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# R. v. Chase

Between
Her Majesty the Queen, Informant, and
Dustin B. Chase, Accused

Manitoba Judgments: [1990] M.J. No. 596

**Manitoba Provincial Court**
**Criminal Division**
**Kopstein Prov. Ct. J.**

November 5, 1990

Stephen S. Bondar, on behalf of the Crown.

D. Goddard, on behalf of the Accused.

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**KOPSTEIN PROV. CT. J.**:— The issue in this case arises out of the testimony of a police officer concerning the apprehension of the defendant far speeding contrary to the provisions of the Highway Traffic Act. S.M. 1985/88. The officer testified with the aid of notes made by him. In cross-examination he admitted that his notes did not refresh his memory of the apprehension itself: he had no independent recollection of the incident. His testimony was simply a recitation of notes he made at the time of the apprehension. The notes themselves were examined by the defendant's agent. They were not tendered by the Crown as an exhibit in the cause. Nor upon examination of them by the agent for the accused. did he seek to have them admitted as evidence. Cross examination included the following exchange:

> "Q And is it fair to say that even when you refer to those notes. that does not refresh your memory. you're simply giving evidence from the notes that you made: is that fair to say?
>
> A That's fair. They were made at the time so it's about as original as you're going to get.
>
> Q And is it also fair to say that you have no independent recollection or a memory refreshed from - with respect to the testing of the particular equipment on that particular day?
>
> A No. Just what our standard procedure is."

While not a precise statement. I understand the witness's first response, above noted, to be a statement of his belief that his notes are accurate because they were made at the time of the incident. The officer's honesty was not challenged.

It is contended on behalf of the accused that in the absence of production of those notes as an exhibit in the cause, there is no evidence of the offence alleged properly before the court. because the exception to the hearsay rule which renders evidence of recorded past recollections admissible applies, only, where the writing which records the recollection is itself entered in evidence.

The use of notes or records as the sole evidence of an event has been classified by Wigmore: Evidence in Trials at Common Law. Chadbourn. Rev. 1970. Vol. 3 at paragraph 734 et. seq. as past recollection recorded, distinguishing it from revived present recollection. A. F. Sheppard. in his textbook Evidence, 1988, sets out

succinctly at paragraphs 402 - 407 the following six propositions relating to the use which may be made of records or notes concerning facts about which the witness has no independent recollection:

> "402 The first requirement is that the document must have been made at the time of the event or within a reasonable time thereafter while the witness's eecollection was fresh. The test has been expressed objectively as requiring contemporaneity. and subjectively as requiring a fresh memory of the facts. It would seem that freshness of memory, either alone or in combination with some other feature, is the prevailing test. The witness must be able to testify that the document accurately reflects his knowledge at the time, but this testimony may be based on his general practice in making such records or on some indication in the document."
>
> "403 Secondly, the witness must have made the document personally. or if someone else made it, it must have been either made in the witness's presence or verified by him while the facts were fresh in his mind. If the document was made by someone under the witness's supervision, but the specific entry was not made in the witness's presence or with his verification, it may be admissible.
>
> "404 Thirdly, where the original document is unavailable, a copy is admissible if it is proven accurate and was made while the facts were fresh in the witness's mind. Thus, a carbon copy made simultaneously is as accurate as the original. A handwritten copy made by someone other than the witness but verified by the witness while his recollection was fresh is admissible.
>
> "405 Fourthly, the witness's memory must be exhausted. Before the document is admissible, there must be a need far it. The witness must be unable to recall the facts in it. Even though the trial judge feels that the witness is feigning a loss of memory. the document is admissible as past recollection recorded."
>
> "406 The writing must be produced and admitted into evidence as an exhibit, and the opposing party may cross-examine the witness on it. The witness may read the relevant statement from the document to the jury." (Emphasis added)
>
> "407 A document received in evidence as past recollection recorded is evidence of its contents, as an exception to the hearsay rule."

It is only the proposition in paragraph 405, above noted. which is raised in this case. In support of that proposition, the learned author cites R. v. Alward (1978) 73 D.L.R. (3d) 290: and R. v. Davey (1969) 68 W.W.R. 142 (B.C.S.C.).

In Alward, supra, the charge was murder. The evidence related to a watch allegedly stolen From the murder victim. The Crown sought to identify a watch found in the room of one of the accused as that which was stolen from the victim. It sought to do so through the testimony of the jeweler who had sold the victim the watch. At the time of the sale the jeweler had recorded the serial number of the watch casing on the sales slip of which he retained a duplicate original or carbon copy. At page 303. Lemerick. J.A. says:

> ". . . . The note of the serial case number written on the sales slip by Mr. Cowie would constitute a memorandum made by him directly from the number on the case of the watch and his comparison at the trial of the number written on the slip with the case number on the watch was not opinion evidence but factual. In as much as it did not refresh actual memory of the number itself but confirmed from recollection that Mr. Cowie had written the number at the time and was indubitably accurate. it was admissible in evidence."

And at page 304. he continues:

> "...Later, on motion of counsel for the Crown. the trial judge admitted the sales slip in evidence and rightly so. under the circumstances. . . When the trial judge announced his decision to admit the document in evidence, counsel could, and, if it was his desire to do so, should have asked to cross-examine Mr. Cowie on the document."

The decision in Alward. supra. was appealed to the Supreme Court of Canada, 76 D.L.R. (3d) 577. but the above issue was not an element of the appeal or of the result therein.

In R. v. Davey, supra, the charge was one of leaving the scene of an accident contrary to Section 221(2) of the Criminal Code 1953/54 Ch. 51. A witness who was present at the scene noted the licence number of the offending vehicle on a paper, and immediately reported the particulars of the accident, as well as the licence number she had recorded to a nearby constable who was equipped with a portable two-way radio. She heard the constable report the accident and the licence number which she had given him. over his two-way radio. Subsequently she lost the piece of paper with the licence number which she had recorded and she retained no independent memory of the number. At trial she was not permitted to refer to the constable's notes of the licence number which she had given him. There being no identification or insufficient identification of the vehicle, the accused was acquitted. On appeal by way of stated case. Aikens J. was of the opinion that the witness should have been permitted to refer to the constable's notebook "to refresh her memory". He set aside the acquittal and ordered that the case be remitted to the trial Magistrate to be dealt with by him accordingly.

It must be pointed out in respect of these two cases that neither Court required the record or note of a past recollection to be entered as an exhibit in the cause as a pre-requisite to the admission of its contents through the viva voce evidence of the witness who relied upon it to testify as to what occurred. The most that can be said, in the light of R. v. Alward, supra, is that where a party tenders a note or record containing information about facts concerning which he or she has no recollection the court should receive the document as an exhibit. The case does not go so far as to hold that a record of a past recollection must be tendered as an exhibit if a witness intends to give testimony based upon it.

In Fleming v. Toronto R.W. Co. (1911) 25 O.L.R. 317 at 325 (C.A.) the defendant company was sued for negligence for its alleged failure to take reasonable care that a railway car was roadworthy and free from the defect which caused the accident. A witness, an employee of the defendant company, had no memory of any inspection made shortly before the accident. There was a report, however, signed by him in the usual course of his work, showing that the car had been examined. At trial, pursuant to the plaintiff's objection, the witness was not permitted to look at the note. On appeal it was held that the defendants were entitled to a new trial because of the impraper rejection of the evidence. At page 325. Meredith J.A. says:

> "If, looking at the report, the witness could have said. 'that this is my report, it refers to the car in question. and shews that it was examined at the time, and, though I cannot from memory say that it was then examined. I can now swear that it was, because I signed no report that was untrue, and at the time I signed this report I knew it was true', that would be very good evidence. but the defendants were not allowed to get that far."

Again. while evidence of past recollection recorded was held to be admissible, there is no suggestion that a pre-requisite to its use is the admission of the note or record in evidence.

In R. v. Schryvers (1953) 2 C.C.C. (2d) 286 (B.C.S.C.). the defendant was charged with speeding. When apprehended, the defendant produced a driver's licence issued in the name of the accused. At trial, the apprehending officer was unable to identify the accused except by reference to the name which he had recorded. On that evidence. the accused was convicted by a Magistrate. The conviction was appealed by way or stated case, on the basis that there was no evidence of identify to support the conviction. On appeal, Munroe J. held there was evidence of identity and that he had no jurisdiction to weigh the sufficiency of the evidence. He went on, however, to say that if he had had jurisdiction. he would have held, in the circumstances, that the Magistrate had come to the correct determination and decision in point of law. He says at p. 288:

> "... Since the appellant would have peculiarly within his own knowledge all the relevant facts to rebut the prima facie case established by the Crown evidence herein, the onus of proof that he was not the driver, in the circumstances above related might properly be regarded by the Magistrate as shifting to him..."

The principle contained in that case is followed. I believe, in Highway Traffic cases regularly. Nor is there any suggestion in that case that far the evidence of the identity of the defendant to be received, the officer's notes containing the name on the driver's licence were required to be entered as an exhibit before the court.

The defendant's agent quotes from Ewart: Documentary Evidence in Canada at p. 284 the following:

> "... When objects or writings are used to refresh the memory of a witness it is still only the witness's recollection of the events which constitute the evidence. The trier of fact must be instructed that whatever is "contained in the memorandum is not evidence unless adopted by the witness. while any discrepancy between the two may only be used to aid the determination of his credibility. This is significantly different from the memoranda or writings which meet the criteria for admission into evidence of past recollection recorded. In this circumstance. the writing or memoranda itself becomes evidence. The writing or memoranda is filed as an exhibit and the trier of fact is instructed that subject to issues of credibility. that document can be used as evidence of the Facts contained therein." (The emphasis is added.)

In support of those statements the learned author appears to rely upon some or all of the following cases:

R. v. Lunan (1983) 2 C.C.C. (3d) 193 (Ont.C.A.):

R. v. Duckworth (1917) 31 O.L.R. 570 (Ont. C.A.):

R. v. Antoine (1949) 94 C.C.C. 106 (B.C.C.A.):

R. v. Duff (1928) 50 C.C.C. 246 (Sask. C.A.):

R. v. Mair (1974) 15 C.C.C. (2d) 305 (Ont. S.C.):

R. v. Brown (1927) 49 C.C.C. 37 (Sask. C.A.):

R. v. Pelletier (1973) 13 C.C.C. (2d) 266 (B.C.C.A.):

Re: Johnson and R. (1977) 36 C.C.C. (2d) 403 (Ont. H.C.):

R. v. Blunden (1975) 30 C.C.C. (2d) 122 (Ont. C.A.):

R. v. Carpenter (1981) 61 C.C.C. (2d) 481 (Ont. C.A.).

With respect, I cannot find anything in those cases which stands far the proposition that records or notes of past recollections must be entered in evidence. For the most part the cases cited deal with the proper use by the trier of fact of witnesses' prior inconsistent statements. R. v. Duff, supra, is authority for the proposition that a Witness's notes are not admissible unless the witness who made them is at the time of the trial, dead.

With respect, in my opinion, the probative value of admissible hearsay evidence is equal, whether advanced through the actual admission in evidence of the note or record or through the oral recital of its contents. The admission in evidence of the note or record does not enhance the probative value of the evidence beyond that of its oral recital. It is not the admission of the note or record in evidence which affords the opportunity for scrutiny. It is the production of the note or record for cross-examination by the opposing party, with or without its admission in evidence. which provides that opportunity,

In the result I rule against the defendant's no evidence motion.