

Case Name:

R. v. Hodgson

**Between
R., and
Hodgson**

[2017] O.J. No. 1591

Ontario Superior Court of Justice

N.L. Backhouse J.

Heard: March 27, 28, 2017.

Judgment: March 29, 2017.

(47 paras.)

Counsel:

M. Cole, for the Crown.

B. Funston, for the Accused.

[Editor's note: The note "[Text deleted by LexisNexis Canada]" indicates the removal of information which may identify individuals protected under LexisNexis Canada's Guidelines for the Protection of Identities.]

Reasons for Decision

1 N.L. BACKHOUSE J.:-- The Crown seeks to admit at the accused's trial for sexual assault three statements made by the complainant, N.M., on the grounds of reliability and necessity.

Background Facts

2 On July 29, 2006 a sexual assault was reported in the area of Earnscliffe Road and Oakwood Avenue, Toronto, involving N.M. and an unknown assailant. Police investigated and Ms. N.M. was taken to Women's College Hospital to have the sexual assault kit administered. Because she reported scratching the assailant, fingernail scrapings were taken. The following is expected to be the evidence at trial: that on July 18, 2014, the National DNA Data Bank through the Centre of Forensic Sciences advised police that a male DNA profile in another investigation had a "hit" with the present case; the DNA matched the profile of the accused, David Hodgson; the matched DNA Was taken from the fingernail scrapings of Ms. N.M. from the sexual assault kit.

Evidence on the Application

Evidence of Officer Pischedda

3 Toronto police received a call on July 29, 2006 at 11:51 p.m., in regard to an assault in progress in the area of Earnscliffe Road and Oakwood Avenue, Toronto. Officers attended the scene and found the complainant, N.M., and several citizens. Ms. N.M. was crying hysterically and was very upset. Officer Pischedda found it difficult to get information from Ms. N.M. because she was hysterical. Eventually she calmed down enough to tell him what had happened. He took notes in his memobook of the information he received from her as she was speaking. He did not record what questions he asked her but would have asked her what happened. Ms. N.M. did not sign a statement and he did not read back to her what he put in his notes. She made the following statement. She was attacked by a man she did not know. She stated that she was walking on the south side of Earnscliffe Road and was trying to light a roach with her lighter. Officer Pischedda's practice is to note anything abnormal about a witness being under the influence or intoxicated and he made no such note.

4 Ms. N.M. stated that she passed a man who was on a porch of a house on the north side of Earnscliffe and was shaking his keys as though he was going to go into the house. After she walked past a few more houses, she crossed over to the north side of the street. She heard the male run down the stairs and start to jog towards her. She thought that because he had no top on that he was going for a jog. He ran up behind her, grabbed her behind the neck, forced her to the ground face down and tried to strangle her. She was gasping for air. She tried to reach around behind her and gouge his eyes out. He started to grind up against her. His body was positioned on her back. She tried to make as much noise as possible and screamed. The male was then scared off by a neighbour.

5 Ms. N.M. described the male as white, approximately 30 years of age, between 260 to 270 pounds, with short hair. She believed he had no shirt on or a white shirt. He had beige shorts which went past his knees. He was between 5 feet 6 inches to 5 feet 7 inches.

6 An ambulance arrived. Ms. N.M. was provided with clean gloves to preserve the evidence that potentially was on her hands from when she tried to gouge the attacker's eyes out. Officer Pischedda could not recall who put the gloves on Ms. N.M. He accompanied Ms. N.M. in the ambulance to Women's College Hospital. They arrived at 12:30 a.m. on July 30, 2006. The sexual assault evidence kit was administered by a nurse at 4:00 a.m. Until that time, the gloves remained on Ms. N.M.'s hands. After the kit was completed, the nurse provided the sealed kit to Officer Pischedda who delivered it with the seal intact to the Forensics Identification Services at 5:20 a.m. on July 30, 2006.

7 Police took photos of Ms. N.M. and of the scene, including a picture of a yellow bic lighter on the driveway where the assault was identified as occurring.

Evidence of Megan Oldfield

8 In July, 2006, Megan Oldfield resided at 22 Earnscliffe Road. On July 29, 2006, she heard noises around 11:30 p.m. which she first thought were raccoons. After the noise continued for approximately one minute, she looked out her second floor bathroom window and realized that something was going on on her neighbour's property. She did not see raccoons. She heard a female voice scream and saw a white male, 5 feet 8 inches to 5 feet 9 inches, fit with an athletic build, with no

shirt on and holding his shorts, running from her neighbour's driveway at 24/26 Earncliffe Road. The neighbour's driveway was approximately 22 to 23 feet away from her vantage point. The man running had no hair or was blond. She yelled "hey, hey, hey" out the window. She ran downstairs to chase after the person but he was gone. She then returned to the victim who was shaken, upset and complaining about a sore throat. The police arrived within 5 to 7 minutes. Ms. Oldfield gave a statement to the police on the night of the assault. She pointed out the driveway where the incident happened on photos taken of the scene.

Evidence of Lisa Crawley

9 Ms. Crawley is the registered nurse who administered the sexual assault kit to Ms. N.M. on July 30, 2006 at Women's College Hospital. She was the clinical leader and manager at St. Michael's Hospital from July, 2005 to January 2013. From June 2003 to June 2007 she worked on an oncall basis at Sunnybrook and Women's College Hospital as the sexual assault nurse examiner during which time she dealt with 90 to 100 sexual assault/domestic violence cases. She received the sealed kit, broke the seal so she could administer it and completed the Sexual Assault For Evidence Form and the Physical Examination Form for Ms. N.M. She made notes of the clothes Ms. N.M. was wearing, including gloves protecting her hands. The gloves were put in the kit because they might contain evidence.

10 Ms. Crawley took appropriate swabs from the areas of the body that may have been in contact with the perpetrator. In response to the question: "Did the victim scratch the assailant", she checked the yes box. Because Ms. N.M. had reported that she had scratched the assailant, under Step 3, fingernail clippings or scrapings were done on both hands with a sterile item from the kit. This allowed debris under the nails to be gathered and then sealed in its own container in the kit. At page 2 of the Evidence Form Ms. N.M. reported smoking marijuana. On page 3 Ms. Crawley wrote what Ms. N.M. told her: "being rushed from behind and choked by a stranger; the perpetrator was unable to get any further; the victim was able to scratch and fight; eventually the perpetrator gave up when the victim went limp." This was not verbatim. Ms. N.M. would not have used the word "perpetrator" to describe her assailant.

11 On page 1 to 3 of the Physical Examination Form, the following injuries were noted: a long scrape to the top of the left thigh, a scrape with dried blood and bruise on her inner left knee cap, a 1/2 inch crescent shaped scratch to the outer aspect of her left forearm, an approximately 5 inch long thin scrape with 2 smaller scrapes running down on either side of the left inner aspect of her thigh, a scraped and slightly bleeding right elbow, 3 scrapes to the skin approximately 2 inches long on the right shoulder, a 1 inch scrape and various small scrapes and cuts of different sizes over her face and multiple fine scrapes from her chin to her collarbone. When Ms. Crawley had completed the kit, she resealed it and handed it over to the police officer in attendance.

12 A Scenes of Crime Officer attended the scene and took photographs. Among the photos taken was a picture of a lighter found in the driveway where the attack took place. Police also took photographs of the injuries to Ms. N.M. on July 30, 2006.

Police Statement of N.M. August 1, 2006

13 Ms. N.M. attended at the police station on August 1, 2006 and gave a videotaped statement to Officers Diane Wood and Darlene Coulis. She was not sworn or affirmed to tell the truth and was not advised of the consequences of lying in her statement. Her 2 children were in attendance while she gave statement. She stated the following regarding the July 29, 2006 incident. It occurred late

Friday night. She was on her way to go out with the girls for the night. Her destination was at the end of the block she was walking down. She had smoked a joint earlier in the evening around 6 p.m. and was trying to light a roach with a yellow bic lighter. She saw a male standing in the doorway of one of the houses dangling his keys. He was pretending he lived there. She walked down the street a little bit further on the opposite side to try to avoid him and after she was past, she crossed over to the side where she had seen him. He had no shirt on and she thought he was going for a jog. She heard someone running and expected that he would be jogging past her.

14 The male came up from behind her, grabbing her from behind with his arms so she could not breathe. Her roach and lighter went flying. He brought her to the ground. Her face was in the grass. She could not kick because his legs were so close to hers. His arms were under her. He dropped all his weight on her. He had his calves on top of her legs holding her down. He had her windpipe. He tried to asphyxiate her for about 4 minutes. She made him think that he had got her by going limp and he gave way a little to undo his pants. She managed to slip her arm out and scratch anywhere she could. She could not really get a grip on his face so she went for the eye socket and dug with the last breath she had. He let her go and ran. Ms. N.M. rolled over, gasped for air and screamed at least 5 or 6 times. A neighbor heard her and tried to come to her aid. The neighbour gave her water. More neighbours came out. The police and ambulance came. The man who attacked her was bald, white, 5 feet 7 inches to 5 feet 8 inches, 245 to 270 pounds, over 30 years and under:43 years with a thick build. He was wearing 3/4 length khaki shorts and no top or a white tshirt. She had marks on her neck, elbow and knee. Her throat was still sore. She knew she hurt him and that he had marks on him.

Police Statement of N.M. July 24, 2015

15 Ms. N.M. attended at the police station on July 24, 2015 and gave a videotaped statement to Detective Ansari after being advised that the police had made an arrest in the case. She was asked to watch her August 1, 2006 videotaped statement. She appears to be very distressed, dabbing at her eyes and crying as she watches it. For most of the time, she appears to be listening to the video statement and not watching. She was then sworn to tell the truth and was advised that it was a criminal offence to lie to the police. She confirmed that her August 1, 2006 evidence was true, subject to a correction that the neighbor who came to help her lived one door away from the assault, not 4 doors away as she had said in her August 1, 2006 statement. She was shown a picture of the accused. She said that he looks familiar but did not know from where.

History of this Proceeding

16 A preliminary hearing was set for December 1, 4 and 7, 2015 on this matter as well as a separate incident on a joint information. The Crown had subpoenaed Ms. N.M. to testify at the preliminary hearing and she attended to testify. Before Ms. N.M. could testify, committal on the sexual assault in this case was conceded.

17 The accused's application for severance of the 2 counts was granted on September 12, 2016. This matter was scheduled for trial on December 5, 2016. On October 27, 2016, Ms. N.M. was served with a subpoena to be a witness at the trial on December 5, 2016. She attended trial. The trial was not reached. A new trial date was set on December 7, 2016 for March 27, 2017.

Evidence of Detective Barbara Douglas

18 Detective Douglas gave the following evidence. She was not the original officer in charge. She took over when Detective Ansari left November 11, 2016. The last known address for Ms. N.M. and where she was served on October 27, 2016 was [text deleted by LexisNexis Canada] Blvd. West, Toronto, which was the residence of her ex-boyfriend, P. On January 10, 2017, Detective Douglas called P. and asked if he had seen her. He said that he had not heard from her and would contact Detective Douglas if he did.

Ms. N.M. had a number of court attendances where she was required to and did appear in court in regard to charges against her prior to January 13, 2017. She was required to report to the Bail Supervision Program and was reporting prior to that time as well. Ms. N.M. was required to appear on domestic charges against her involving her ex-partner, P.W. on January 13, 2017. Three days after learning from Ms. MaCallum's ex-boyfriend, P., that she was no longer living at his residence, in an effort to serve Ms. N.M. with a subpoena to testify at this trial, Detective Douglas attended 2201 Finch Avenue W., Courtroom 205 on January 13, 2017. Detective Douglas remained for approximately an hour. Ms. N.M. did not appear on January 13, 2017 and a bench warrant was issued for her arrest.

19 Detective Douglas contacted P. again on January 27, 2017 and there was no answer. On the same day she checked on the outstanding warrants against Ms. N.M. and there were two: a bench warrant for the fail to appear and a bench warrant for failure to comply with her recognizance for failing to report to the Bail Program. Detective Douglas emailed the Victim Witness Assistance Program and was advised that the worker assigned to Ms. N.M. had not heard from her. On February 6, 2017, and February 28, 2017, Detective Douglas checked to see if the warrants were still outstanding which they were. On February 28, 2017, she again contacted P. and did not get a response. On March 14, 2017 Detective Douglas contacted P. who stated that he had not heard from Ms. N.M. in a long time and had no way of contacting her.

20 On March 15 and 16, 2017, Detective Douglas with 2 uniformed officers assisting her partner and herself attended the 2 addresses they had for Ms. N.M.-one was P.'s address at [text deleted by LexisNexis Canada] Blvd. W. and one was the address of Ms. N.M.'s ex-partner, P.W., at [text deleted by LexisNexis Canada] Road. P.W. allowed them to check the apartment. There were 4 children there but Ms. N.M. was not there and he said he had not seen her.

21 On March 15, 2017, Detective Douglas went to the apartment across the hall from P.W. where M. lived and where Ms. N.M. was known to frequent. M. advised that she had seen Ms. N.M. on March 13, 2017 when she gave her \$20.00 and Ms. N.M. had stolen some items from her but had not seen her since then and was not sure of her current address.

Officers attended P.W.'s residence on March 16, 2017 with negative results.

22 On March 17, 2017 P. called Detective Douglas and advised that he would let her know if he found out where Ms. N.M. was.

23 On March 17, 2017, Detective Douglas arranged for officers from the Fail to Comply Unit at 22 Division to assist in trying to locate Ms. N.M. They checked at P.W.'s residence and M.'s residence on a few occasions on the weekend of March 18 and 19, 2017 with negative results. P.W. said that he did not know where she was but knew people who may and would try to find out. He stated that Ms. N.M. was fairly far along in a pregnancy and he believed that the child was his. This could be hindering her decision to turn herself in. The officers from the Fail to Comply Unit were continuing to check the known addresses for Ms. N.M. the rest of this week.

24 Detective Douglas was aware that it was a term of Ms. N.M.'s recognizance that she reside at an address approved by the Bail Supervision Program and that she report to the Bail Supervision Program. On the recognizance her address is noted as [text deleted by LexisNexis Canada] Road which is P.W.'s address.

25 Detective Douglas was cross-examined on why she had not contacted Ms. N.M.'s worker at the Bail Supervision Program to see if Ms. N.M. had provided a new address as required by her recognizance. During the morning break, Detective Douglas did so at my request and advised that the only address Ms. N.M. had provided was [text deleted by LexisNexis Canada] Boulevard, which is P.'s address which is one of the addresses they have been checking.

Submissions of the Crown

26 The Crown submits that necessity and reliability have both been met in this case.

Submissions of the Defence

27 The Crown has not met the requirements of necessity and reliability. In any event, the residual discretion to exclude the evidence should be exercised because the prejudicial effect of the evidence outweighs its probative value.

28 With respect to necessity, police attendances to find Ms. N.M. only began March 15, 2017. A neighbor of P.W., M., reported to the police that she had seen Ms. N.M. as recently as March 13, 2017. Detective Douglas only contacted the Bail Supervision Program at the Court's request. There were many other steps the police could have taken to find Ms. N.M.

29 With respect to reliability, the statement given to Csp. Pischedda was not verbatim. It was not signed or initialed. Ms. N.M. did not review it for accuracy. It was not videotaped or audiotaped. No warning was given to Ms. N.M. There is no way of knowing the exact time the statement was given and whether leading questions were asked.

30 With respect to the August 1, 2006 statement, the presence of Ms. N.M.'s children crying, blocking the camera, standing on the table, knocking the microphone over, etc. prevented Ms. N.M. from giving a coherent explanation of what happened to her. It is impossible for the jury to assess her demeanor because of the distractions and interruptions. The statement was not under oath and no warning was given. The fact that Ms. N.M.'s children were present may cause the jury to be unduly sympathetic with her.

31 With respect to the third statement given July 24, 2015, it suffers from the same problems as the August 1, 2006 statement because the constant distractions from the children can be heard as Ms. N.M. watches the August 1, 2006 video. It will also unfairly bolster Ms. N.M.'s credibility because in it she confirms a prior consistent statement. At the end of the video, Ms. N.M. is shown a picture of the accused without a photo line up. She says it looks familiar without any more information on when or how she recognizes the person.

32 The prejudicial effect of the evidence sought to be adduced vastly outweighs its probative value.

Analysis

In *R. v. Khan* [1990] 2 S.C.R. 531 at para 29-31, the Supreme Court of Canada held that a hearsay statement may be admissible as evidence provided that the criteria of necessity and reliability are met.

33 In *R. v. Khelawon* [2006] 2 S.C.R.787 at para 3, the court further emphasized the need to distinguish between threshold reliability and ultimate reliability when deciding whether to admit a hearsay statement for the truth of its contents:

The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.

34 In *R. v. Smith*, [1992] 2 S.C.R. 915 at para.36, the Supreme Court, citing Wigmore, held that necessity may be made out where the person is "dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]".

35 In *R. v. J.M.* [2010] O.J.No.585 at para 54, the Ontario Court of Appeal set out some factors to consider in the determination of reliability which include but are not limited to:

- i. the timing of the statement in relation to the event reported;
- ii. the absence of a motive to lie on the part of the declarant;
- iii. the presence or absence of leading questions or other forms of prompting;
- iv. the nature of the event reported;
- v. the likelihood of the declarant's knowledge of the event, apart from its occurrence; and
- vi. confirmation of the event reported by physical evidence.

Necessity

36 I do not agree with the defence submission that the police are guilty of laches in their efforts to find N.M. The police had no reason to be concerned about Ms. N.M. not cooperating until Janu-

ary 2017. They were in regular contact with her up until that time. Ms. N.M. had voluntarily shown up to give 2 police statements, one in 2006, one in 2015. She had attended the preliminary hearing and had attended the first trial date set for December 5, 2016. She had a number of court appearances where she was required to and did attend in court in regard to charges against her prior to January 13, 2017 and was required to and had provided her address in compliance with her recognizance. She had been served at P.'s residence in October, 2016. It was reasonable for the police to start their efforts to serve her there in January, 2017 at which time it came to their attention that she was no longer living at that address. Detective Douglas then almost immediately attended Ms. N.M.'s scheduled court appearance but Ms. N.M. failed to appear. A bench warrant was issued for the favour to appear with a second bench warrant for failing to report to the Bail Supervision Program.

37 Detective Douglas monitored the progress of the bench warrants. She continued to make efforts in February, 2017 to locate Ms. N.M. Starting on March 15, 2017, officers made numerous attendances to try to find Ms. N.M. including during the week, on weekends and physically went into where they believed she might be. They have made numerous phone calls. They went to the neighbour's where she had been known at times to be. M.'s statement that she had seen her on March 13, 2017 was not coming from the most reliable source, M. having recently been apprehended under the *Mental Health Act*. In any event, the police went looking for her at M.'s apartment. It appears obvious that Ms. N.M. does not wish to be found. The obligation on the Crown is to show due diligence and do everything reasonable to locate the person, not every possible thing that could be done without regard to the availability of resources. I am satisfied that the Crown has demonstrated sufficient reasons why Ms. N.M. has not been served with a subpoena and that necessity has been made out.

Reliability

38 There are numerous indicia of reliability in the case of the statements sought to be admitted. The statements are similar in tone and content. They are also similar to Ms. N.M.'s statement in the Sexual Assault Forensic Evidence Form, part of the sexual assault kit. The first statement was made to the police at the scene almost immediately after the event. The statement to the nurse administering the sexual assault kit was made immediately after the assault and her statement to the police. The second statement made August 1, 2006 was within a few days of the incident. Memory loss over time is not an issue. The third statement was a sworn affirmation of the contents of the August 1, 2006 statement.

39 The injuries to Ms. N.M. photographed at the time of the assault and noted on the Physical Examination Form (part of the sexual assault kit) are consistent with her statements and with someone who has been attacked. Marks on her face, neck, knees and elbows are consistent with someone who was taken face down on the ground and choked. The lighter found on scene and photographed is a specific detail mentioned in her August 1, 2006 statement.

40 Ms. N.M.'s statements are consistent with the evidence of the neighbour, Megan Oldfield, who heard noise, heard Ms. N.M. scream and saw a man running from her neighbour's driveway. She then stayed to help Ms. N.M. who was shaken, upset and complaining about a sore throat. Her demeanor observed by Ms. Oldfield, Officer Pischedda and the sexual assault nurse are consistent with a victim who has been attacked.

41 At points Ms. N.M. said things in her statements not in her favour such as smoking marijuana. The evidence of Ms. Oldfield and Ms. N.M. that the male fled the scene is consistent with Ms. N.M.'s statements that she was assaulted. There is nothing to suggest that Ms. N.M. had any motive to lie or knew the perpetrator. There is nothing to suggest that Ms. N.M. was not attacked consistent with what she said in her statements.

42 The main issue in the present case is one of identity. This is not a case where evidence is likely to demonstrate that the attack did not happen or where consent will be alleged.

43 Aside from a generic description of her attacker, Ms. N.M. does not assist in any substantive way with identifying who he is. The jury can be instructed on the dangers of eyewitness identification evidence, compounded in this case where she was under attack at the time and there has been no opportunity to test her evidence by cross-examination. The main thrust of her evidence relates to describing the attack, being taken to the ground by a stranger from behind and choked, gouging the eyes of her assailant and the assailant running off, facts which do not appear to be in issue.

44 In some cases whether leading questions may have been asked or where there is no verbatim record, these are important factors affecting the statement's reliability. In this case where the fact that the attack occurred is confirmed by other evidence and where Ms. N.M.'s statement to Officer Pischedda mainly describes what happened, these factors are not critical. The exact time Officer Pischedda took Ms. N.M.'s statement from her at the scene is also not important in this case. The police were at the scene within minutes of the assault. There is no evidence of witness tainting or colluding before Ms. N.M. gave her statement to Officer Pischedda. While Ms. N.M. did not review her statement to Officer Pischedda, it was not under oath and she was not given a warning, the statement is consistent with what Ms. N.M. told the nurse administering the sexual assault kit and her August 1, 2006 statement and confirmed by the other evidence.

45 While it would have been preferable if Ms. N.M.'s children were not present during her August 1, 2006 statement, I do not agree that this may cause a jury to feel unduly sympathetic to her. This is a case of an attack of a woman grabbed by a stranger on the street. Sympathy for the victim can be expected. The main issue is one of identity. The jury can be instructed to take nothing from the fact that Ms. N.M.'s children are present. The fact that the distractions and interruptions from the children may interfere with the ability to assess Ms. MaCallum's demeanor, this is a less important factor where the issue is not whether the assault occurred but the identity of the assailant.

46 With respect to the 3rd statement, the main purpose was to get the statement under oath. Ms. N.M.'s demeanor 9 years later is not a significant factor. Her being shown a picture of the accused without a photo lineup has no evidentiary value and should be redacted. The jury can be instructed on the limited purpose of the third statement, namely to get her August 1, 2006 statement under oath and why prior consistent statements are normally excluded.

47 The 3 statements are confirmed by the neighbor, the bruises, by the police photos, the police investigation and by the Sexual Assault for Evidence Form and Physical Examination Form of the sexual assault kit. When the 3 statements are considered in conjunction with the other evidence, I find on a balance of probabilities that the Crown has met its onus to demonstrate threshold reliability. The prejudicial effect of the evidence does not outweigh its probative value. The statements are admissible subject to an editing out of the portion in the July 24, 2015 statement of the accused's photo being shown to Ms. N.M. and subject to further discussion with counsel about the appropriate limiting instructions for the jury.

N.L. BACKHOUSE J.

---- End of Request ----

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Time Of Request: Friday, May 04, 2018 10:45:30