IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

TYLER CHARLES COUROUBLE

Transcript of the oral ruling on admissibility of evidence, delivered by The Honourable Justice L. A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 12th day of January, A.D. 2012.

APPEARANCES:

Mr. A. Godfrey and Mr. B. MacPherson:	Counsel for the Crown
Mr. T. Boyd:	Counsel for the Accused

(Charge under s. 271 and 266 of the Criminal Code of Canada)

THE COURT: During the course of this trial, the Crown sought a voir dire to determine the admissibility of evidence of an utterance allegedly made by the complainant, Karen Lander, and heard by her adult son, Blake Hickling. I concluded that the evidence was admissible, and I said I would put my reasons on the record later during the trial so as not to hold off the continuation of the proceedings before the jury at that time. These are my reasons.

The charges that the accused faces are sexual assault and assault. The complainant's trial testimony was applied by consent to the voir dire, as were two exhibits that had already been filed in the trial at that point, namely Exhibit 1 (two photos taken on May 18th showing bruising and swelling to an area near the complainant's left eye) and Exhibit 2, which sets out the results of forensic testing confirming the presence of the accused's DNA on the complainant's underwear and on a vaginal swab.

At the trial, the complainant testified that she consumed alcohol on the night in question and had a blackout from sometime in the early morning hours when she was still at the Ravens' Pub. Her next memory is being on a couch in her apartment with her son Blake having pulled the accused off

of her. She has no recollection of either the sexual assault or the assault. In fact, she has no recollection of meeting the accused at all that evening, and, before this night, she had never met him.

The evidence which was the subject of the voir dire is the evidence of her son Blake Hickling. He was sleeping in his room in the apartment where the incident is alleged to have happened. His evidence was that he woke up at some point and heard two things. He was not certain in what order these things happened, but he said they happened very close to one another. One was what he described as a "smacking noise", the sound of someone being hit. The other was his mother's voice saying, "Stop. You are not doing that." That is the utterance the Crown wanted to adduce in front of the jury.

Mr. Hickling testified at the voir dire that after hearing this, he went to the living room and found the accused on top of his mother on one of the couches in the living room. Their pelvises were close together and it appeared they were having sex.

The Crown wanted to adduce this utterance that Mr. Hickling heard for the truth of its contents, as evidence the complainant was not

consenting to what the accused was doing at the time. The Crown argued that the evidence was admissible because it falls under one of the traditional exceptions to the inadmissibility of hearsay, the res gestae or "spontaneous utterance" exception. The Crown also argued that this evidence met the requirements for admissibility under the principled exception to the inadmissibility of hearsay as elaborated by the Supreme Court of Canada. Defence took the position that the evidence was not admissible, and defence's submission on both the res gestae and principled exception areas centred on the issue of reliability of the evidence.

The first question, of course, is whether the evidence is, in fact, hearsay. If it is not, then it is not presumptively inadmissible. One fundamental aspect that defines hearsay is the purpose for which the evidence is being adduced. Evidence that is simply adduced to show the utterance was made is not hearsay. Evidence of what someone heard that is adduced to explain the actions of that person (in this case, for example, explain why Blake got up and went to check what was happening in the living room) is also not hearsay. So for those purposes, in my view, this evidence would be clearly admissible

without any consideration needing to be given to either the traditional exceptions or the principled approach because those purposes are not hearsay purposes. But to the extent that the Crown wanted to use this utterance as proof of its contents and argue that it is an expression of lack of consent on the part of Ms. Lander, then the analysis is required.

First, with respect to the traditional exception, it is important to note that as the Supreme Court developed the principled approach with respect to the admissibility of hearsay, there evidently was a need to address how the traditional exceptions fit within this new regime. The answer was provided in the case of R. v. Mapara, [2005] 1 S.C.R. 23, at para. 15, at page 42, which I will quote from. The Supreme Court summarized the state of law in the following way:

> "(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
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> (b) A hearsay exception can be challenged to determine whether it

is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

(c) In 'rare cases', evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire."

So res gestae, as an exception to the inadmissibility of hearsay, is still presumptively in place. Counsel did not refer me to any case where it has been found that this exception had been successfully challenged as not being supported by the indicia of necessity and reliability required under the principled approach, and, in my view, that exception is still a valid one. Really, all of its components

mirror very much the concerns that are addressed through the principled approach.

The exception itself was not challenged in this case because defence counsel's submissions really were focused on reliability, and defence's position was that this evidence did not fit within the res gestae exception.

This court some time ago examined whether evidence was admissible under the res gestae exception in the case of R. v. Oliver [1996] N.W.T.J. No. 69. In that case the Court identified some of the considerations that apply in deciding whether a statement should be admitted under this rule. I am not going to quote from the case, but, by way of summary, my understanding of it is that the considerations include the possibility of concoction or distortion either by the declarant or by the person who testifies about the utterance. Another consideration is the question of whether a startling or dramatic event dominated the thoughts of the declarant in such a way that the declarant did not have any real opportunity for reasoned reflection. This is where contemporaneity of the utterance in relation to the events is important. Also, whether the utterance was made spontaneously in response to

the event or was the result of questions being asked of the declarant. And, finally, the reliability of the evidence with respect to the accuracy of the words spoken and reliability generally, although it was recognized that unless there are special features of concern, the issue of reliability is a matter better left to the trier of fact.

Here, the utterance is alleged to have been made at the time of the incident, at a time where the complainant would not have even known that it might be overheard. It was also made, allegedly, close in time to when she was struck. In my view, this makes it both as spontaneous as could be and as contemporaneous as could be. The risk of concoction is minimal under those circumstances.

The concerns raised by defence, and that arise on the evidence, have to do with reliability. In dealing with that issue, I have considered the evidence about the layout of the apartment, showed him the drawing made by the witness which was first marked as Exhibit "A" on the voir dire and then made a full exhibit in the trial. I have considered the evidence that there were no other noises in the house, that the witness had consumed some alcohol that evening,

but that his evidence was that he was not feeling the effects of alcohol when he went to bed. I have considered that Mr. Hickling is the son of the declarant, which is a factor that could have a bearing on reliability; but it was not suggested to him on cross-examination that he was fabricating this evidence to assist his mother somehow. So the connection is a factor on reliability, but, in my view, it remains one for the trier of facts to assess.

The other issue on reliability is the evidence that Mr. Hickling gave a statement to the police and testified at the preliminary hearing and at those times reported having heard different words. To the police, he said what he heard was "get off and get out", and at the preliminary hearing, his evidence was that all he remembered hearing was "stop". Defence argued that this presented a serious problem on the question of reliability, and argues that this is one of the big distinctions between this case and the Oliver case because, in Oliver, the conversation had been recorded, so there was a clear record of it.

Looking at the factors as a whole, I conclude that this evidence, for the reasons I have given, is admissible as res gestae and that

any concerns about the accuracy of what the witness reported hearing and the other factors that go to reliability are matters properly left with the trier of facts. If I am wrong in my analysis, either in concluding that the res gestae exception should still stand or in concluding that the evidence in this case meets the requirement for admissibility under that exception, I would have concluded, in any event, that the evidence is also admissible under the principled approach, and it obviously flows from that that I do not think this is a rare case or evidence falling within a recognized exception should still be excluded because it fails to meet the requirements of the principled approach.

Necessity here is established because the declarant, Ms. Lander, has no recollection of what happened before Mr. Hickling was in the living room. So there is no other way that the Crown can adduce evidence of this utterance.

Reliability is the second factor, and at the stage of deciding whether the evidence is admissible or not, what the Court is concerned with is threshold reliability, not ultimate reliability, which is to be left to the trier of facts.

In the case of R. v. Khelawon, [2006]

2S.C.R. 787, the Supreme Court clarified how this analysis must be conducted and modified the approach from its earlier pronouncement in R. v. Starr, [2000] 2 S.C.R. 144, the Court said that all relevant factors should be considered when determining threshold reliability, including, where appropriate, the presence or absence of supporting evidence. The approach must be functional, focused on the particular dangers of the proposed evidence as well as the attributes and circumstances relied upon by the party seeking to adduce the evidence to overcome those dangers.

The comments that I have already made about the aspects of the evidence that are relevant to reliability when I was dealing with my analysis of the res gestae principles applies to the analysis of the threshold reliability requirement.

I conclude that the evidence is sufficiently reliable to be weighed by the jury because of following reasons:

First, because of the spontaneous nature of the utterance and the lack of opportunity for concoct. Next, because the declarant had no way of knowing her utterance would be heard. Next, because of the evidence about the "smacking

noise" right around the same time as the utterance was made, combined with the evidence about the injury that the complainant had, which started to show moments later and was clearly visible the next day as set out in the photographs. Another factor are the circumstances under which this utterance was overheard, including the fact that the diagram of the layout of the apartment shows that although Mr. Hickling was in a bedroom with the door closed, the location where the complainant was would have been right on the other side of the wall from where he was. So although he was in a separate room with the door closed, in terms of physical surroundings, he was not that far from where she was. I have considered as well the evidence about the lack of other noise and the fact that the witness said he does not have a hearing problem.

I made this decision recognizing there were also some concerns. The complainant's blackout means that she cannot be cross-examined about the utterance; but, at the same time, she was a trial witness, so she was, in a general way, available for cross-examination. I am also mindful of the prior inconsistent statements that Mr. Hickling gave about what he heard, but I have considered

the nature of the differences. It might have been a different matter if the three versions were diametrically opposed as to what he heard. Here, the three versions, although different, all convey messages of a similar nature, consistent with the declarant wanting something to end or stop. Finally, I have also given some thought to the fact that Mr. Hickling is Mr. Lander's son, that he may not be a completely objective or distant observer to these events, but, in my view, that is not in and of itself a reason to conclude that his evidence is so inherently unreliable that it does not meet this basic threshold reliability test. And as I have already mentioned, there was nothing in his cross-examination on the voir dire tending to show that he was fabricating this to assist his mother, and he did acknowledge the earlier inconsistent statements that he had made. So, on the whole, I am satisfied that the criterion on reliability was met on this evidence.

Finally, I considered the defence counsel's submission that the evidence should be excluded because of its prejudicial nature. The Supreme Court has recognized that when dealing with applications to adduce hearsay under the principled exception the Court has, as it always

does in matters of evidence, a residual discretion to exclude evidence if the prejudicial effect outweighs the probative value. There is no doubt that this evidence is prejudicial to the accused. If it was not, the Crown would probably not seek to adduce it. But words spoken as an event is unfolding is also something that is very probative as far as determining the true nature of the interaction between the parties. So, in my view, this is not a case where it can be said that the prejudicial effect outweighs the probative value to the point that otherwise admissible evidence should be excluded.

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter