IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

EDWARD AUGER

Transcript of the Decision on a Voir Dire held before The Honourable Justice V.A. Schuler, sitting in Yellowknife, in the Northwest Territories, on the 5th day of June, A.D. 2001.

APPEARANCES:

Ms. S. Kendall:	**Counsel for the Crown**
Mr. S. Duke:	**Counsel for the Defendant**

(Charge under s. 268 of the Criminal Code of Canada)

THE COURT: I'll deal first with the issue of Section 9(1) of the *Canada Evidence Act*. The Crown seeks to cross-examine Miss Kendi on the previous inconsistent statements made by her.

Following the *Cassibo* case from the Ontario Court of Appeal, 1982, in my view it would be appropriate to make a finding of adversity on the basis that the witness Doris Kendi has given previous inconsistent statements and on the basis of the change in her story, because clearly there has been a change since she gave the various statements up to her testimony yesterday in court, and bearing in mind that she says she doesn't remember making those statements, but considering that, considering her expressed desire not to see the accused stay in jail, in my view she is clearly adverse to the prosecution and I would allow cross-examination of her by the Crown on the statements in question. In fact, if the statements are to be admitted as substantive evidence, it seems to me she would have to be cross-examined on them, for what it might be worth, so that the jury could assess them and could assess her change.

Now, the much more difficult issue is the question of the admissibility of the statements themselves as substantive evidence. First of all, clearly none of them were taken using the procedures set out in *K.G.B.*, none were taken under oath. They

weren't audio or videotaped, and obviously that's simply because of the circumstances at the time; everyone was concerned about Miss Kendi's injuries and treating those injuries. There weren't any procedures put in place that might be the equivalent of an oath. Again, in the circumstances, all of this is understandable because the medical personnel were concerned with treating her and she made it clear to Constable Bellamy that she didn't want to give a formal statement.

The Crown submits, firstly, that the statements should go in under the res gestae rule, and the defence points out that the evidence does not show precisely when the injuries occurred, which is correct, although the medical evidence - for example, Dr. Mahboub's evidence - suggested that they were fairly recent in time to when he actually treated her. The statements were not completely spontaneous in that they were made in response to questioning, although the questioning was fairly brief. In most cases she was just asked what happened.

During the questioning, beginning at the point when the ambulance attendant deals with her, she is being treated for the severe lip injury, she's in pain, there's a lot of blood. I think it can be concluded that what was operating on her mind was the event, the injury.

Now, the statements themselves were made over a period of approximately three hours. So as one moves along that period, one does -- or the statements do become less closely contemporaneous to the event that caused the injury. That is relevant to the question of concoction, and in this case there has not been any evidence put forward or any basis to suggest actual concoction. And I note that Miss Kendi did say to Constable Bellamy that she did not want the accused to go to jail. There's no indication that she had any ill will towards the accused.

The real concern in this case, it seems to me, is the issue of the possibility of error, which is something one has to consider in connection with res gestae. But the bigger issue, obviously, inclusive of that, is the question whether the statements are reliable. The principle behind the admission of res gestae statements is that they are made in circumstances which are deemed to make them reliable, and as reliability is also the second prong in the *Starr* principled approached to the admission of hearsay evidence, I'm going to deal with that aspect of it, bearing in mind that it relates to both res gestae and the principled approach.

Miss Kendi's evidence, and, really, this is the only evidence except for some of what Dr. Mahboub said which I'll refer to, this is the only evidence about

how much she had consumed. Her evidence was that she was drinking heavily, probably since seven o'clock in the morning and that she had also smoked some marijuana. Now, at the point where she's attended to by the ambulance attendant, I note that Lieutenant Dewar and Constable Bellamy differed somewhat in their evidence as to whether they observed her to be coherent or incoherent. At the hospital she's given morphine and Ativan, and the evidence of Dr. Mahboub was that these drugs can affect concentration, memory, and the higher cerebral functions. At the hospital her blood alcohol level is noted to be twice the toxic level, and as I understood the doctor's evidence, some 20 times what he called the higher acceptable level. It's in this condition that she then makes her statements to Constable Bellamy and to the nurse, Ms. Olds. Now, their evidence was that she appeared to them to be functioning, to be coherent, to be responding appropriately. I suppose one could say the words that she is said to have said, the statements she is said to have made, are fairly brief and perfunctory. In my view it is significant, and it is something that I have to consider, that Constable Bellamy would not take a K.G.B. statement from her, and he said that that was in part due to his concern that because of her alcohol consumption she might not be in a condition to understand the oath and the usual

K.G.B. warnings. So as I said during counsels' argument, it seems to me it is somewhat ironic, and it does cause me some concern, that at the time she is giving one of these statements, and it would be the second last of the four statements the Crown seeks to have admitted, at that time Constable Bellamy concludes she is not in a condition to swear under oath and to give a formal statement, and yet now today the Court is being asked to admit the statements as being reliable, statements which obviously aren't under oath.

Now, just moving into some of the issues raised by the Crown's argument that the statements should be admissible under the principled approach to the hearsay rule as set out in *Starr*. I spent some time last night reviewing the various cases that were submitted, and, for the most part, those cases, and I include *Starr* itself, but also *Khan*, deal with the admission of hearsay evidence that are not previous inconsistent statements in the true sense. They are cases where the declarant of the statement is no longer available as a witness or for some reason is not able to testify, is not able to say what happened. I also distinguish this case from the *Oliver* case. In *Oliver* the complainant testified in court that she could not remember what had happened during the incident. She had made an audiotaped statement to the

police saying that the accused had assaulted her. She said that she couldn't remember what happened but that she wouldn't likely lie to the police, and she came fairly close, although not all the way, to adopting the statement that she had made to the police, and again I note it was audiotaped. So in that case there was the ability to actually hear what it was she had said to the police, and to, accordingly, make some judgments about her demeanour.

The cases which do deal with previous inconsistent statements -- and the way I look at this case is that we are dealing with a previous inconsistent statement. Ms. Kendi said in court that she hurt herself by falling, that Mr. Auger didn't hit her. What she said in the statements that the Crown is seeking to admit is that Mr. Auger hit her or beat her. So in my view we are talking, obviously, about a previous inconsistent statement which she is recanting. She is telling a different story now, and she is, of course, saying that she doesn't remember making those previous statements.

In the cases of *K.G.B.* and *F.J.U.*, the Supreme Court made some comments about previous inconsistent statements which I think are very important and which have to be taken into account. First of all, in the *K.G.B.* case, at page 291 of the version in the Crown's authorities, which is the 79 C.C.C. (3d), the Court

talks about indicia of reliability in the case of prior inconsistent statements and says:

> "...that the statement, to be substantively admissible, has been made under (i) oath, solemn affirmation, or solemn declaration and (ii) following the administration of an explicit warning to the witness of his or her amenability to prosecution if it is discovered that he or she has lied."

The Court goes on to say:

> "This indicium satisfies the first hearsay danger entirely: in no case will the trier of fact be asked to accept unsworn testimony over sworn testimony, verdicts will not be based on unsworn testimony, and the circumstances which promote truthful trial testimony will have been recreated as fully as is possible."

So obviously, in my view, the Court has alerted us to the concern that triers of fact not be asked to accept unsworn testimony over sworn testimony.

Now, the Court does go on to say:

> "...that there may be situations" --

and I'm looking at the last paragraph on page 291

> -- "in which the trial judge concludes that an appropriate substitute for the oath is established and that notwithstanding the absence of an oath the statement is reliable. Other circumstances may serve to impress upon the witness the importance of telling the truth, and in so doing provide a high degree of reliability to the statement. While these occasions may not be frequent, I do not foreclose the possibility that they may arise under the principled approached to hearsay evidence."

Turning then to the *F.J.U.* case, at page 115, -- I'm sorry 114, paragraph 34. Again this is in the version that is found in the Crown's material, from 101 C.C.C. (3d). Justice Lamer, Chief Justice Lamer as he then was, says that, referring to *K.G.B.*, he held that:

> "The gravest danger associated with hearsay evidence simply does not exist in the case of prior inconsistent statements because the witness is available for cross-examination. The other two dangers, absence of an oath and absence of demeanour evidence, can be met through appropriate police procedures and occasionally appropriate substitutes can be found. Finally, the prior statement is necessary evidence when a witness recants,"

and he goes on to speak about that. Then over on page 119, in talking about the procedure on the voir dire, paragraph 47, he again speaks about the indicium of reliability being the oath or affirmation for the K.G.B. statement, the warning of penal consequences for lying, a videotape of the statement, and how the reliability assessment can be relatively easily made in those circumstances. He says:

> "If the reliability criterion is to be met, in rare cases, by the striking similarity between the statement being assessed and another statement which is already clearly substantively admissible, the trial judge must be satisfied on a balance of probabilities that there are striking similarities..."

and he goes on to speak about that. But it seems to

me that the Supreme Court of Canada has fairly carefully set out the procedure for admitting a prior inconsistent statement as substantive evidence, and it has also fairly carefully indicated that the exceptions to the various precautions which are to be put in place to try to assure reliability will be narrow exceptions.

Now, in this case, as I've said, the statements that the Crown seeks to have admitted as substantive evidence were not given under oath; the declarant was under the influence of alcohol and drugs, both marijuana and the medications that were given to her; she has given a different version of events under oath from what she gave to the individuals to whom she spoke after the incident. The jury in this case would be asked, if the statements are admitted, to accept these unsworn statements over her sworn evidence. Because she now says she doesn't recall making those statements, I have to agree that cross-examination of her would be certainly impeded and possibly not really effectively possible at all. Another concern is that the jury really has no effective way of assessing her demeanour when she made the statements other than through the evidence of the persons to whom the statements were made, and the *K.G.B.* case talks about, if a statement is not videotaped or audiotaped, having independent evidence of demeanour. I have considered

whether the evidence of the four individuals in this case would be sufficient, but I note in each case that it's the individual to whom she's giving the statement that is really the witness for what her demeanour was like. There really isn't any independent evidence, although in the one case with the ambulance attendant, Constable Bellamy was there. But then, as I say, he and the ambulance attendant differed about the extent to which she was coherent. So the precautions aren't there. They aren't there as they were in the *Oliver* case where there was an audiotaped statement and the Court could hear what she said as she said it and make some conclusions about that. I am also reminded of another case I dealt with two or three years ago, the *Firth* case, where there was an audiotape of the complainant's statement to the police which was very helpful to the Court, and, I'm sure, to the jury, in making conclusions about the extent of the witness's intoxication at the time she gave the statement and her demeanour in giving it, and we simply don't have that in this case, and it seems to me it would be something that would be very important because it is unsworn evidence and because of all the evidence of alcohol and drugs, and the jury would essentially be relying on the evidence of the persons who observed her but they'd have no way of making their own assessment as to whether what she said, whether that

unsworn evidence is reliable. In saying this, I certainly don't want to be taken to be casting any criticism on what was done in this case. Obviously, at the time that the individuals in question were dealing with Miss Kendi, they had more pressing matters to deal with. They had the injuries and she wasn't willing to give a formal statement. So it is not a criticism of what happened, but it simply is noting that this is the situation, unfortunately, that we are in at this point.

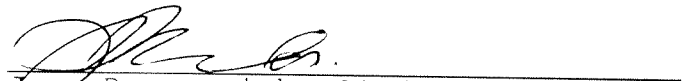
It is tempting to perhaps try to expand the *Khan* decision, which did refer to and approve somewhat relaxed rules with child witnesses, to cases like this, and by that I mean cases of alleged spousal assault, because of the obvious difficulties of obtaining testimony in these cases. But, on the other hand, I suppose it is a question of how far the Court should go in accepting unsworn evidence and especially in circumstances which point to unreliability, and by that I mean the alcohol consumption and the evidence about the drugs. Hopefully the Supreme Court of Canada may provide some further guidelines. I am not sure that this is the case in which to expand the principles. And, again, my concerns are very much the specific circumstances, the alcohol, the drugs, the fact that the jury would have so little means of assessing the reliability of what she said to these

individuals.

Now, I acknowledge that the test at this stage is simply threshold and not final reliability. But in all the circumstances, I don't think that the evidence meets threshold reliability, and for the reasons I have given and as I understand *K.G.B.*, *F.J.U.* and the other cases, considering the type of statement we are dealing with and the use that the Crown seeks to make of it, I feel I must rule in this case that the statements are not admissible either as res gestae or under the principled approach.

.....

Certified Pursuant to Rule 723
of the Rules of Court



Jane Romanowich, CSR(A)
Court Reporter