

Inconsistent Statements and their Evidentiary Capability

Weldekidan is a case that questions whether the statements made by the victims in the hospital, which were later inconsistent with future statements are admissible evidence. It questions the strength of the exemption to the hearsay evidence rule. This brings in the precedent that was set in *R. v. B(KG)*, “*KGB*” where the issue in front of the Supreme Court was whether previously recorded statements could be used as evidence when the contents of the statements have been questioned or changed. This demonstrated an exemption to the hearsay rule. Chief Justice Lamer laid out three rules in regards to accepting previously recorded statements as evidence in the *KGB* case. First “if the statement is made under oath, solemn affirmation or solemn declaration following an explicit warning to the witness as to the existence of severe criminal sanctions for the making of a false statement”. Second, “if the statement is videotaped in its entirety”. Third, “if the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness at trial respecting the statement”. This exception to the hearsay rule was demonstrated to be a very strict one by the Supreme Court in *R. v. Bradshaw*.

Weldekidan was charged with four counts of attempted murder, seven firearms offences as well as a breach of recognizance after a house party in Winnipeg. Before the house party in question, the victims were at a bar called the “Red Sea”. All three victims were at the bar, Miracle Tamana (Tamana), Henok Goitom (Goitom) and Mehari Mehari (Mehari). At the bar, the accused got into an argument with Goitom, whom have been acquaintances for many years. After the argument, the victims left the bar and went to the house party where they partook in alcohol consumption.

In the hospital, all three victims that were injured made recorded statements where they gave detailed recognition of the events that occurred on the night in question and all three identified the accused as the shooter. Goitom stated he was shot in the back lane, the accused then moved to the back of the house where Tamana was and shot him seven times. Mehari was shot and the accused said “Of everyone, I want you dead” and was shot in the stomach. The accused shot at the vehicle that was driving to get Goitom to the hospital and went back to shoot Mehari again but the gun didn’t fire and got into a

vehicle and drove away. They were told that the statements were being recorded and that they would have to be witnesses in trial. In giving these recorded statements the victims were warned and affirmed the following statements; that it was an offence to make a false statement, they were not obligated to make a statement, if they changed their statement at trial they could be charged with fabricating evidence and they should disregard anyone's attempt to persuade them to make a statement. They signed documents stating they understood these statements and that their statements were true. This shows that the officers would have passed the first test of the *KGB* Test given by the SCC. The recording showed the entire conversation and statement and demonstrated the condition that all victims were in while giving these statements. This shows that the officers worked to meet the second part of the test given by the SCC.

At trial, all victims changed their statements from the hospital recordings. Both Mehari and Goitom denied any memory of the shootings or of giving of their statements to the police. They essentially agreed to the defence suggestion that this was due to the medication they were on at the hospital and their intoxication the night of the shooting. Tamana gave a detailed outline of the events of the night of the shooting but denied any memory of who the shooter was, saying that he was "black out drunk". Evidence showed that all there victims were shot by the same gun.

Tamana's medical records showed a very detailed consultation report where it was shown that he was coherent and in a state capable of giving a valid statement. During the judge's initial conversation with Tamana he agreed with the suggestion from defence counsel saying that the officer who took the statement had told him who the shooter was before the statement. The officer who took the statement specifically denied this. The trial judge found that there was no evidence that the statements given by the victims were not given voluntarily. Judge specifically found that "each of the declarants can be cross-examined at trial". She did conclude that Mehari and Goitom "now remember very little", "they will not be cross-examined effectively" and "their statements cannot eve tested". She found that Tamana was available to be cross-examined on his statement, but was greatly concerned with the effect medication in the hospital would have had on him. There was no evidence as to the effects the medication could have had on the three victims and their abilities to give coherent statements. This is where the trial judge said

that the third step of the *KGB* test would fail, and would not allow the previously recorded statements to be admitted as evidence.

The trial judge relied upon the four-step process set out in *R v. Bradshaw*. *Bradshaw* significantly restricted the situations where this exception to the hearsay evidence rule would be accepted. She found that the specific hearsay danger presented by the statements was the difficulty assessing “perception, memory and narration”. She also found that alternative and speculative explanations for the statements included hospital visitors or the police may have told the victims that the accused was responsible or had been arrested, which would have led to them identifying him as the shooter. She also determined there was no corroborative evidence that ruled out alternative and speculative evidence led at the *void dire* relative to each statement of the other two victims, none of which were inherently trust worthy.

Lamer CJC in the *KGB* decision, concluded that threshold procedural reliability of a prior inconsistent statement will be established and “there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the [prior inconsistent] statement”. Cases where prior statements were inadmissible where cases where there were questions of the voluntary nature of the statements, this was not an issue here as it was obvious that the statements were voluntary. SCC in *KGB* clearly contemplated that a prior inconsistent statement could meet the test for procedural reliability even where “the nature of the witness’s recantation limits the effectiveness of cross-examination” on the prior inconsistent statement. Both *KGB* and *R v Devine* define the importance of “a full opportunity to cross-examine the witness” but it is shown in both decisions that there are reasonable limitations on this aspect of the test for procedural reliability.

The MB Court of Appeal found that the trial judge made two errors in her principle. She erred by furthering her assessment past an assessment of procedural reliability and went to consider ultimate reliability. Trial judge also erred in her application of the test for procedural reliability by giving an overly restrictive meaning to the third part of the *KGB* test, “a full opportunity to cross-examine the witness”, which both *KGB* and *Devine* showed there were reasonable limitations to this part of the test.

Court of Appeal allowed the appeal and ordered a new trial. This shows that even though *Bradshaw* restricted the situations where this exception is allowed, the *KGB* rules are not as strict in regards to allowing previously recorded statements that are inconsistent if it meets the procedural threshold of what is allowed.

Bibliography:

R v Weldekidan - 2019 MBCA 109
R v KGB - [1993] 1 SCR 740
R v Bradshaw 2017 SCC 35
R v Devine 2008 SCC 36