COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Taylor, 2012 ONCA 809
DATE: 20121122
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Winkler C.J.O., Rosenberg and Hoy JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Dayntry Taylor

Appellant

Richard Litkowski, for the appellant

Eliott Behar, for the respondent

Heard: October 10, 2012

On appeal from the conviction entered by Justice Richard J. LeDressay of the Ontario Court of Justice, sitting without a jury, on September 23, 2010, and from the sentence imposed on December 3, 2010.

Rosenberg J.A.:

[1] The appellant appeals from her conviction and sentence on a charge of fraud following a trial before LeDressay J. The appeal turns entirely on the admissibility and use of a statement the complainant made to the police prior to her death. The appellant submits that this hearsay statement should not have

been admitted into evidence and, having been admitted, should not have been found sufficiently reliable to found a conviction.

[2] The appellant's principle submission turns on the application of the principled approach to what counsel terms a "testimonial" statement, that is, a statement taken by the police in circumstances where it is likely that the statement will be used in evidence. Mr. Litkowski, counsel for the appellant, contrasts this kind of statement with other statements that have been admitted under the principled approach, such as those dealt with by the Supreme Court of Canada in cases such as *R. v. Khan*, [1990] 2 S.C.R. 531 and *R. v. Smith*, [1992] 2 S.C.R. 915. He also contrasts this kind of statement with K.G.B. statements [*R. v. B. (K.G.),* [1993] 1 S.C.R. 740] or the statement dealt with by the court in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764. While such statements are taken in contemplation of litigation, their admissibility is premised on the availability of the complainant for cross-examination at the trial.

[3] The appellant submits that the effect of the trial judge's ruling was to create an unfair imbalance in that the complainant's evidence was received untested through cross-examination. On the other hand, the appellant was subjected to a searching cross-examination, a cross-examination that exposed fatal flaws in her claim that the complainant consented to her taking most of the complainant's savings for the appellant's own use. In his interesting and helpful submissions, Mr. Litkowski relies upon the ruling of the Grand Chamber of the European Court

of Human Rights on two appeals from the United Kingdom: *Al-Khawaja and Tahery v. The United Kingdom* [GC], nos. 26766/05 and 22228/06 (15 December 2011).

[4] The appellant also appeals the sentence imposed of 21 months imprisonment to be followed by two years probation. The trial judge also made a restitution order in the amount of $126,464.54.

[5] For the following reasons, the appeal from conviction and sentence is dismissed.

A. THE FACTS

[6] From shortly before 2005 until the fall of 2007, the appellant was the regular caregiver to the complainant, Ms. Dokaupe, a relatively frail, elderly woman who lived alone in an apartment in Burlington. The complainant faced some serious physical challenges that left her mainly home-bound. She had spent most of her adult life working for the Halton District School Board. She took early retirement in the 1980s with a pension and savings of almost $165,000. During the time that the appellant worked as her caregiver, the complainant came to rely on her for a number of daily needs. The complainant also befriended the appellant and her family.

[7] In 2005, at the suggestion of the appellant, the complainant had a lawyer prepare a will and power of attorney. The appellant acted as the attorney and

was named the executor of the complainant's estate. In February 2006, the appellant went to the bank where the complainant did her banking and, using her power of attorney, had a bank card issued for herself on the complainant's savings account. The evidence, independent of the complainant's hearsay statement, established that from February 2006 to September 2007, the appellant used the bank card to empty the savings account of over $126,000, all but $17,000. The independent evidence also established that this money was used for the appellant's own needs, not those of the complainant, and that during this period, the appellant continued to draw a salary for the care-giving services she performed for the complainant.

[8] In late August 2007, the appellant left the complainant's employment. One month later, another of the complainant's caregivers, Vanessa Rapedius, read the complainant's bank statements. After informing the complainant about what had happened to the savings account, Rapedius contacted the police. The complainant was contacted by a police officer who began an investigation. Several months later, on April 17, 2008, another police officer took a videotaped statement from the complainant. The elderly complainant died before the trial on December 19, 2008.

[9] When she provided the video statement, the complainant was 90 years of age. She had no criminal record. The statement began with the police officer's explanation that the statement was being videotaped and that it would be taken

under oath. The officer explained the penal consequences of public mischief, obstruct justice, and perjury if the statement was false. A commissioner for oaths administered the oath to the complainant. The complainant then provided a detailed statement in which she denied knowing about the bank card or giving the appellant permission to withdraw funds from her savings account.

[10] In her statement, the complainant disclosed that she was taking a number of prescription medicines. She explained the purpose of each of the medications. No independent evidence was adduced at the *voir dire* about the effect of this medication. At the trial proper, after the trial judge admitted the videotaped statement, the complainant's family physician testified and explained that none of the medications would have affected the complainant's mental ability.

[11] On January 24, 2008, Dr. Lightfoot, a psychologist who is a designated capacity assessor, met with the complainant and provided an opinion that the complainant had the mental capacity at that time to modify her will and to appoint or revoke a continuing power for attorney for property. Dr. Lightfoot testified at the *voir dire* after viewing the videotaped statement. Dr. Lightfoot testified that at the time of the interview, the complainant was mentally capable of managing her property.

[12] The contents of the videotaped statement reveal a possibility that the complainant was upset with the appellant because the appellant abruptly

terminated her employment contract. The trial judge was of the view that while the complainant may have fabricated the allegations, the better view was that she was concerned about the appellant's well-being because she had suddenly disappeared. There was "no evidence and no logical inference … that Ms. Dokaupe had a motive to fabricate her story." On the other hand, there was insufficient evidence to conclude that the complainant had no known motive to fabricate the entire story.

B. THE TRIAL JUDGE'S RULING

[13] The trial judge recognized that the videotaped statement, as hearsay, was presumptively inadmissible and did not fall within any of the recognized exceptions to the hearsay rule. He found that the statement could be admitted under the principled approach to hearsay. The necessity requirement was made out because of the death of the complainant. The requirement for threshold reliability was satisfied as a result of a number of circumstances. The statement was under oath with clear cautions as to the legal consequences of providing a false statement. The complainant had no criminal record and appeared to take the warnings seriously. She appeared to understand her moral obligation to tell the truth. The statement was provided voluntarily and was not the product of threats, promises or any form of coercion. The statement was video recorded in its entirety and thus the court was able to examine the complainant's demeanour. The complainant had an ability to recall events and to provide specific and

detailed information. There was no evidence of any mistake or any diminished or distorted mental capacity.

[14] The trial judge looked at whether there was extrinsic evidence either confirming or undermining the reliability of the statement. He noted that virtually everything in the statement was confirmed by the bank records. He recognized, however, that the question of consent was a crucial issue in the case and that there was no evidence confirming the complainant's assertion that the money was withdrawn from her savings account without her consent. The trial judge found that there was no extrinsic evidence undermining the truthfulness of the complainant's account in the statement. The trial judge was satisfied that there was little likelihood that the statement was a product of pressure from Ms. Rapedius. The complainant's responses to the questions from the police officer were intelligent, detailed and comprehensive. There was no indication that her memory was faulty or that her answers did not originate from her own experience.

[15] Finally, the trial judge took into account the fact that cross-examination is the main factor that ensures the integrity of the trial process. He noted the defence argument that credibility was the crucial factor in the case and that cross-examination of the complainant would be essential for the court to resolve the credibility issue. The trial judge nevertheless found that the criteria of necessity and reliability had been met and that the statement should be admitted.

[16] At the trial proper, the trial judge found that the statement was sufficiently reliable to found the conviction. In addition to the factors considered on the earlier admissibility ruling, the trial judge took into account the evidence from the complainant's family physician who explained that the various medications the complainant was using would not have affected her mental functioning. The trial judge noted that there was not a shred of evidence to contradict the complainant's statement that her life savings were rapidly depleted without her knowledge and consent. The suggestion that the complainant's assertions were either the result of pressure or influence from others or because the complainant was upset that the appellant stopped visiting her were very weak and largely speculative. The trial judge also dealt with the defence submission that in several areas, the complainant's evidence might have changed had there been cross-examination. In cogent reasons, he explained why it was unlikely that the complainant's evidence would have changed significantly in cross-examination.

[17] Finally, the trial judge referred to the appellant's testimony, which was seriously undermined in cross-examination. The trial judge was satisfied that the prosecution's case was made out beyond a reasonable doubt.

C. ANALYSIS

[18] The admissibility of the statement in this case rests on the test set forth in cases from the Supreme Court of Canada, such as *R. v. Khelawon*, 2006 SCC

57, [2006] 2 S.C.R. 787, *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517 and *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298. Contrary to the submission of counsel for the appellant, the admissibility of this statement cannot be determined under the approach taken by the European Court of Human Rights in *Al-Khawaja and Tahery*. While that decision is interesting and provides a helpful survey of developments in the hearsay rule in various common law and other countries, its context is rooted in specific United Kingdom statutory provisions, such as ss. 23 to 28 of the *Criminal Justice Act 1988* (U.K.), 1988, c. 33; Part 11, Chapter 2 of the *Criminal Justice Act 2003* (U.K.), 2003, c. 44; and, most importantly, Article 6 §§ 1 and 3(d) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [*ECHR*]. Article 6 § 3(d) is a form of confrontation guarantee similar to the Sixth Amendment to the United States Constitution. Article 6 §§ 1 and 3(d) provide as follows:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses

> on his behalf under the same conditions as witnesses against him.

[19] While the *Canadian Charter of Rights and Freedoms* in ss. 7 and 11(d) provides broad fair trial guarantees, it does not include an explicit guarantee to confront the witnesses.

[20] In its decision in *Al-Khawaja and Tahery*, the Grand Chamber of the European Court of Human Rights adopted a somewhat more flexible approach to the admission of hearsay than had previously been used by the court. Previously, the court had rigidly applied a "sole or decisive rule". As explained in *Unterpertinger v. Austria* [1986] E.H.C.R. 9120/80, (1991) 13 E.H.R.R. 175, at para. 33, the rule provides that "if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted" (*Al-Khawaja and Tahery*, at para. 128). Such restriction on the defence rights "is incompatible with the guarantees provided by Article 6": *Lucà v. Italy*, [2001] E.H.C.R. 33354/96, (2003) 36 E.H.R.R. 46, at para. 40. In *Doorson v. the Netherlands,* [1996] E.H.C.R. 20524/92, (1996) 22 E.H.R.R. 330, at para. 70, the court held that, even in a case where there was a justification for the failure to call a witness (what we would term necessity), a conviction based solely or to a decisive extent on evidence of that witness would be unfair.

[21] In *Al-Khawaja and Tahery*, the court affirmed its continued adherence to the sole or decisive rule, subject to the proviso that there may be circumstances in which hearsay that is decisive of the case may nevertheless be admissible. As the court said, at para. 139:

> The Court similarly cannot accept the third argument [by the government of the United Kingdom] that the sole or decisive rule is predicated on the assumption that all hearsay evidence which is crucial to a case is unreliable or incapable of proper assessment unless tested in cross-examination. Rather, it is predicated on the principle that the greater the importance of the evidence, the greater the potential unfairness to the defendant in allowing the witness to remain anonymous or to be absent from the trial and the greater the need for safeguards to ensure that the evidence is demonstrably reliable or that its reliability can properly be tested and assessed.

[22] While this approach is somewhat more flexible than that laid out in the court's earlier decisions, it remains rooted in Article 6 and the principle that the admissibility of hearsay and trial fairness are inextricably linked to the importance of the evidence. As the court said, at para. 143:

> the Court has consistently assessed the impact that the defendant's inability to examine a witness has had on the overall fairness of his trial. It has always considered it necessary to examine the significance of the untested evidence in order to determine whether the defendant's rights have been unacceptably restricted[.]

The court explained the modified sole or decisive rule in these terms, at para. 147:

> The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, to use the words of Lord Mance in *R. v. Davis* [[2008] UKHL 36, [2008] 1 A.C. 1128], and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.

[23] The approach adopted by the Supreme Court of Canada is different. As Charron J. observed in *Khelawon*, at para. 47, the inquiry into admissibility of hearsay in the criminal context may take on a constitutional dimension. This is because the accused's difficulty in testing the prosecution evidence may impact on the ability to make full answer and defence. In the same paragraph, she also noted the link between the right to make full answer and defence and the right to a fair trial. It would compromise trial fairness if the prosecution were allowed to introduce unreliable hearsay.

[24] But, trial fairness concerns and the admissibility of hearsay are not reconciled by resort to a sole or decisive rule, which asks how important the

evidence is to the outcome. Rather, under the Supreme Court's principled approach, the court examines all the relevant circumstances to determine whether the evidence is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. Further, there is nothing in the Supreme Court's decisions that warrant carving out a special type of evidence, which Mr. Litkowski describes as testimonial. Rather, the fact that the statement may have been taken by the police in contemplation that it might be used in litigation is merely one circumstance the court must take into account. That fact does not give rise to a special category of evidence requiring searching scrutiny.

[25] In some circumstances, the fact that the state might have availed itself of other methods of preserving the evidence may tell against necessity, as Charron J. explained in *Khelawon*, at para. 104. But the importance of the evidence or its testimonial quality does not place the evidence in a special category. That said, as pointed out at para. 49 of *Khelawon*, because trial fairness may involve factors beyond simply necessity and reliability, the trial judge retains a discretion to exclude hearsay evidence where its prejudicial effect outweighs its probative value.

[26] I turn then to consideration of the admissibility of the hearsay evidence in this case. No question of necessity arises; the death of the complainant fulfills the necessity criterion. This case turns on whether the complainant's statement to the police had sufficient threshold reliability to warrant its reception. As is well

known, threshold reliability may be demonstrated because of the circumstances in which it came about or because in the circumstances its truth and accuracy can nonetheless be sufficiently tested: *Khelawon*, at paras. 49, 62-63. However, these two different grounds are not watertight compartments: *Khelawon*, at para. 49.

[27] The complainant's statement in this case had elements of both grounds. Like testimony in court, it was taken under oath and the trier of fact could observe the declarant's demeanour throughout because of the complete video recording. The complainant was warned of the criminal consequences of not telling the truth, which was an additional safeguard that is not explicitly found in courtroom testimony.

[28] The other circumstances under which the statement was taken supported its reliability. The principal concern in this case was not dishonesty but whether the complainant could accurately recall the events. The trial judge, whose findings in this respect are entitled to deference, found that there was no concern in that regard. The complainant was able to recall events and to provide specific and detailed information. There was nothing in the statement or the surrounding circumstances to show that the complainant was mistaken or that her mental capacity was in any way diminished or distorted. In this respect, the trial judge had the assistance of the evidence of a psychologist, Dr. Lightfoot, the

designated capacity assessor, who fortuitously had assessed the complainant only months before the statement was taken by the police.

[29] The complainant's statement in this case can be usefully compared to the evidence considered in *Khelawon*. The declarant in that case did not give his statement under oath and there was reason to doubt whether the declarant understood the consequences of making his statement. There were serious reasons to doubt whether he was mentally competent when he made the statement and he may have been motivated by dissatisfaction about the nursing home where the assault allegedly occurred and under the influence of a disgruntled employee of the home.

[30] In *Khelawon*, the court also held that a trial judge can consider all the circumstances, including the presence of corroborating or conflicting evidence. In this case, the trial judge was of the view that there was no corroborating evidence because there was nothing to confirm the complainant's evidence on the sole fact put in issue by the appellant, which was that she had the complainant's consent to take money out of the complainant's savings account for her own use. In reaching that conclusion, the trial judge may have taken an overly cautious approach. In considering all the surrounding circumstances, a court need not be restricted to the kind of corroboration that characterized the accomplice rule before *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811.

[31] There was abundant, incontrovertible independent evidence confirming virtually every part of the complainant's story. Bank records and other records show that at the same time she was being paid by the complainant, the appellant was regularly taking money from the savings account for her own use. This is the kind of evidence referred to in *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 42, which, "when looked at in the context of the case as a whole … should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence".

[32] In my view, the trial judge was correct in admitting the complainant's videotaped statement. The criteria of necessity and reliability were satisfied. There were no grounds for finding that the prejudicial effect of the evidence outweighed its probative value. The prejudice occasioned to the appellant because of her inability to cross-examine the complainant did not outweigh the probative value of the evidence. This was not a borderline case for threshold reliability where the probative value of the evidence was minimal or suspect.

[33] Further, the trial judge did not err, as trier of fact, in his assessment of the ultimate reliability of the statement. In the context of the evidence as a whole, the statement's ultimate reliability was completely established, especially by the testimony of the family physician and of the appellant herself. The appellant's story was riddled with contradictions. Taking just the most obvious problem, the appellant explained that the complainant allowed her access to her savings

account because the appellant had fallen on hard times when she was fired from her job at Chippewa Place. However, independent evidence established that the appellant lost this employment in January 2007, almost a year after she obtained the debit card and began emptying the savings account.

[34] Accordingly, I would dismiss the appeal from conviction.

D. SENTENCE APPEAL

[35] The appellant appeals her sentence of 21 months imprisonment and argues that the trial judge should have imposed a conditional sentence. There were undoubtedly some mitigating factors in this case. The appellant was 38 years old at the time of sentencing and had no prior criminal record. She had a supportive family. There was also evidence that at the time of the offence and during the trial, the appellant was coping with a physically abusive relationship with her ex-husband that left her unemployed and destitute.

[36] On the other hand, this was a serious offence. The appellant voluntarily placed herself in a position of trust in relation to the complainant. She became her attorney and the executor of her estate. The frail, elderly complainant was completely reliant on the appellant. This was not a one-time act but a planned and deliberate fraud committed over many months by someone whom the complainant looked upon as a friend. The appellant stole and then spent over $126,000, almost the complainant’s entire life savings. In such a case, the

paramount objectives of sentencing must be deterrence and denunciation, and they cannot be adequately met by a conditional sentence.

E. DISPOSITION

[37] Accordingly, I would dismiss the appeal from conviction. I would grant leave to appeal sentence but dismiss the appeal from sentence.

Released: “WKW” November 22, 2012

“M. Rosenberg J.A.”
“I agree W.K. Winkler C.J.O.”
“I agree Alexandra Hoy J.A.”