*, [1987] 1 All E.R. 513 (H.L.). They are set out below along with my comments as to the trial judge's ruling in this case:

1. *The primary question which the judge must ask is: can the possibility of concoction or distortion be disregarded?*

14 The trial judge in this case specifically considered whether the complainant had time to concoct and whether there was a possibility of distortion, lying or fabrication.

> 2. *To answer the question just noted, the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that her utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.*

15 In this case, the trial judge carefully considered the circumstances in which the statement was made, saying:

> *To me it's close in time, she had no time to concoct, the events were unfolding as the constable arrived with the problems out in the parking lot or in front of the house with Oliver. She was clearly still upset over whatever had transpired, and can be heard crying on the audio tape.*

16 The trial judge then went on to conclude that the possibility of distortion, lying or fabrication was "*pretty remote*".

17 In this case, the trial judge did not have to rely solely on the evidence of witnesses as to the complainant's demeanour and her emotional state; he was able to hear her for himself on the audiotape.

18 Was the statement made in conditions of approximate contemporaneity? As the trial judge stated, the events were unfolding as the police officer arrived. When the police officer came to the door, the complainant wanted to know where the accused was, suggesting that his whereabouts, what had happened and what was then happening were very much on her mind.

19 Counsel for the appellant submits that the thirty minute or so delay between the receipt by the police of the complaint from the neighbour and the beginning of the tape-recorded statement amounts to a lack of contemporaneity. However, the length of time between the event and the statement is only one circumstance to be considered in deciding whether the declaration is to be admitted: *R. v. Slugoski* (1985), 17 C.C.C. (3d) 212 (B.C.C.A.). As was said in that case, in some circumstances, a few seconds will be more than enough time to permit concoction and in others, a period of hours will not be too long.

20 In *Slugoski*, reference is made to *R. v. Henry* (1983), 10 W.C.B. 215 (unreported). The victim in that case was found seriously injured on a highway approximately one hour after the assault which eventually resulted in her death. She had crawled some distance to the highway. Statements made by her about her assailant's identity over a period of two hours from the time she was found, to the driver who found her, ambulance crew, police and a doctor, were admitted into evidence. The trial judge held that she was still overtaken by the terrible event that had befallen her and the time between the assault and being found could not have been devoted to detached reflection and concoction.

21 In this case, the evidence does not clearly show when the assault itself occurred within the context of the calls to the neighbour, the neighbour's call to the police, the arrival of the police and their observation of the appellant on his way from his house. The trial judge was, however, entitled to conclude that all of that was, in effect, one continuing occurrence, which was still unfolding as the police officer approached the complainant and spoke to her.

22 These circumstances can be distinguished from those in *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.). In that case, the sexual assault had occurred in the doctor's office and the statement of the three year old child was made to her mother approximately 15 minutes after leaving the office and approximately one half hour after the assault had occurred. After leaving the office, the mother and child had been in and then left a drugstore. It was only after that interval that the mother had asked the child about talking to the doctor and the child's statement was made.

23 The Supreme Court held in *Khan* that evidence of the child's statement was correctly rejected by the trial judge because it was not contemporaneous, nor was it made under pressure or emotional intensity. Clearly, the event had concluded; there was nothing in the evidence to indicate that it was still on the child's mind. In my view, the circumstances are quite different from this case.

> 3. *In order for the statement to be sufficiently spontaneous it must be so closely associated with the event which has excited the statement that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event which provided the trigger mechanism for the statement was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.*

24 Clearly the trial judge in this case was satisfied that the event which triggered the statement was still operative.

25 Counsel for the appellant argued that because of the lack of injury in this case, along with the time lapse, which I have dealt with above, the complainant's statement

lacks the spontaneity and freedom from risk of concoction that are necessary for it to be admitted under the *res gestae* rule.

26 As was noted in *Slugoski*, most of the cases in which statements have been admitted into evidence have involved a declarant who suffered severe personal injury in an attack. That was the case in *Henry*, in *Dakin*, where the victim suffered severe burns, and in *R. v. Muckler*, June 20, 1994, Ont. Prov. Ct. (unreported) where the victim was bleeding from a wound to the head. The rationale is that the severe injury so occupies the mind of the victim that it eliminates the possibility of taking time to concoct a story.

27 It has not invariably been the case, however, that severe injury has been part of the circumstances. Fear, for example, may operate on the declarant's mind in the same manner. In *Ratten v. Reginam*, [1971] 3 All E.R. 801 (P.C.), statements made by the deceased in a call for police assistance to a telephone operator before she was fatally shot were admitted as being "forced from the deceased by an overwhelming pressure of contemporary event".

28 I conclude that the presence of injury is simply one circumstance to be taken into account. In this case, the trial judge considered that the complainant was upset and crying and was still concerned about the whereabouts of the appellant. He was entitled to conclude on the evidence, and obviously did, that she was still under the pressure of the appellant's violence or threats of same. The police officer arrived at virtually the same time as the appellant was leaving the scene. In the circumstances, I can see no good reason to differentiate between a case where the victim's mind is occupied with an injury, the result of the event, and a case, as here, where her mind is occupied with the event

itself in circumstances where the event has been a threat to her safety. In either case, the trial judge must make an assessment of the possibility of concoction. The trial judge did that in this case and ruled out that possibility. In my view, he was entitled to do so on the evidence before him.

29 Although the trial judge in his reasons for admitting the statement did not deal specifically with the fact that the statement was made in the course of a question and answer interview, he did consider the surrounding circumstances. In most cases where statements have been admitted, they have either not been prompted by questions, or there has been minimal questioning. In some of the cases, for example, in *Henry* and in *Dakin*, the reported information is not clear about the extent to which the statements were made in response to questions from other persons.

30 In *R. v. Aguilar* (1992), 77 C.C.C. (3d) 462 (Ont. C.A.), an eight year old child made statements to an adult about a sexual assault that she said had taken place only moments before. The Court of Appeal agreed with the trial judge that the statements were inadmissible, saying:

> ...I do not consider the statements in the present case to fall within the spontaneous declaration exception to the hearsay rule, for they do not attain the level of spontaneity that is an essential element of that exception. They were made in response to very particular questions ("Was this man in the room? What did this man say?"). The questioner, Ms. M., was in an emotionally charged state ("I was pretty upset at just by looking at him wearing those bikini briefs in the kids' room behind a locked door"; "I was angry looking at him like that"; "I took her to the living room where her mom was. And I told M., my cousin, I think something's terribly wrong. You better ask your daughter what happened. Ask her what happened."). In my view, statements made in response to those questions asked in that atmosphere are bereft of the spontaneity which this exception to the hearsay rule requires and cannot be admitted on the basis suggested.

31 I interpret the reference to "those questions asked in that atmosphere" in the passage just quoted to mean that it was possible that the manner in which the questions were asked of the child, rather than the event itself, was the pressure to which she responded.

32 The trial judge in this case did consider the atmosphere in deciding that the statement should be admitted. He obviously found nothing in the manner in which the complainant was questioned to cause concern, referring to the tape and the story she related on it as "straightforward".

33 Each case turns very much on its own facts and the issue of spontaneity involves factors of not only time, but also the atmosphere, as I have indicated. So a statement made, as in this case, as the event is unfolding, and in response to a few questions within a nine minute period, may be spontaneous in a different way than statements made, as in *Henry* and *Dakin*, over a lengthier period of time to different persons.

> 4. *Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. The trial judge must be satisfied that, having regard to any such features, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.*

34 In *Andrews*, the special feature was evidence of the deceased declarant's motive to fabricate, arising from malice toward the accused caused by the declarant's belief that the accused had done damage to his home on a prior occasion.

35 In *Slugoski*, the court reviewed certain factors that militated against admission of the statements made by the declarant to her neighbour about a fire that was then burning. The court considered that nothing in the evidence excluded the possibility that the declarant was the person responsible for the fire and was blaming the accused, there was no factual basis shown for her statements about what the accused had done and she was at the time under treatment for mental problems. The court held that these factors disclosed a positive likelihood that, consciously or otherwise, the declarant had concocted or distorted the facts to the disadvantage of the accused. Although really going to weight, the factors were, the court held, properly considered by the trial judge who must weigh the evidence and find it trustworthy before admitting it.

36 In this case, in contrast, the special features diminished any possibility of concoction. The trial judge contrasted the complainant's feelings about the appellant at the time of the statement (upset, crying, wanting him out of the house) with her feelings as expressed at the time of trial (still living with the appellant, not wanting him to go to jail). There was no evidence of a motive for her to fabricate or concoct at the time the statement was made, but a clear motive for her not to want to give evidence at the trial.

37 In addition, although the complainant did not actually adopt her statement made to the police, she did testify that she would not lie to the police and that her description in the statement of the appellant as the devil was a description she always used of him when he was drunk.

5. *As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied on, this goes to the weight to be attached to and not*

> *to the admissibility of the statement and is therefore a matter for the trier of fact. Here again there may be special features that may give rise to the possibility of error, for example intoxication at the time of the event about which the statement is made.*

38 In this case, there was no evidence presented on the voir dire which would suggest the possibility of error. The trial judge did not accept the complainant's evidence as to the extent of her intoxication. He accepted the evidence of the police officer that the complainant was not drunk. He also noted that on the audiotape of the statement there were no indications of her being drunk. He noted that she agreed with much of the evidence about the circumstances leading up to the assault and she did not give contradictory evidence to what was in the statement; she simply said she did not remember what happened.

39 On the trial itself, there was no evidence raising the possibility of error; the accused testified that he remembered nothing of what happened between himself and the complainant.

**Conclusion:**

40 The trial judge properly considered the issues and in my view was entitled to reach the conclusions he did on the evidence before him. In the specific circumstances of this case, I am unable to say that he erred in admitting the statement under the principle of *res gestae*, except in one aspect, as follows.

41 Strictly speaking, statements admitted under *res gestae* are statements about the event which has transpired and caused the emotional pressure under which the declarant

speaks. In this case, the statement of the complainant included references to how long she had lived with the complainant, the names of her children and previous assaults by the complainant. Those parts of the statement ought not to have been admitted. There being no evidence, however, that the prejudicial information about the previous assaults affected in any way the trial judge's decision to convict, I would not disturb his decision.

42 The appeal is therefore dismissed. I would like to thank counsel for their helpful submissions and the materials they filed.

V.A. Schuler

J.S.C.

Dated at Yellowknife, Northwest Territories
this 12th day of August, 1996

Counsel for the Appellant: Robert Gorin

Counsel for the Respondent: Ulla Arvanetes

CR 03136

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

**JOHN OLIVER**

Appellant

- and -

**HER MAJESTY THE QUEEN**

Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE MADAM JUSTICE V.A. SCHULER

**SCHEDULE "A"**

**Transcript of Tape**

Q Linda I understand there was a disturbance here at the house tonight involving you and your common-in-law partner, John OLIVER. Can you tell me what happened? (I'm just going to set this down.)

A I have no idea what happened he just went berserk. He was drinking ..not intelligible.. and then he drinks hard liquor he just goes nuts. We were having fun and all of a sudden he just, I don't know if it was a black out or. He just started threatening me and he's going to kill me. And when I tried to get out he grabbed me. I telephoned my girlfriend, I finally got in contact with her and that's Nicky BETSINA ..inaudible.. I told her to call you guys.

Q Okay what time did this happen today?

A It started about two or three.

Q Do you know how much John had to drink tonight?

A No.

Q And how much have you had to drink tonight?

A Ahh I had about four beer at the bar and about a beer here.

Q And when did you start drinking at the bar?

A Around ten thirty.

Q Uhm you were saying he went crazy, what did he actually say, what words did he use?

A I'm going to fucking kill you. That's after he, he ahh sort of pinned me on the couch and I wasn't allowed to get up ..inaudible.. I was scared for my kids. After John started screaming they woke up. ..inaudible..

Q So, so what I'm understanding you're saying is he went crazy and started threatening you. And this happened in what, in what part of the house?

A Living room.

Q And ahh did he actually physically or try to touch you in a way at that time, what did he do?

A He grabbed my throat and said I'm going to fucking kill you right now.

Q What, what was his manner like?

A Because he was drinking, he was the devil. That' all I can think of, the devil.

Q And what did you think when he said those things to you?

A ..inaudible..

Q I'm sorry?
A (crying) ..not intelligible..hurt me. He's so different when he's not drinking. (crying)

Q And after he said those things after you?
A He locked me in my room, I tried to get out but he wouldn't let me out. That's it, I sat on the couch and then he had to go to the bathroom and I ran upstairs cause my kids were crying. I went to the room and I ..not intelligible.. the RCMP ..not intelligible..

Q And then what happened?
A I came downstairs and he said, did you call the cops? ..inaudible..

Q You have another children living in the house there, what are their names and how old are they?
A ..not intelligible.. eleven, Darcy eight, Chrissy four.

Q And what were they doing when this was happening?
A In the beginning they were sleeping but as soon as John raised his voice they woke up, well Troy woke up and said Dad quit arguing. And then he wouldn't stop.

Q How long have you been living with John?
A Oh four and a half years.

Q Four and a half years uhm and this has happened, has this happened before? Has John ever been charged with assault ..not intelligible..
A ..inaudible..

Q Were you injured in any way tonight?
A No.

Q Uhm you had mentioned to me before that he attempted to put you at one point ahh you, you did something.
A ..not intelligible..

Q I'm sorry?
A I blocked it, blocked it.

Q How did you block it?
A With my arm.

Q Okay what did he try to hit you with?
A With his hand.

Q Open or closed?
A It happened too fast.

Q And did this happen more than once or?
A He treats me like possession that I'm his and no one else can have me and if I don't do what he says, watch out.

Q Is there anything else that you can tell me about this evening?
A Silence.

Q Statement is now completed it's ahh 04:34.

**SCHEDULE "B"**

**Police Officer's Evidence Regarding the Transcript**

Q Constable Munn, you have a document in front of you that you were reading while the tape was playing, what is that?

A That is a typed transcript of the conversation that you just heard, the statement of Linda Franklin.

Q Did you note any errors in comparing that document to what you were hearing on the tape, did you note any errors or omissions there?

A On the second page I had asked her, the question was "four and half years this has happened, has this happened before, has John ever been charged with assault", and I could hear more plainly on the tape she stated that he had just gotten out.

Q There's a reference to children on page two of that tape, is there not?

A Yes, that is correct.

Q There's a, the children are, names are given there, is that correct, are those names correct?

A On the tape I asked her, "do you have other children living in the house, what are their names and how old are they?" And her answer was Troy 11, Darcy age eight, and Chrissy four, and those are the same children that I spoke to that night as well at the residence.

...

Q Are you able to, so other than the addition that you have spoken of that Mr. Oliver had just gotten out of jail, did you note any other errors in the transcript compared to the tape?

A Yes, if, on page three the question was, "you had mentioned to me before that he had attempted to..." and then you have "hit", and I heart on the tape "hit".

Q Sorry, page two?

A Page two, the third question from the bottom.

Q Yes?

A You hear on the tape she said "he attempted to hit me". The question was "You had mentioned to me before that he attempted to hit you at one point and you did something". Then her answer was unintelligible and my next question was "I'm sorry" and she says "I blocked it, I blocked it. How did you block it? With my arm."

Q Did you note any other errors?

A She mentioned there on the first page, initially when she was talking about Niki Betsina's house I wrote in here Niki Betsina's house number, I believe it was 803.

Q Is that tape recording, does that accurately record the interview that you had with Linda Franklin that morning?

A Yes it is, that is my voice and that is the interview that I conducted with Linda Franklin.