

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

JAMES WILSON

Transcript of the Ruling on Admissibility of Complainant's Utterance by The Honourable Justice L. A. Charbonneau, at Inuvik in the Northwest Territories, on 28th May A.D., 2015.

APPEARANCES:

Ms. A. Piché, : Counsel for the Crown

Mr. C. Davison: Counsel for the Accused

*Charges under s. 271, 145(1) (a)
Criminal Code of Canada*

**Ban on publication of the Complainant/Witness
pursuant to Section 486.4 of the Criminal Code**

1 exceptions to the inadmissibility of hearsay and
2 the admissibility of hearsay under the principled
3 approach developed over the last twenty years or
4 so by the Supreme Court of Canada was explained
5 in the case of R. v. Mapara 2005 SCC 23. That
6 analysis has been applied in this jurisdiction
7 in relation to the res gestae exception in the
8 case of R. v. Courouble 2012 NWTSC 8 and
9 R. v. Paulette 2014 NWTSC 14 among others. I
10 adopt the reasoning outlined in those cases and
11 will not repeat it here. Defence does not
12 challenge the validity of the res gestae
13 exception but rather argues that the
14 prerequisites are not met here, particularly in
15 terms of the timing of the utterance in relation
16 to the timing of the events that the utterance is
17 about.

18 Dealing first with res gestae, there are not
19 a lot of details about the circumstances of this
20 utterance in the evidence that was called at the
21 voir dire. What I have already referred to above
22 is essentially it. S. was cross-examined about
23 the complainant's speech impediment and about how
24 well she could understand what she was saying.
25 S. said she did understand the complainant to be
26 saying someone was bothering her, and she
27 confirmed that to her this word sometimes means

1 sexual contact.

2 The Defence takes the position that there is
3 too much uncertainty about the timing of events
4 and about when the utterance was made in relation
5 to the alleged incident for the situation to be
6 captured by the res gestae exception. Defence
7 points out to a comment made in the case of R. v.
8 Khan 1990 CarswellOnt 108 many years ago by the
9 Supreme Court of Canada when that court commented
10 that an utterance made by a child 30 minutes
11 after the commission of an alleged assault was
12 not admissible under the traditional tests
13 dealing with spontaneous assurances. R. v. Khan
14 paragraph 19.

15 As it turns out, of course, the Khan case
16 marked a pivotal moment in the development by the
17 Supreme Court of Canada of a new approach to the
18 admissibility of hearsay, one that focuses on
19 principles of necessity and reliability instead
20 of a list of exceptions defined by specific and
21 rigid criteria. The Crown argues that
22 notwithstanding this comment in Khan, the timing
23 of the utterance is not determinative, and I
24 agree. As noted in the case of Paulette,
25 referred to by the Crown, there have been cases,
26 including cases in this jurisdiction, where the
27 res gestae exception has been found to be

1 applicable for statements made not just minutes
2 but more than an hour after the event.
3 R. v. Oliver (1996) N.W.T.J. No. 69 from this
4 jurisdiction is a good example of that.

5 I agree with the court's comments in
6 Paulette. The focus of the inquiry should be on
7 the circumstances of the utterance including the
8 spontaneity of the statement, the possibility for
9 concoction, and whether the individual is still
10 under the stress or pressure from the events. In
11 Paulette the elements of evidence which the court
12 found were significant in this regard were that
13 the declarant had left the accused's residence
14 without a jacket, leaving her cell phone behind.
15 She arrived at the witness's home hysterical,
16 visibly upset, crying and bleeding, and she
17 spontaneously told the witness that her cousin
18 had raped her. When asked which cousin she
19 identified the accused. The court concluded, at
20 paragraph 29 of the decision, that the
21 circumstances in which the utterances were made
22 were close in time to the event when the
23 complainant appeared to still be under the stress
24 or pressure of the event and the utterances were
25 spontaneous and the risk of fabrication or
26 concoction were minimal in the circumstances.

27 I find similarly that here there are

1 elements to suggest that the risk of fabrication
2 or concoction are minimal and that the
3 complainant was still under the pressure and
4 stress of the events she told Ms. R. about when
5 she encountered her. There was no evidence here
6 of the complainant being hysterical or physically
7 injured when she came upon Ms. R., but there are
8 other aspects of the evidence that to me suggest
9 that she was still under the pressure and the
10 stress of the events complained of. The first is
11 that she was walking around the community in the
12 middle of the night. This was not a usual or
13 normal thing for her to do as evidenced by the
14 reaction of S.R. when she saw her. The utterance
15 was not completely spontaneous. It was in
16 response to the question - "What are you doing
17 outside your house at this hour?" - but it was
18 also not an answer to a leading question such as
19 "Has someone hurt you?" or "Has something
20 happened to you?" or "Is somebody bothering you?"
21 The question put to the complainant by Ms. R. was
22 fairly open-ended, and she immediately answered
23 that someone was bothering her at her house. The
24 complainant was in essence seeking assistance
25 from Ms. R. that night. She then went back with
26 her to the house and identified who had done this
27 to her.

1 Based on all of that I find that even
2 without clear evidence as to timing there is
3 enough evidence here to conclude that the
4 complainant was still under the stress or
5 pressure or effects of those events, and that she
6 had a limited opportunity for concoction before
7 she ran into Ms. R. These circumstances are
8 different, admittedly, from the ones that existed
9 in the Paulette case, but in my view looking at
10 it from the point of view of overall
11 circumstances as opposed to strictly a question
12 of timing or time line, the features that are
13 central to the res gestae exception are met
14 despite that lack of clarity about the timing.
15 I conclude that this evidence is admissible under
16 the res gestae exception.

17 If I am wrong about that I would consider
18 the evidence to be admissible in any event
19 pursuant to the principled exception.

20 Defence has argued that the necessity
21 criterion is not met here because the complainant
22 was to be called as a witness to testify at the
23 trial, and as such it was not necessary to have
24 what she said outside the courtroom adduced
25 through another witness. I disagree that the
26 concept of necessity should be interpreted as
27 narrowly as Defence suggests. I find support for

1 this proposition in the decisions of R. v. Rockey
2 1996 CanLII 151 (SCC) and R. v. Pearson 1994
3 CanLII 8751 (BC CA) referred to by the Crown. It
4 is true that necessity is often made out because
5 the declarant is unable or unavailable to
6 testify, but at page 840 of the Rockey decision
7 the Supreme Court of Canada itself said:

8 Necessity can be established even if the
9 witness testifies if the trial judge is
10 satisfied that it is reasonably necessary in
11 order to a put a full and frank account of
12 the child's version of the relevant events
13 before the jury.

12 Rockey was a case involving a child witness.
13 Here we were not dealing with a child witness,
14 but given the anticipated difficulties for the
15 complainant to communicate her evidence, allowing
16 her utterance to Ms. R. to be adduced for the
17 truth of its contents, I find, is reasonably
18 necessary to provide the trier of fact with
19 Ms. K.'s full and frank account of the relevant
20 events.

21 Defence did point out that by doing so a
22 prior consistent statement will be put before the
23 jury, which is something that is not normally
24 permitted. That is true. And it is also true
25 that the principled approach to the admissibility
26 of hearsay is not to be used to circumvent other
27 evidentiary rules. But in this particular

1 situation the consistency of the earlier
2 utterance forms part of why the evidence is found
3 to be reasonably necessary in the first place.
4 I find some comments that were made at the very
5 end of the Rockey decision suggest that again the
6 Supreme Court of Canada supports the notion that
7 in those types of circumstances, prior consistent
8 statements are not only admissible but they
9 bolster the Crown's case. This is at the very
10 end of the Rockey decision, where the court is
11 talking about the potential effect of an alleged
12 inadequate portion of the instruction to the
13 jury. The court says that the absence of
14 direction pales to insignificance against the
15 backdrop of the strength of the case of the Crown
16 in that case. And what follows is what I find
17 interesting. The court says:

18 With the exception of the two statements in
19 play therapy briefly referring to the
20 presence of his father, the child's
21 statements to many individuals from two days
22 after the alleged event to the date of
23 the trial, covering a period of two and one
24 half years, were entirely consistent.

25 So here we have the Supreme Court of Canada
26 saying that the case was very strong, in part
27 because of all these consistent statements. I
28 think it suggests that there are situations where
29 that - and it is an exceptional situation in the

1 broader context of the law of evidence - the fact
2 that an utterance amounts to a prior consistent
3 statement is not a reason to not permit the
4 evidence to be adduced.

5 For all of these reasons I am satisfied that
6 the requirement of necessity is met with respect
7 to this utterance.

8 The second criterion that must be applied is
9 reliability, and the focus here is threshold
10 reliability, not ultimate reliability.
11 Everything I have talked about when I was dealing
12 with the res gestae aspect of things, about the
13 circumstances under which the utterance was made,
14 those same things persuade me that this utterance
15 meets the threshold reliability test. The
16 utterance was made in circumstances where the
17 complainant had left her own home in the middle
18 of the night to get away from what was unfolding
19 there. She sought assistance from S.R., someone
20 who was known to her, when she encountered her.
21 The utterance was not made in answer to a leading
22 or suggestive question. The recipient of the
23 declaration reacted immediately to it which
24 suggests that Ms. R. perceived the situation as
25 serious and requiring some sort of intervention.
26 There may well be issues about the reliability of
27 the utterance, about whether Ms. R. accurately

1 heard or understood what the complainant was
2 telling her, and other things going to whether
3 the jury should attach any reliability, any
4 weight to this utterance, but those in my view
5 are for the jury to assess. Those were my
6 reasons for admitting the utterance made to S.R.
7 into evidence.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 21st, July, 2015.

Certified Pursuant to Rule 723
Of the Rules of Court



Darlene Sirman, CSR(A)
Court Reporter