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**R. v. Nickerson**

**Between**

**Her Majesty the Queen, and  
Roger Blithroy Nickerson**

[1996] N.S.J. No. 342

Nos. C.610709, C.610706, C.610701 and C.610702

Nova Scotia Provincial Court  
Yarmouth, Nova Scotia

**Crawford Prov. Ct. J.**

Heard: May 28, 1996.

Judgment: August 26, 1996.

(6 pp.)

*Criminal law -- Evidence and witnesses -- Confessions and voluntary statements -- Admissibility of prior inconsistent statement of witness for truth of its contents.*

This was an application by the Crown to admit statements of three witnesses for the truth of their contents. The accused was standing trial on charges of assault, assault with a weapon, and cruelty to an animal. The statements sought to be admitted were made by the accused's common law spouse, her father, and her mother to the police following an incident at the accused's residence. Each of the witnesses gave testimony at trial which was inconsistent with the written statements, and the Crown was given leave to cross-examine the three witnesses on their statements. The Crown now sought admission of those statements.

HELD: The prior statements were admissible for the truth of their contents. At issue was whether or not there were sufficient guarantees of reliability to substitute for the lack of oath, warning and videotaping. The court held there were sufficient indicia of reliability to satisfy it on a balance of probabilities that the statements should be admissible. The statements were taken separately, yet corroborated each other. The witnesses knew the importance of telling the truth, both for themselves and for the accused. An experienced police officer testified under oath that he had truthfully recorded what the witnesses told him.

**Statutes, Regulations and Rules Cited:**

Criminal Code, ss. 446, 266, 267.

**Counsel:**

James Burrill, for the Crown.  
Russell W. Cushing, for the defendant.

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**1 CRAWFORD PROV. CT. J.:**-- Roger Nickerson is charged under s. 266 of the Criminal Code with two counts of assault, under s. 267 of the Code with one count of assault with a weapon and under s. 446 of the Code with one count of cruelty to an animal.

#### FACTS

**2** The Crown has made what has become known as a "B.(K.G.) application" to admit statements of three witnesses for the truth of their contents. The common-law spouse of the accused, her father and mother all gave statements to the police following an incident at the accused's residence on January 20, 1996. As a result of the statements the charges before the Court were laid.

**3** In her statement, Kathy Anne Crosby, common-law spouse of the accused, stated:

- (1) that the accused slapped her across the face with his open hand
- (2) that she had had two measured drinks of whiskey, one about 1/2 ounce, the other about 1 ounce;
- (3) that after she and her father left the house, her father went back in when they heard her mother screaming. When Ms. Crosby followed, she saw her father down on the wood pile with the accused on top of him, and she hit the accused with a piece of wood.

**4** At trial Ms Crosby's evidence was that:

- (1) the accused's hand brushed by her face when he playfully knocked her hat off;
- (2) she had drunk approximately one quart of whiskey;
- (3) her father had the accused against the woodpile.

**5** Bernard Hugh Crosby, father of Kathy Crosby, said in his statement on January 20, 1996 that:

- (1) when he went back into the porch in response to his wife's screams, the accused was beating his dog over the head with a stick of hardwood; he saw him hit the dog once;
- (2) when he told the accused not to hit the dog anymore, the accused hit him over the head with the same stick;
- (3) he then grabbed the accused, who was still attempting to hit him again, and hit him in the face with his fist to prevent him from doing so. He described the accused as "extremely violent" at this stage -- swinging the stick at Crosby, forcing Crosby to duck
- (4) Kathy hit the accused over the head with a small stick to defend her father, whom the accused had by the throat. After the second blow with the stick, the accused fell, and all three witnesses left.

**6** At trial, Mr. Crosby testified that:

- (1) when he heard the dog howl twice and heard his wife call for help, he went back into the porch; the dog exited fast, and the accused was facing Crosby with a stick of wood over his head in both hands; he said he did not see the accused hit the dog;
- (2) Crosby told the accused, "Don't hit that dog again", "Drop that"; when the accused did not drop the wood, Crosby grabbed the accused and forced him back against the woodpile and the stick of

wood brushed down by Crosby's face;

- (3) Crosby held the accused down as long as he could, then called his daughter for help, and Kathy hit the accused on the head with a small stick
- (4) the only force the accused applied to Crosby was to try to get up; on cross-examination, he stated that the accused's hold on his throat was possibly to try to get up, or possibly a defensive reflex.

**7** In her statement on January 22, 1996, Joyce Elizabeth Crosby stated that:

- (1) As the three witnesses started out the door, the accused pushed Kathy against the wall and told her that if she left, she couldn't come back;
- (2) Mr. Crosby and Kathy went out, and Mrs. Crosby was behind the accused. The dog tried to get past him. He kicked the dog twice, shut the outside door, took a piece of firewood and, holding it in both hands, struck the dog over the head three or four times. Mrs. Crosby saw blood coming out of the dog's nose, and was screaming, "He's killing the dog!"
- (3) Mr. Crosby ran in and told the accused not to hit the dog again, and the accused swung the stick at him and hit him on the side of the head, a glancing blow.
- (4) They scuffled and fell, Crosby on top, trying to keep the accused down. The accused kept swinging the stick and kicking. He had Crosby by the throat with one hand and the stick in the other.
- (5) Crosby called for help; Kathy came in and hit the accused on the head two or three times with a stick. Crosby and the accused got up; the accused started to walk into the kitchen and fell on the floor, the stick of wood still in his hand. The three witnesses left.
- (6) The accused pushed Mrs. Crosby against the wall with his arm when she tried to stop him from hitting the dog.

**8** On the witness stand, Mrs. Crosby said that:

- (1) the accused did not push Kathy, just put a hand on her shoulder when he told her if she left she would not be coming back;
- (2) the accused gave "Duke", the dog, a couple of kicks in the behind with his sockfeet, and hit the dog with the stick of wood twice and was on his third hit when Mr. Crosby opened the door. The dog yelped; there was a little blood on the end of his nose, but he was not hurt in any way afterwards
- (3) Mrs. Crosby said, "Roger, please don't hit the dog" and the accused put his arm up and put his hand on Mrs. Crosby's chest, as if to say, "Stay out of this"; he did not push Mrs. Crosby;
- (4) Mr. Crosby told the accused to put the stick down; the accused did not, Crosby pushed the accused back, and the stick came down, swish, by Crosby's head; it did not hit Crosby.

**9** Given the inconsistencies between the written statements and the testimony at trial, following Milgaard applications, the Crown was permitted to cross-examine each witness on his/her statement.

**10** Kathy Crosby was both reluctant and hostile when questioned regarding the inconsistencies between her evidence on the stand and her written statement. She explained the inconsistencies by saying that she was under the influence of alcohol and was upset and angry at the accused at the time the statement was taken.

**11** Bernard Crosby said he presumed that Cpl. Flynn wrote down everything he said when he gave his statement, but he thought that maybe Cpl. Flynn misinterpreted what he said. He denied reviewing it after it was written down, although he admitted that Cpl. Flynn gave it to him to read. His reason for not reading it was that he could not understand Cpl. Flynn's writing.

**12** On cross-examination by the Crown Mr. Crosby admitted that at the time he gave his written statement to Cpl.

Flynn he understood the importance of telling the truth and knew that he had solemn obligation as a member of the public to tell only the truth; but he insisted that what he said that night was the same as what he said on the witness stand: that the accused did not hit him with the stick of wood. His only explanation for the inconsistencies was that Cpl. Flynn did not take it down right.

**13** Mrs. Crosby stated that all of the inconsistencies between her statement and her evidence on the witness stand were just a misunderstanding. The police officer must have got all of it wrong.

**14** Cpl. Flynn gave evidence on each Milgaard application. He stated that each statement was taken separately, but that they were not given under oath, were not videotaped, and he did not warn the witnesses of the possible consequences of giving a false statement.

**15** He said that Ms. Crosby's statement was not verbatim in that he had not recorded all the pauses, um's and ah's, but that it was otherwise full and complete. He detected a slight smell of liquor from her, consistent with the two drinks she told him she had had. Her speech was not slurred or impaired, nor was her walk. Although some people show signs of drinking more than others, he thought he would have detected consumption of one quart of liquor.

**16** He said that Mr. Crosby's statement was true and accurate. He did not summarize what Mr. Crosby said; he told him to stop so that he could catch up with what he was saying. When the statement was complete, he passed each page to Mr. Crosby, who took it, held for twenty seconds or so, as if reading it, then initialled it. Cpl. Flynn then had him sign the last page following the statement, "I have read this statement and it is true and correct." He said that Mr. Crosby was not upset at the time of giving the statement; he was very well composed. He remembered that as he interviewed Mr. Crosby, the latter was rubbing the side of his head and made the comment, "No blood."

**17** He said that he took Mrs. Crosby's statement two days later, because, after taking the other two statements, he felt it was crucial to get to the scene of the incident. He expected at that time to find the accused dead.

**18** When he took Mrs. Crosby's statement he had no difficulty keeping up with her; she spoke slowly and he recorded truly and accurately what she said. Afterward she appeared to read each page.

**19** Mrs. Crosby, like her husband and her daughter, signed the last page of her statement under a statement that it was true and correct and that she had nothing to add.

## ISSUES

**20** Are the statements or any of them substantively admissible in accordance with the rule laid down in *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257, 19 C.R. (4th) 1?

## ANALYSIS

**21** In *B.(K.G.)*, supra, Lamer, C.J.C. stated at C.R. 39:

Therefore, the requirement of reliability will be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of its truthworthiness with respect to the two hearsay dangers a reformed rule can realistically address: if (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement, there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement. Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in

place of those which the hearsay rule traditionally requires.

**22** The burden of proof is the normal burden on the party seeking to admit evidence, i.e. that the indicia are established on the balance of probabilities. B.(K.G.), supra, p. 42.

**23** In the present case the third condition has been met. The question is whether or not there are other sufficient circumstantial guarantees of reliability to substitute for the lack of oath, warning and videotaping.

**24** In regard to the statements of Mr. and Mrs. Crosby, I note that they stated on the witness stand that at the time they gave their statements to Cpl. Flynn they knew it was important to tell the truth and considered themselves obligated to do so. They also said that they did tell the officer the truth and that he must have taken it down wrong.

**25** As I am satisfied (given that the statements were taken by an experienced police officer, that the witnesses read and signed their statements at the time, and that the statements are consistent with each other and with Ms. Crosby's) that the police officer did not and could not have made all of the mistakes attributed to him by the witnesses, I find that Mr. and Mrs. Crosby in effect adopted their statements on the witness stand.

**26** Alternatively I find that the following indicia of reliability are sufficient to satisfy me on a balance of probabilities that they should be substantively admissible:

(1) the statements were taken separately

(2) they corroborate each other

(3) the witnesses knew the importance of telling the truth, both for themselves and the accused

(4) an experienced police officer with no reason to be inaccurate testified under oath that he accurately and truthfully recorded what the witnesses told him.

**27** In regard to Ms. Crosby's statement, although my notes do not reflect that she was asked whether or not she knew the importance of telling the truth when she gave her statement, the other three indicia are sufficient to satisfy me that her statement also should be admitted for the truth of its contents.

## CONCLUSION

**28** The Crown's application for the admission of the three statements for the truth of their contents is granted.

CRAWFORD PROV. CT. J.

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