IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Phagura,*
2018 BCSC 2541

Date: 20181213
Docket: X080616-2
Registry: New Westminster

Regina

v.

Sukhdev Singh Phagura

Ban on Publication: Pursuant to s. 648(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. This ban restricted the publication, broadcasting or transmission, in any way, of any portion of the trial at which the jury was not present. The publication ban applied until the jury retired to consider its verdict.

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting, or transmission in any way of evidence that could identify a complainant or witness under the age of 18, referred to in this judgment by the initials M.K. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr. Justice Crabtree

Oral Ruling on *Voir Dire* #4

Admissibility of Photographs of Text Messages

Counsel for the Crown:	M.A. Fortino B.A. Lane
Counsel for the Accused:	B. Mohan D. Parker, Articled Student
Place and Dates of Trial/Hearing:	New Westminster, B.C. December 10-12, 2018
Place and Date of Judgment:	New Westminster, B.C. December 13, 2018

[1] **THE COURT:** Mr. Phagura is charged with the sexual assault of M.K., on or about June 11, 2018, in Surrey, British Columbia.

[2] This *voir dire* concerns the admissibility of three photographs depicting the content of text messages located on the complainant's phone. The photographs, or screenshots, were taken by RCMP Constable Naidu on June 11, 2017, when she attended to take a statement from the complainant.

[3] I am providing the ruling orally today, and reserve the right to make any edits in the event that the ruling is transcribed and to insert case references, but the substance of the reasons shall not change.

[4] Let me turn to the evidence on this *voir dire*.

[5] The Crown seeks to tender three photographs taken by Cst. Naidu, on June 11, 2017, while she was in attendance at the residence where the complainant was living at the time of the incident, in Surrey, B.C. The officer was there to investigate an allegation of sexual assault. In the course of the interview, the complainant made reference to a series of text messages located on her cellular phone. The officer took photographs of the cellular phone's screen, capturing text messages exchanged between Mr. Phagura and the complainant, which she says occurred between 11:44 p.m. on June 10, and 12:15 a.m., on June 11, 2017.

[6] The Crown seeks to introduce those photographs at trial. The defence is opposed to the admissibility of the photographs.

[7] The text messages, captured in the three photographs are in English letters; but, as was referenced during the course of the *voir dire*, there are a mixture of English words and letters put together to create Punjabi-sounding words.

[8] The exchange of text messages occurred on *WhatsApp*. The complainant identified the text messages. She described that *WhatsApp* is a social media program, by which a person can send and receive text messages or telephone calls. It is an online app requiring Wi-Fi or a data plan, in order to operate.

[9] The complainant testified that her phone was fully functional on the night in question. She acknowledged she had difficulties with her phone on occasion. However, these difficulties occurred after the incident. The problems, or difficulties, were associated with her failure to pay her bills and with respect to the SIM card. She testified that none of these difficulties were experienced prior to, or during time of, the alleged offence.

[10] The Crown seeks the admission of the text messages on the following bases:

- as photographs, as authenticated by the police officer;
- as electronic documents, submitted pursuant to the *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*CEA*]; and
- as an out-of-court-statement exception to the hearsay rule, in that it was an admission by a party.

[11] The Crown submits that the messages are relevant and that the evidence relates to communications between the person alleged to have committed the offence and the complainant. The communications took place both before and after the alleged incident. The Crown further submits that the messages are material, in that they offer proof as to when the event occurred and whether the complainant consented to the activity.

[12] Let me deal first with whether the photographs of the screenshots are admissible as photographs as authenticated by the police officer. *R. v. Nikolovski,* [1996] 3 S.C.R. 1197 was cited for the proposition that, once it is established that videotape has not been altered or changed, and that it depicts a scene relevant to the matter before the court, it is admissible. Here, the officer's testimony established the necessary foundation for the photographs or, as I will describe them, as the screenshots, to be admitted at trial.

[13] Second, are the photographs of the three screenshots of the complainant's phone, admissible as electronic documents?

[14] The *CEA* addresses the introduction into evidence of electronic documents. Photographs meet the definition of electronic messages for the purposes of the *CEA*. In order for electronic documents to be admitted pursuant to the *CEA*, the documents must be authenticated and must meet the "best evidence" rule.

[15] The evidentiary threshold to authenticate an electronic document has been described as low. The court in *Hamdan* at para. 44 stated:

> [44] A party seeking to admit an electronic document only need present "evidence capable of supporting a finding that the electronic document is that which it is purported to be". This is a lower threshold than proof that the electronic document is the same as the digital file which allowed for the display of a webpage. The party seeking to admit an electronic document does not need to prove that the electronic document is an exact and complete copy.

[16] In this case, the complainant testified the officer did not photograph several of the text messages exchanged prior to the first text message depicted on the screenshot introduced at the *voir dire*.

[17] The complainant identified the messages and testified that the photographs of the screenshots accurately depicted the product of an exchange on *WhatsApp*, between herself and Mr. Phagura, during that period. Both were part of the *WhatsApp* online program which facilitated the electronic conversation. The complainant added his name to what she understood was his phone number in her contact information. The exchange took place in the residence where the defendant lived and the complainant was residing at the time. The exchange occurred both before and following the alleged offence.

[18] I find, based on the testimony of the complainant, that the Crown has authenticated the document in this case. As noted in para. 14, the second prerequisite to the electronic document's admissibility is whether it meets the best evidence rule. There are two ways or routes for a party to satisfy this requirement; through the statutory provisions of the *CEA* or the common law.

[19] The first route is through one of the presumptions set out in the *CEA*. Again, from *Hamdan*, Justice Butler at para. 70 states:

> [70] These presumptions seek to ensure that the evidence the court receives is, functionally, the same as the information that went into the computer system. In an age of abundant digital copies, the statute makes allowances for inconsequential differences in presentation and format. ...

[20] The relevant provision here is s. 31.3(a) of the *CEA* which reads as follows:

> 31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven
>
> (a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system ...

[21] The defendant submits the presumption does not apply here, as the evidence adduced at the *voir dire* does not demonstrate the device was always functioning properly. M.K. testified that the device was operating properly at the material time. She testified that the phone was fully functional on the night in question. She testified that, while she had difficulties with her phone on occasion, these difficulties arose after the incident. She also testified that the original messages were no longer available, as the phone had subsequently become inoperable and had since been discarded.

[22] The second route for establishing the best evidence rule is based on the common law. Again, as noted in *Hamdan*, where the primary source of the evidence no longer exists, secondary sources become admissible. Even where the primary source is incomplete or inaccurate, it does not necessarily bar admission of the document.

[23] I find that on either basis the best evidence rule in respect to the electronic documents is satisfied; that is, through either *CEA s.* 31.3(a) or the common law.

[24] Is the document admissible as an exception to the hearsay rule?

[25] An out-of-court statement tendered for the truth of its content is considered hearsay and is inadmissible unless it is admissible under one of the hearsay exceptions, or based on the principled approach to hearsay. The Crown submits that part of the text message exchange is an admission by the defendant, Mr. Phagura, to the complainant. In particular, the two messages he sends which state: "Don't tell anyone", and "Am so sorry."

[26] The defendant submits that the statements are hearsay and presumptively inadmissible. They further submit the admission by imposing a party exception has no applicability in this case. The defendant argues that the Crown has failed to establish that the maker of the statement was, in fact, the defendant and that the court cannot rely or attribute the admission to the defendant.

[27] The complainant gave evidence that she received text messages from the defendant on the evening of June 10, into the early morning of June 11, 2017. She identified the messages as a chat on *WhatsApp*; which, as I have said earlier, is the social media program which can be used to enable calls and text messages to be exchanged or communicated between two participants. She explained how the name "Sukhdev Mamaji" appears on her phone. She added his telephone number to her list of contacts and then saved it. Then she added his name, in order that his name was linked to the number. The name which I have indicated: "Sukhdev Mamaji", appears at the top of photograph number 1. The complainant's evidence was not adversely impacted on cross-examination. I find that there is evidence that the chat is between the complainant and the defendant, based upon her testimony.

[28] The defendant submits that even if the statement is attributable to the defendant, it falls within the party admission exception. It should be held inadmissible, because the indicia of necessity and reliability are lacking in the particular circumstances of this case. In support of the proposition, the defendant relies upon *R. v. Starr*, 2000 SCC 40 [*Starr*], where the Court developed a functional and principled approach to the hearsay analysis. This involves consideration of the

necessity and reliability of the evidence in question. In *Starr*, Justice Iacobucci set out the framework to be applied for such an analysis:

> (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.
>
> (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*.

[29] The defendant submits that the evidence should be excluded under subparagraph (c), to which I have just referred.

[30] When considering necessity and reliability in this context, we are discussing the threshold stage, not the ultimate stage where reliability of the statement is before the trier of fact. This argument that the evidence should be excluded under subparagraph (c) is, in my view, not open to the defendant in these circumstances. In *R. v. Foreman*, (2002), 62 O.R. (3d) 204 (Ont. C.A.) [*Foreman*], a decision of the Ontario Court of Appeal, the court held (at para. 37) that:

> [37] Admissions, which in the broad sense refer to any statement made by a litigant and tendered as evidence at trial by the opposing party, are admitted without any necessity/reliability analysis.

[31] In *Foreman*, the court relied on *R. v. Evans*, [1993] 3 S.C.R. 653, a decision of the Supreme Court of Canada, for the proposition that admissions are admitted on a different foundation than other exceptions to the hearsay rule.

[32] In *R. v. Bonisteel*, 2008 BCCA 344 [*Bonisteel*] at para. 82, our Court of Appeal commented that, "The weight of authority is against the application of the *Starr* analysis to admissions such as those made by the appellant." In *Bonisteel*, reference was made to *R. v. Terrico*, 2005 BCCA 361, which adopted the principle set out in *Foreman*.

[33] Based on the foregoing jurisprudence, I accept that statements are admitted without engaging the necessity/reliability analysis. Accordingly, it is not necessary to consider whether this is one of those rare cases, as suggested by defence counsel. In my view, the means by which the admission was conveyed, in this case by text message, is not a sufficient distinction requiring consideration of the necessity/reliability analysis as suggested by the defendant.

[34] Finally, the defendant submits that the court should exercise its residual discretion to exclude the statement on the basis that the prejudicial effect of admitting the statement outweighs its probative value. It is acknowledged that frailties with the evidence could exist. Those frailties were illustrated to a degree during the cross-examination of the complainant. Counsel was able to point out that a number of the messages exchanged were in Punjabi, by the author using English letters intending to create the phonetic sound of a Punjabi word. In addition, a number of those words used were spelled inaccurately.

[35] The cross-examination illustrated the difficulty in interpreting messages sent by the defendant and that some letters may also be missing from the words in the text messages. The defendant claims this is prejudicial to the defendant as it, in effect, forces him to give evidence as to what the intended meaning of the message was; in other words, it violates his right to a fair trial.

[36] In weighing the prejudicial effect versus probative value to assess whether a trial judge should exercise his discretion to exclude such evidence, the focus of the analysis is how the evidence would prejudice a fair trial. Here, I refer to *R. v. Frimpong*, 2013 ONCA 243, where the court at para. 18 stated: "Evidence is prejudicial ... if it threatens the fairness of the trial ... it cannot be adequately tested and challenged through cross-examination and the other means available [through] the adversarial process", or "there is a real risk that the jury will misuse the evidence ... or be unable to properly assess the evidence ... of the trial judge's instructions."

[37] The concerns outlined in this case are not, in my view, a reason for ruling the evidence inadmissible. It is reason to exercise caution with respect to the use of the evidence. To that end, care will need to be taken to ensure that sufficient instructions are given to the jury as to how the evidence can and cannot be used.

[38] In conclusion, the Crown is seeking to have the text messages admitted for the truth of their contents and for the following purposes:

1. as a part of the narrative;

2. as an admission of an opposing party;

3. as evidence of conduct; and

4. as evidence of the timeline of the event.

[39] I conclude that the three photographs are relevant, material, and admissible as evidence of the exchange between the defendant and the complainant that took place on June 10 and 11, 2017; and I am satisfied that the probative value of the evidence outweighs its prejudicial effect.

[40] I will add one word of caution which arises as a result of some of the responses provided by the witness during the course of the *voir dire*. The Crown should guard against the witness providing her view as to what the sender of the message meant in the texts he sent. Clearly, it is not her role to interpret what he

meant and I think that her testimony in that regard needs to be confined in that regard.

[41] That concludes my ruling in regards to this *voir dire*.

"T.J. Crabtree J."