

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

JASON FRANK PAULETTE

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Transcript of the Ruling on the admissibility of  
utterances as res gestae by The Honourable Justice S. H.  
Smallwood, at Fort Smith in the Northwest Territories, on  
January 17th A.D., 2014.

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APPEARANCES:

Mr. A. Godfrey: Counsel for the Crown  
Ms. K. Lakusta:  
Mr. M. Hansen: Counsel for the Accused

An order has been made banning publication of the  
identity of the Complainant/Witness pursuant to Section  
486.4 of the Criminal Code of Canada

1 THE COURT: Earlier in this trial, a  
2 voir dire was to held to determine the  
3 admissibility of evidence of an utterance  
4 allegedly made by the complainant R. P. to  
5 Ashleigh Stokes. I ruled that the evidence  
6 was admissible and said that I would provide  
7 reasons later in the trial so as not to delay  
8 the continuation of the proceedings before the  
9 jury at that time. These are those reasons.

10 The charge that the accused is facing is  
11 sexual assault causing bodily harm. The  
12 complainant and Ashleigh Stokes testified on  
13 the voir dire and three exhibits were filed:  
14 Two were agreed statements of facts. One  
15 related to the injuries and condition of the  
16 complainant as observed by members of the RCMP  
17 and medical personnel and another which  
18 related to DNA evidence which was discovered  
19 as a result of a sexual assault examination  
20 which was performed on the complainant during  
21 the course of the investigation. The DNA  
22 evidence located the accused's DNA in the  
23 vaginal pool of the complainant. The third  
24 exhibit was photographs which were taken of  
25 the complainant which showed the injuries that  
26 she had when the photographs were taken  
27 following the alleged incident.

1           In the voir dire, the complainant  
2 testified that she went to the accused's  
3 residence. The accused is her cousin and she  
4 went over because she knew his common-law  
5 spouse was away for medical treatment and she  
6 thought that she would help him out with his  
7 children. She spent the evening at his  
8 residence and they smoked marijuana and drank  
9 alcohol.

10           The complainant testified that she went to  
11 the accused's residence before 5 p.m., they  
12 smoked a joint, had supper and did the dishes,  
13 then smoked another joint. She was asked to  
14 go to the liquor store to get a 15 pack of  
15 beer which she did. When she returned, she  
16 and the accused smoked another joint. After  
17 this the accused had a tattoo gun and offered  
18 to touch up a tattoo that she had on her  
19 ankle. She agreed and the accused proceeded  
20 to work on her tattoo and they also began to  
21 drink the beer. The complainant estimated  
22 that she had seven beer and the accused had  
23 about the same amount of the 15.

24           While the accused was working on the  
25 complainant's tattoo, the complainant was  
26 texting a friend. She testified that she  
27 texted this friend throughout the evening.

1 After the accused finished touching up her  
2 tattoo, they smoked another joint. At some  
3 point the complainant testified that there was  
4 a discussion about going to the bootlegger to  
5 get a 26-ounce bottle of vodka but she does  
6 not remember if they did so.

7 Following this, the accused got mad at the  
8 complainant for being constantly on the phone.  
9 She testified that she thought it was a joke  
10 at first but she realized he was serious when  
11 he slapped the back of her head. She was  
12 scared and put her phone away.

13 The complainant then went to the bathroom  
14 upstairs. When she was in the bathroom, she  
15 blacked out. When she came to again, the  
16 accused was choking her. She faked being  
17 unconscious so he would get off of her. He  
18 went downstairs and she pulled up her pants  
19 and went downstairs. She stated she was  
20 "freaking out" and asking how he could do this  
21 to her. The accused then punched her in the  
22 face cutting her chin. Blood went all over  
23 her clothes and floor. The complainant  
24 started yelling at the accused again and he  
25 grabbed her by the neck and pushed her to the  
26 floor and used her hair to mop up the blood.  
27 The accused told her to "shut the fuck up you

1 stupid bitch".

2 The complainant testified that she blacked  
3 out again and the next thing that she  
4 remembered was putting on her shoes and  
5 running out the door, leaving behind her cell  
6 phone, jacket, Ipod, and a bag of clothes.  
7 She testified that when she left the residence  
8 she wasn't thinking about her stuff; she just  
9 wanted to get out of there. When she left the  
10 residence she did not know where the accused  
11 was.

12 The complainant testified that she ran  
13 over to her friend Ashleigh Stokes' residence,  
14 which was a street over, approximately three  
15 minutes away. When she left the accused's  
16 residence, it was cold out and the complainant  
17 testified that it was minus 40.

18 At Ashleigh Stokes' residence, the  
19 complainant knocked on the door. When there  
20 was no immediate answer, she began banging on  
21 the door yelling and crying. Ashleigh Stokes  
22 answered the door. The complainant testified  
23 that Ashleigh Stokes asked her what happened  
24 and she tried her best to explain. She  
25 testified that she was still kind of drunk.  
26 The complainant was unable to recall the words  
27 that she said when she was talking to Ashleigh

1 Stokes. She went into the residence and went  
2 into the washroom and tried to wash the blood  
3 off her hair. She testified that Ashleigh  
4 Stokes told her to stop and then they went to  
5 the hospital.

6 The complainant testified that when she  
7 blacked out during the evening, she did so  
8 because she had been consuming alcohol and  
9 marijuana.

10 The complainant also testified that there  
11 were portions of the night that she did not  
12 remember as a result of blacking out due to  
13 alcohol and marijuana consumption.

14 She testified that she did not recall any  
15 sexual relations with the accused that night  
16 and she did not consent to any sexual  
17 relations with the accused that night.

18 That is essentially the complainant's  
19 evidence regarding the evening on the voir  
20 dire.

21 The Crown also called Ashleigh Stokes to  
22 testify. She testified that she was sleeping  
23 at her residence that morning. At around 4:30  
24 in the morning, she heard knocking on her  
25 door. Initially she was not going to answer  
26 the door. She then heard yelling and  
27 screaming and realized that it was the

1 complainant. She got up and answered the  
2 door. She testified that when she opened the  
3 door she saw the complainant who was crying,  
4 her hair was messy. There was blood on her  
5 face and she was shivering. She was wearing a  
6 sweater and jeans and her clothing was not  
7 appropriate for the cold weather.

8 She testified that the complainant said to  
9 her "my cousin raped me" over and over again.  
10 She asked the complainant "your cousin who?"  
11 to which the complainant responded "my cousin  
12 Jason raped me".

13 Ashleigh Stokes described the complainant  
14 as being in a frantic state. She testified  
15 the complainant went and laid down on her  
16 couch. When the complainant came inside,  
17 Ashleigh Stokes noticed the cut on her chin.  
18 While inside Stokes' residence, they had a  
19 further conversation about what happened.

20 With respect to the complainant's  
21 intoxication, Ashleigh Stokes said she noticed  
22 the smell of alcohol on the complainant but  
23 did not observe any other signs of  
24 intoxication. There was no slurring of  
25 speech, her walking was fine, but she was  
26 shivering and frantic. Ashleigh Stokes  
27 herself had not been drinking or consuming

1 drugs that evening.

2 Ashleigh Stokes denied the complainant  
3 used the washroom while at her residence.

4 The Crown is seeking to adduce the  
5 utterances made to Ashleigh Stokes "my cousin  
6 raped me", "my cousin raped me", "my cousin  
7 Jason raped me" for the truth of its contents  
8 as an exception to the hearsay rule. The  
9 Crown argues that the evidence is admissible  
10 because it falls under one of the traditional  
11 exceptions to hearsay evidence being  
12 inadmissible. That is the res gestae  
13 exception which refers to what is also called  
14 spontaneous utterances.

15 The Crown has also argued that the  
16 utterances meet the principled exception to  
17 hearsay which has developed, which is that the  
18 utterances are necessary and reliable and thus  
19 admissible on that basis as well. The  
20 position of the defence is that the utterances  
21 were not admissible and that they did not  
22 satisfy either res gestae or the principled  
23 exception and the arguments focused on the  
24 reliability of the evidence.

25 The utterances are hearsay. There is no  
26 dispute regarding that. As hearsay, they are  
27 presumptively inadmissible. There have been



1 traditional exceptions to the hearsay rule for  
2 many years, *res gestae* being one of them.  
3 More recently the Supreme Court of Canada has  
4 developed what has been called the principled  
5 exception to hearsay which focuses on the  
6 necessity and reliability of the evidence.

7 The case of *R. v. Mapara*, [2005] 1 S.C.R.  
8 358, a decision of the Supreme Court of  
9 Canada, discussed how the principled exception  
10 and the traditional exceptions are to be  
11 considered. At page 42, which is quoted in  
12 *R. v. Courouble* 2012 NWTSC 8, they say:

13 (a) Hearsay evidence is  
14 presumptively inadmissible unless  
15 it falls under an exception to the  
16 hearsay rule. The traditional  
17 exceptions to the hearsay rule  
18 remain presumptively in place.

19 (b) A hearsay exception can be  
20 challenged to determine whether it  
21 is supported by indicia of  
22 necessity and reliability required  
23 by the principled approach. The  
24 exception can be modified as  
25 necessary to bring it into  
26 compliance.

27 (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*.

1           So as I understand it, the traditional  
2           exceptions to hearsay such as *res gestae*  
3           remain presumptively in place. In this case  
4           the defence has not challenged the exception  
5           but focused on the reliability of the evidence  
6           to argue that the issues with reliability are  
7           such that neither *res gestae* nor the  
8           principled exception have been met.

9           In the case of *R. v. Oliver*, a decision  
10          from 1996 of this Court sitting as a summary  
11          conviction appeal Court, the requirements of  
12          *res gestae* were considered. At paragraph 12,  
13          quoting from the Ontario Court of Appeal  
14          decision in *Khan*, *res gestae* is defined as

15                 A spontaneous statement made under  
16                 the stress or pressure of a  
17                 dramatic or startling act or event  
18                 and relating to such an occasion  
19                 may be admissible as an exception  
20                 to the hearsay rule. The stress  
21                 or pressure of the act or event  
22                 must be such that the possibility  
23                 of concoction or deception can be  
24                 safely discounted. The statement  
25                 need not be made strictly  
26                 contemporaneous to the occurrence  
27                 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.

1           It was noted in Courouble at paragraph 11  
2           that the issue of reliability, unless there  
3           were special features of concern, was better  
4           left to the trier of fact to determine.

5           In this case, the utterance is alleged to  
6           have occurred shortly after the incident in  
7           question. It is not clear how long as the  
8           complainant has no memory of the event but she  
9           does remember fleeing the accused's house. If  
10          a violent sexual assault had occurred which  
11          left her bleeding and scared, then it is  
12          reasonable to assume that she left the house  
13          shortly after the event so that the utterance  
14          could be considered contemporaneous.

15          Contemporaneousness is not required.  
16          There have been cases where utterances have  
17          been admitted where they were made not just  
18          minutes but in some cases hours after the  
19          event. So the focus is really on the  
20          circumstances, including the spontaneity of  
21          the statement, the possibility of concoction,  
22          and whether the individual is still under the  
23          stress or pressure of the event.

24          In my view, the statement meets the  
25          requirements of *res gestae*.

26          The complainant fled Jason Paulette's  
27          house. She did not stop to put her jacket on,

1 left her cell phone behind and went to  
2 Ashleigh Stokes' residence which is a short  
3 distance from the accused's home. She arrived  
4 hysterical, visibly upset, bleeding, and  
5 spontaneously told Ashleigh Stokes that her  
6 cousin had raped her, repeating it twice. In  
7 response to one question "my cousin who?", she  
8 said her cousin Jason raped her. In the  
9 circumstances, the utterances were made close  
10 in time to the event when R. P. appears to  
11 still be under the stress or pressure of the  
12 event and her utterances were spontaneous. In  
13 my view, the risk of fabrication or concoction  
14 are minimal in the circumstances.

15 The concerns raised by defence regarding  
16 the reliability of R. P.'s evidence, (there  
17 did not appear to be much issue taken with  
18 Ashleigh Stokes' evidence and the accuracy of  
19 what she heard) relate to whether what R. P.  
20 said to Ashleigh Stokes is reliable. The  
21 defence says that R. P.'s mind appears to be  
22 one that has been overwhelmed by a startling  
23 event as opposed to a focused mind. He  
24 submitted that R. P. did not have time to get  
25 control of her mind and focus but was  
26 overwhelmed by events.

27 In my view, this is one of the main

1 features of res gestae - that the declarant is  
2 overwhelmed, preoccupied with the event, and  
3 is not focused. They do not have time for  
4 reflection and it is that preoccupation, that  
5 stress or pressure of a recent dramatic or  
6 startling event which minimizes the risk of  
7 concoction or fabrication.

8 The defence also suggests that she is  
9 mistaken about what occurred and because of  
10 her level of intoxication that her memory is  
11 not reliable. He points to the  
12 inconsistencies in her statement and the  
13 testimony on the voir dire, her reference to  
14 dreams, and that she now thinks that she must  
15 have been sexually assaulted.

16 Today, over two years later, the  
17 complainant is convinced that she was sexually  
18 assaulted. It appears from her testimony on  
19 the voir dire that this is as a result of her  
20 knowledge of the DNA evidence, her belief that  
21 she would not have consented, and her  
22 knowledge of the accused's criminal history.  
23 That is her belief today. What is relevant is  
24 her perception at the time of the events.

25 The accused's criminal history is not  
26 clear. While the complainant knew about his  
27 history at the time, she said that she had

1 heard the accused had been convicted of sexual  
2 assault in the past. Her evidence was that  
3 prior to going to the accused's residence on  
4 that night, she didn't know what to believe  
5 about the accused's criminal history. She  
6 said that she didn't acknowledge his criminal  
7 history. She viewed the accused as her cousin  
8 and did not believe he would do that to her.

9 While there may be inconsistencies in the  
10 complainant's evidence on the voir dire and  
11 the statements she gave to the police and the  
12 testimony she gave at the preliminary inquiry,  
13 none of them relate to the alleged sexual  
14 assault. The complainant testified that she  
15 has no knowledge of the sexual contact between  
16 her and the accused and this has been  
17 consistent throughout. That has not changed.  
18 Her only statement on this point is that made  
19 to Ashleigh Stokes and she acknowledged that  
20 she did not remember what she said to Ashleigh  
21 Stokes.

22 It is clear that the complainant was  
23 intoxicated at the time of the utterance. She  
24 acknowledged that her memory had blanks that  
25 evening due to the consumption of alcohol and  
26 marijuana.

27 Ashleigh Stokes testified that she smelled

1 alcohol on R. P.'s breath but made no other  
2 observations of intoxication. She indicated  
3 that R. P. handled her liquor well and she had  
4 not seen her get so drunk that she would be  
5 falling down.

6 While intoxication is a factor on  
7 reliability, in the circumstances I do not  
8 view R. P.'s intoxication that it was such  
9 that the utterances should not go before the  
10 trier of fact.

11 For these reasons, looking at all of the  
12 factors, I conclude that this evidence is  
13 admissible as res gestae and that any concerns  
14 about the reliability of the evidence are  
15 matters that are better determined by the  
16 triers of fact.

17 I have gone on to consider the principled  
18 exception in the event that I am incorrect  
19 about res gestae still being a valid exception  
20 to the hearsay rule or that my analysis  
21 regarding res gestae is incorrect.

22 Necessity and reliability are the  
23 requirements of the principled exception to  
24 the hearsay rule. Necessity in this case is  
25 established because although the complainant  
26 is available to testify, she has no  
27 recollection of the sexual contact between her

1 and the accused. In addition, she recalls  
2 speaking to Ashleigh Stokes but she does not  
3 recall what she said.

4 So reliability is the other requirement  
5 and at this stage we are concerned with  
6 threshold reliability.

7 In R. v. Khelawon at paragraph 3, the  
8 Supreme Court of Canada said,

9 The distinction between threshold  
10 and ultimate reliability reflects  
11 the important difference between  
12 admission and reliance.  
13 Admissibility is determined by the  
14 trial Judge based on the governing  
15 rules of evidence. Whether the  
16 evidence is relied upon to decide  
17 the issues in the case is a matter  
18 reserved for the ultimate trier of  
19 fact to decide in the context of  
20 the entirety of the evidence.

21 Later in the paragraph, the Court  
22 continues,

23 The trial Judge's function is to  
24 guard against the admission of  
25 hearsay evidence which is  
26 unnecessary in the context of the  
27 issue to be decided, or the  
28 reliability of which is neither  
29 readily apparent from the  
30 trustworthiness of its contents,  
31 nor capable of being meaningfully  
32 tested by the ultimate trier of  
33 fact.

34 The Court emphasized that ultimate  
35 reliability is left to the trier of fact and  
36 that trial Judges need to be cautious about  
37 encroaching on that area.



1           So threshold reliability is not concerned  
2           with the truthfulness of the statement; that  
3           is for the trier of fact to determine.  
4           Threshold reliability is concerned with  
5           whether there are circumstantial guarantees of  
6           trustworthiness surrounding the making of the  
7           statement and consideration can be given to  
8           the presence or absence of supporting  
9           evidence.

10           In this case, many of the factors with  
11           respect to reliability pursuant to res gestae  
12           are applicable to the analysis pursuant to the  
13           principled exception. As noted in Courouble,  
14           the res gestae exception is still a valid one  
15           and all of its components mirror very much the  
16           concerns that are addressed in the principled  
17           approach.

18           In considering other evidence which might  
19           corroborate the complainant's utterance, I  
20           have considered the DNA evidence which  
21           establishes that the accused's spermatozoa was  
22           found in the complainant's vaginal pool. With  
23           respect to a sexual assault, this evidence is  
24           equivocal as it does not establish that there  
25           was nonconsensual sex. However, it does  
26           establish that there was sexual contact  
27           between the complainant and the accused.

1           At the time that the utterance was made to  
2           Ashleigh Stokes, there was no apparent  
3           evidence of a sexual assault or sexual  
4           contact. To Ashleigh Stokes, the  
5           complainant's appearance demonstrates injuries  
6           consistent with an assault. The complainant  
7           obviously had no knowledge of whether there  
8           would be any DNA evidence and only she would  
9           have had knowledge of the sexual contact  
10          between her and the accused. And the point  
11          that I am trying to make is that when the  
12          statement was made, at that point, why would  
13          R. P. say that she was sexually assaulted if  
14          that was not true. She had no reason at that  
15          point to concoct a story about being sexually  
16          assaulted by the accused.

17                Obviously the issue of the truth of the  
18                statement, the ultimate reliability of that  
19                statement is for the trier of fact to  
20                consider, along with all of the other  
21                evidence. But I am satisfied, for the reasons  
22                given, that threshold reliability and  
23                necessity have been established.

24                I have made this decision acknowledging  
25                that there were some concerns.

26                The complainant's lack of memory of the  
27                sexual assault and lack of memory of what she

1 told Ashleigh Stokes means that she can only  
2 be cross-examined in a limited way. She can  
3 still though be challenged, cross-examined in  
4 a way that challenges her reliability as a  
5 result of lack of memory due to intoxication  
6 and potentially having suffered a head injury.

7 Ashleigh Stokes is also available to be  
8 cross-examined and her evidence has been  
9 consistent throughout about what was said to  
10 her by R. P. So I am satisfied that the  
11 circumstances in which the statements were  
12 made and the evidence of Ashleigh Stokes and  
13 R. P. are sufficiently reliable so that this  
14 evidence should go to the jury.

15 I have also considered that I have a  
16 discretion to exclude the evidence if the  
17 prejudicial effect outweighs the probative  
18 value.

19 The utterance is obviously prejudicial.  
20 The Crown would probably not seek to adduce it  
21 if it were not. It is evidence of the  
22 nonconsensual nature of the sexual contact  
23 between the complainant and the accused. It  
24 is also highly probative for the same reason.

25 I am satisfied that the probative value  
26 does outweigh the prejudicial effect. The  
27 word spoken by R. P. shortly after the events

1 in question are very probative in determining  
2 what occurred between her and the accused. So  
3 in my view this is not a case where the  
4 prejudicial effect outweighs the probative  
5 value to the point that the otherwise  
6 admissible evidence should be excluded.

7 So for these reasons, I conclude that the  
8 evidence is sufficiently reliable to be  
9 weighed by the jury.

10 All right, counsel, so we will adjourn to  
11 await the jury.

12 (ADJOURNMENT)

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Certified to be a true and  
accurate transcript pursuant  
to Rules 723 and 724 of the  
Supreme Court Rules,

\_\_\_\_\_  
Lois Hewitt,  
Court Reporter