Date: 20170821
Docket: CR 14-01-33516
(Winnipeg Centre)
Indexed as: R. v. Okemow
Cited as: 2017 MBQB 150

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:		**COUNSEL:**
HER MAJESTY THE QUEEN	)	For the Crown:
	)	W. Rustyn Ullrich
	)	Danielle Y. Simard
- and -	)	
	)	For the Accused:
	)	Bruce F. Bonney
MICHAEL FRANK OKEMOW,	)	William G. Marks
	)	
Accused.	)	Ruling pronounced:
	)	October 25, 2016
	)	
	)	Written reasons:
	)	August 21, 2017

BOND J.

RULING ON APPLICATION FOR LEAVE TO CROSS-EXAMINE HOSTILE WITNESS

INTRODUCTION

[1] During the trial of Michael Okemow, I found Suede Soulier, a witness called by the Crown, to be a hostile witness and granted leave to the Crown to cross-examine him, pursuant to the common law. I gave the ruling with reasons to follow. These are those reasons.

[2] Suede Soulier was called as a Crown witness to give evidence during the trial by jury of Michael Okemow on an indictment charging second degree murder and attempt to commit murder. Mr. Soulier was asked questions about what he did and whom he was with on the night of the murder. He was also asked about some time he spent with Mr. Okemow that evening, and what Mr. Okemow did and said during that time. Mr. Soulier frequently responded with "I don't remember." When invited to attempt to refresh his memory with the statement he had given to police, he refused.

[3] The Crown initially sought leave to cross-examine Mr. Soulier on his police statement, pursuant to section 9(2) of the ***Canada Evidence Act***, R.S.C. 1985, c. C-5 ("***CEA***"). The defence did not consent, but did not oppose. In accordance with the procedure in ***R. v. Milgaard*** (1971), 2 C.C.C. (2d) 206 (Sask. C.A.), leave to appeal to S.C.C. refused (1971), 4 C.C.C. (2d) 566n (S.C.C.), I reviewed Mr. Soulier's police statement. There were clearly inconsistencies between what Mr. Soulier stated to the police and what he said in court. The defence conceded this point. Before submissions on the section 9(2) ***CEA*** motion were complete, Crown counsel indicated that they were also seeking leave to cross-examine Mr. Soulier as a hostile witness, pursuant to the common law. Mr. Soulier was then re-called to give evidence in a *voir dire*.

POSITIONS OF THE PARTIES

[4] The Crown argued that despite the apparent absence of any recent application in Manitoba Courts, the common law rule regarding leave to

cross-examine a hostile witness has not been abandoned. The Crown argued that there is a distinction to be made between the "adverse" witness under section 9(1) of the ***CEA*** and the "hostile" witness under the common law. Mr. Soulier was not only adverse, said the Crown, but also hostile to the prosecution. Crown counsel sought leave to cross-examine Mr. Soulier at large.

[5] The defence agreed that the common law rule regarding the hostile witness is applicable and that a distinction is to be made between the adverse witness under section 9(1) of the ***CEA*** and the hostile witness under the common law. The defence took the position, however, that the threshold for a finding of hostility was not met in relation to Mr. Soulier.

ANALYSIS

The Hostile Witness Under the Common Law

[6] It appears that Courts in Manitoba have not been called upon recently, in a criminal trial, to declare a witness hostile under the common law. This may be in part because of the Manitoba Court of Appeal's decision in ***R. v. Deacon*** (1948), 56 Man. R. 1, [1948] 1 W.W.R. 705 [***Deacon*** cited to Man. R.]. In ***Deacon***, an important Crown witness had given evidence inconsistent with statements, and testimony, she had given on prior occasions. She was declared adverse under sections 9 and 10 of the ***Canada Evidence Act***, R.S.C. 1927, c. 59 ("***CEA 1927***"), and was cross-examined by the Crown. The trial judge had instructed the jury that any prior statements adopted by the witness were evidence against the accused and any prior statements not so adopted were not

evidence against the accused. The majority of the Court simply held that any error, if there was one, was to the benefit of the appellant and made no further comment. Justice Dysart, in a concurring judgment, noted that the appellant had also argued that the cross-examination of the witness after she was found to be adverse under the ***CEA 1927*** ought to be limited. Justice Dysart disagreed with the appellant and held that when a witness is found to be adverse, she may be cross-examined at large. He stated (at p. 18):

> In the present instance defence counsel suggests that cross-examination of one's own witness who is declared adverse under secs. 9 and 10 of the *Canada Evidence Act* is to be confined to the contradictory matters to which resort is made for impeaching the witness' credibility. The sections, however, are silent on that point. In my opinion, which conforms with that of the other judges of this court, a witness who is declared by the court to be adverse, and therefore to be subject to cross-examination, is subject to such cross-examination as fully and freely as though he were the witness of the opposite party.

[7] Section 9(1) of the current ***CEA*** reads:

> 9. (1) Adverse witnesses — A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

[8] The wording in section 9(1) of the current ***CEA*** is the same as in section 9(1) of the ***CEA 1927*** when ***Deacon*** was decided.

[9] The history of section 9 of the ***CEA*** is outlined and analyzed in ***McWilliams' Canadian Criminal Evidence***, 5th ed. by Mr. Justice S. Casey Hill, Professor David M. Tanovich & Louis P. Strezos, eds. (Toronto: Thomson Reuters Canada Limited, 2017) vol. 2 (loose-leaf). ***Deacon*** is referenced in that textbook as one example of several cases where courts have ruled that a finding of adversity under section 9(1) of the ***CEA*** allows for cross-examination of the witness at large. The editors argue that this broad interpretation of section 9(1) is not supported by the wording of the section, nor its history, and note that many other more recent cases have held that section 9(1) only permits a limited scope of cross-examination. Indeed, the analysis of the law in ***McWilliams*** calls into question whether section 9(1) of the ***CEA*** permits any cross-examination at all, but the editors recognize that courts have interpreted the provision as allowing at least some cross-examination. The editors also refer to the common law rule regarding the hostile witness as being available to a party seeking leave to cross-examine its own witness. See ***McWilliams***, ch. 21:20.30.60.40 at pp. 21-47 to 21-49 (loose-leaf revision 2016-1).

[10] In ***McWilliams***, at p. 21-47, the editors outline the debate found in the case law as follows:

> **21:20.30.60.40 Cross-examining the Adverse Witness**
>
> Section 9(1) expressly provides that where a witness is declared adverse the party calling the witness can prove a prior inconsistent statement. This, of course, was the reason for passing the legislation. But there is no reason to believe that the provision was intended to provide a free-standing right to cross-examine, in addition to that

> provided at common law for a hostile witness. Section 9(1) says nothing to suggest otherwise. Nonetheless, many Canadian courts have interpreted s. 9(1) to mean that upon proof of adversity a party is permitted to cross-examine his or her own witness. While some courts have come to the opposite conclusion, the trend appears to be to recognize some sort of a statutory right to cross-examine.
>
> Arguably, the real debate concerns the *scope* of cross-examination permitted by s. 9(1). Some cases appear to hold, usually without much discussion, that cross-examination under s. 9(1) is general or at large, and thus commensurate with that permitted where a witness is hostile. Others argue for a narrower scope, for example forbidding cross-examination aimed at eliciting favourable evidence as opposed to neutralizing the harmful testimony that the witness has already given, or restricting cross-examination to matters pertaining to a prior inconsistent statement. [Emphasis in original.]
>
> [Footnotes omitted.]

[11] The definition of "hostile" that is frequently cited originates in ***Reference Re R. v. Coffin***, [1956] S.C.R. 191 at 213, where a hostile Crown witness was described as a witness who is "not giving her evidence fairly and with a desire to tell the truth because of a hostile animus toward the prosecution". The hostile witness is distinguished from the adverse witness in ***Wawanesa Mutual Insurance Co. v. Hanes***, [1961] O.R. 495 at 505:

> The word "adverse" is a more comprehensive expression than "hostile". It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavourable in the sense of opposite in position.

[12] In ***R. v. Figliola***, 2011 ONCA 457, 105 O.R. (3d) 641, the Ontario Court of Appeal held that there is a distinction between a finding that a witness is "adverse" under section 9(1) of the ***CEA*** and a finding that a witness is "hostile" under the common law. In ***Figliola***, the Crown sought leave to cross-examine

its own witness, Ms. Teresa Pignatelli, pursuant to section 9(1), and after leave was granted, it proceeded to cross-examine the witness at large. The Ontario Court of Appeal held that this was an error. The Court reasoned:

> [49] However, this seamless move to a cross-examination at large was misguided. In Ontario, a ruling that a witness is "adverse" pursuant to s. 9(1) of the *Canada Evidence Act* is not the equivalent of a common law declaration of "hostility" entitling the beneficiary of the ruling to cross-examine the witness at large. This court has held that adversity and hostility are not synonymous for these purposes: ***Wawanesa Mutual Insurance Co. v. Hanes***, [1961] O.R. 495, [1961] O.J. No. 562 (C.A.); ***R. v. Cassibo*** (1982), 39 O.R. (2d) 288, [1982] O.J. No. 3511 (C.A.). See, also, ***R. v. Vivar***, [2004] O.J. No. 9, [2004] O.T.C. 5 (S.C.J.), at paras. 11-12; ***R. v. S. (S.W.)***, [2005] O.J. No. 4958, [2005] O.T.C. 1004 (S.C.J.); ***R. v. Osae***, [2010] O.J. No. 2285, 2010 ONSC 3108; ***R. v. Gushue (No. 4)***, [1975] O.J. No. 2211, 1975 CarswellOnt 25 (Co. Ct.); and ***R. v. Cronshaw***, [1976] O.J. No. 2466, 33 C.C.C. (2d) 183 (Prov. Ct.).
>
> [50] This jurisprudence confirms that an "adverse" witness is one who is opposed in interest or unfavourable in the sense of opposite in position to the party calling that witness, whereas a "hostile" witness is one who demonstrates an antagonistic attitude or hostile mind toward the party calling him or her. In ***R. v. Coffin***, [1956] S.C.R. 191, [1956] S.C.J. No. 1, 114 C.C.C. 1, at p. 213 S.C.R., p. 24 C.C.C., Kellock J. described a hostile witness as one who does not give his or her evidence fairly and with a desire to tell the truth because of a hostile *animus* towards the prosecution.
>
> [51] The common law right of a party to cross-examine his or her own witness at large with leave of the trial judge, if in the judge's opinion the witness is "hostile", is not affected by s. 9(1) of the *Canada Evidence Act*: ***Cassibo***, *per* Martin J.A., at p. 302 O.R. Section 9 makes no reference to a witness "proving *hostile*" and contains no suggestion of a right to cross-examine at large. As Porter C.J.O. pointed out in ***Wawanesa***, a declaration of hostility and its consequences are something that arise "in addition [to]" a finding of adversity. At pp. 507-508 O.R., after reviewing the steps to be taken by a judge in deciding whether to make a declaration of adversity and the factors to be considered, he stated that "[t]he Judge, *if he declared the witness hostile*, might, *in addition* permit him to be cross-examined" (emphasis added). It follows that a declaration of adversity pursuant to s. 9(1) was not, itself, sufficient to trigger a right in the Crown to cross-examine Ms. Pignatelli [the witness] generally as to all matters in issue.

[13] The important distinction identified by the Court is in the effect of the finding. The Court of Appeal stated, at para. 62: "Following the s. 9(1) ruling, the Crown should have been restricted to cross-examining on the prior inconsistent statements and the circumstances surrounding them." For leave to cross-examine its witness at large, the Crown ought to have shown that its witness was not only adverse but also hostile.

[14] This distinction between adverse under section 9(1) of the ***CEA*** and hostile under the common law is found as well in ***R. v. Ethier*** (2005), 197 C.C.C. (3d) 435, 2005 CanLII 18288 (ONSC), ***R. v. Vivar***, 2004 CanLII 34315 (ONSC), and ***R. v. McAllister***, 2008 NSCA 103.

[15] In light of this case law, the comments of the editors in ***McWilliams***, and the absence of any recent cases addressing the issue in Manitoba, I decline to follow ***Deacon***, and instead adopt the rule as set out in the recent Ontario cases.

[16] In support of the adoption of this approach in Manitoba, I note that although the case is not directly on point, in ***Telecommunication Employees Assn. of Manitoba Inc. v. Manitoba Telecom Services Inc.***, 2008 MBQB 265, 233 Man. R. (2d) 201, Bryk J. referred to the ***Wawanesa*** decision with approval and stated (at para. 34):

> Moreover, there is nothing in s. 9(1) of the ***CEA*** that remotely suggests a right to cross-examine a witness at large once that witness is found to be "adverse". The section only permits that witness to be cross-examined on his/her prior inconsistent statement.

[17] Justice Bryk cited ***Vivar*** extensively, and concurred with Dambrot J.'s comments in that case, to the effect that "adverse" under section 9(1) of the ***CEA*** does not mean "hostile" in the traditional sense, and that a finding that a witness is adverse under section 9(1) does not permit cross-examination at large, whereas a finding that a witness is hostile under the common law does.

[18] The Ontario approach is based on the wording of section 9(1) of the ***CEA***, and is more in keeping with that wording than the ***Deacon*** approach. There is nothing in the ***CEA*** to suggest that the common law rule regarding hostile witnesses should not be preserved.

[19] As pointed out in ***Vivar***, section 9(1) serves a purpose that is complementary to section 9(2) of the ***CEA***. See ***Vivar*** at paras. 8-9. Section 9(2) permits a party to cross-examine its own witness on a prior inconsistent statement without a finding of adversity where the prior statement is reduced to writing. Section 9(1) does not require a prior inconsistent statement reduced to writing, but rather permits the party to contradict its own witness if found to be adverse. A finding that a witness is hostile goes further and allows cross-examination at large.

Was Suede Soulier a hostile witness?

[20] Whether a witness is hostile is to be determined by considering all of the circumstances. ***McWilliams***, at pp. 21-40 to 21-41 (loose-leaf revision 2014-4) provides a helpful and succinct summary of the factors that may be considered:

21:20.30.50.10 Definition of Hostile and Manner of Proof

. . .

> It is for the court to decide whether a witness is hostile based on all of the circumstances, and the judge can hear evidence on the issue. Relevant factors include the demeanour and general attitude of the witness, the substance of his or her evidence, any motive for animosity against the calling party or favouritism towards that party's opponent, a prior inconsistent statement and the circumstances in which it was made, any explanation for recanting a prior inconsistent statement, a failure to tell the calling party that the prior inconsistent statement would be recanted at trial, a refusal to attempt to refresh his or her memory, and so on.
>
> Some older cases suggest that hostility can only be proven by the demeanour and general attitude of the witness while testifying, and that the trial judge cannot take into account any prior inconsistent statement. This position is inconsistent with current jurisprudence, and is artificially restrictive. If the point is to permit a party to attack the credibility of a witness who bears an animus sufficient to cause perjury, the court should be permitted to take into account any relevant factor. An outwardly polite and congenial witness may harbour such an animus. Prohibiting cross-examination would force the fact finder to assess the reliability of possibly perjured evidence without the benefit of ever having seen the witness's credibility tested.
>
> [Footnotes omitted.]

See also ***R. v. Serré***, 2012 ONSC 3193, [2012] O.J. No. 2967 (QL) at para. 23.

[21] Suede Soulier was a witness hostile to the prosecution. I made that finding based on the inconsistencies between Mr. Soulier's testimony and his statement to the police, the answers he gave in direct examination by the Crown and in the *voir dire*, and his manner when he testified. Mr. Soulier's motivation was unclear and may have included any number of personal considerations, but his intention to undermine the Crown's case was clear. I found that he was manifestly hostile and held a demonstrated animus towards the prosecution.

[22] In direct examination, Mr. Soulier testified to some events of the evening, but when asked about matters that touched on his knowledge of Mr. Okemow's involvement in the shooting, he said that he did not remember. When asked by the Crown, he said that reviewing the statement he gave to the police would not refresh his memory.

[23] In his statement, Mr. Soulier told police that on the night of the shooting, he was at a house drinking beer with Mr. Okemow and some other people. He said that at one point he saw Mr. Okemow with something that "looked like a shotgun". He said that he saw Mr. Okemow put the gun under his sweater, and leave. He heard a gunshot, and then saw Mr. Okemow come running back to the house. He said that Mr. Okemow later admitted that he had killed someone.

[24] When called to testify by the Crown, Mr. Soulier did not testify to any of these events. When he was asked questions that might elicit that evidence, he said that he did not remember. It was clear, however, that Mr. Soulier did have a memory of the events of that night. He was able to recount certain events in detail, such as the route he and Mr. Okemow took when they walked to the beer store. When questions were asked about his knowledge of the shooting, he claimed he could not remember. This memory loss was obviously feigned.

[25] In the *voir dire*, when asked by Crown counsel about giving his statement to the police, Mr. Soulier said that the police treated him well and did not force him to give a statement or threaten him. He said he was doing his best to tell

the truth. However, under cross-examination on the *voir dire*, he agreed with defence counsel's suggestion that the police put words in his mouth when he gave his statement. He testified that the police were trying to put words in his mouth because they "were trying to basically help themselves in the case". Mr. Soulier denied any recollection of what it was he claimed the police were trying to get him to say.

[26] Mr. Soulier was not aggressive or angry in his manner of giving evidence. His manner was impassive and steadfast. He was impenetrable.

[27] The defence argued that in order to find Mr. Soulier to be a hostile witness, the Court had to find that he was motivated by a dislike or enmity towards the police or the Crown. It was argued that a witness who is motivated to recant his statement or to feign memory loss by a desire to protect the accused or to protect himself, cannot be found to be hostile. The defence cited ***Vivar*** and ***Ethier*** in support of its position.

[28] I agree that something more than giving evidence inconsistent with a prior statement is necessary for a finding that the witness is hostile. In my view, however, the focus ought to be on the witness' intent rather than his underlying motivation. Whether the witness is motivated out of friendship, gang loyalty or fear may be a factor to consider, but it is not, in my view, determinative. What is required is an intention to undermine or thwart the prosecution's case, and

this intention may be inferred from the circumstances. See ***R. v. Haughton (No. 3)*** (1982), 38 O.R. (2d) 536 (Co. Ct.), and ***Serré*** at paras. 14-15.

[29] In all of the circumstances, it was clear to me that Mr. Soulier intended to thwart the Crown's case. He feigned a loss of memory and refused to have his memory refreshed. He refused to give any evidence about the events that he had described in detail in his statement to the police. His claim that the police put words in his mouth was not credible. His manner on the witness stand was intractable.

CONCLUSION

[30] Crown counsel's application for leave to cross-examine Suede Soulier at large as a hostile witness was, therefore, granted.

_____J.