SUPREME COURT OF YUKON

Citation: *R. v. L.F.G.*, 2020 YKSC 48

Date: 20201123
S.C. No.: 19-01516
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

L.F.G.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before Chief Justice S.M. Duncan

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Raymond Dieno — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] DUNCAN C.J. (Oral): This is a ruling on the admissibility of a videotaped statement of the complainant (in this case, D.G.) taken when she was 4 years old by the RCMP. A *voir dire* was held in which the complainant's grandmother, mother, police officer, interviewer, and the complainant testified.

[2] The background is that the accused, who is the father of the complainant, was charged with sexual interference (s. 151) and sexual assault (s. 271) of the complainant

allegedly occurring between January 1, 2019, and May 19, 2019. Several days after the complainant disclosed the allegations to her grandmother and mother for the first time (that is, on or about the 19th or 20th of May 2019) the complainant was taken to the RCMP to provide a statement. D.G. was interviewed by Cst. Locke on May 23, 2019, for approximately half an hour. The interview contained the allegations that led to the laying of the charges against the accused.

[3] During the *voir dire*, the videotaped statement was played for the complainant to watch. She was questioned in-chief by the Crown and cross-examined by defence counsel. Her testimony was provided through CCTV and she had a support person present. Although initially defence raised the possibility of a competence inquiry of the complainant, he later advised that he would not be pursuing that issue, given the presumption of competence in s. 16 of the *Canada Evidence Act* and the test of competence being the ability to understand and respond to questions. I agree that there is no issue of D.G.'s competence, based on the test in s. 16 of *Canada Evidence Act*.

[4] D.G. testified clearly that she has no present memory of the allegations.

[5] Section 715 of the *Criminal Code* provides:

> 715.1 (1) In any proceeding [relating to offence] ...

— and I will just refer to the two offences at issue here: under s. 151 or s. 271 —

> ... in which [the complainant] was under the age of eighteen years at the time the offence is alleged to have been committed, a [videotape] made within a reasonable time after the alleged offence, in which the [complainant] describes the acts complained of, is admissible in evidence if the [complainant], while testifying, adopts the contents of the [videotape] ...

[6] In this case, there is no issue with respect to the age requirement, or the offences, or the fact that she described the acts complained of except to the extent as I set out below.

[7] The matters at issue are: first, the requirement that the statement be recorded within a reasonable time after the alleged offence; second, the requirement that D.G. adopt the statement; and third, whether the statement's prejudicial effect outweighs its probative value to the extent that I should exercise judicial discretion and refuse to admit it. For this last issue, the type and form of questions, including the description of the acts complained of, is a relevant factor.

[8] More specifically, defence counsel states that the failure of the complainant to identify a particular date or period of time during which the offences occurred means that it is impossible to determine whether the statement was recorded within a reasonable period of time after the alleged offences.

[9] Secondly, defence counsel says that the Crown struggled to get D.G. to state that she was telling the truth when she provided the statement and that her memory of the interview was hazy, in that she required significant prompting around her testimony of that statement.

[10] Thirdly, defence counsel says that the combined factors of the unspecified dates of the offences, the leading nature of the questions and the general inadequacy of the interview by the police officer, and the failure of the complainant to have her memory revived by the video means that it is difficult or impossible for the accused to defend himself and warrants the exercise of discretion to refuse to admit the statement.

[11] First, I want to discuss the purpose of s. 715.1.

[12] It is undisputed that the purpose of s. 715.1, a statutory exception to the hearsay rule, has two goals.

[13] First, it aids in the preservation of evidence and the discovery of truth.

[14] As stated by the Supreme Court of Canada in *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, a 1997 decision, referencing *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, a 1993 decision of the Supreme Court of Canada in which the constitutionality of the section was challenged and upheld, the Court wrote that s. 715.1 is a recognition that children, even more than adults, will have a better recollection of events shortly after they occurred than they will weeks, months, or years later:

> 19 ... [a] videotape ... made within a reasonable time after the alleged offence ... [describing] the act will almost inevitably reflect a more accurate recollection of events than will testimony given later at trial. ... [this] enhances the ability of [the] court to find the truth ...

[15] In para. 35 of *R. v. L. (D.O.),* there is a quote from Mr. R.G. Mosley, then senior general counsel at Department of Justice, when he testified before the Standing Senate Committee on Legal and Constitutional Affairs. He said:

> ... [a] videotape ... is simply a means of getting the child's earlier statement before the court in the belief that [the] early statement will be an accurate and, hopefully, [a] more complete account of what took place.

[16] The second purpose is to diminish the stress and trauma suffered by a complainant as a by-product of their role in the criminal justice system. As noted at para. 20 of *R. v. F. (C.C.)*:

> 20 ... a record of events made in more informal and less forbidding surroundings than a courtroom will serve to reduce the likelihood of inflicting further injury upon the child witness.

[17] In sum, as Justice L'Heureux-Dubé wrote in *L. (D.O.)*:

> ... Section 715.1 ensures that the child's story will be brought before the court regardless of whether the young victim is able to accomplish this unenviable task.

[18] I also want briefly to consider generally the legal principles in relation to the evidence of children. These are summarized in the 2012 decision of the Manitoba Court of Appeal in *R. v. R.G.B.*, 2012 MBCA 5, at paras. 26 and 27. These reasons refer to *R. v. B. (G.)*, [1990] 2 S.C.R. 30, a 1990 decision of the Supreme Court of Canada, in which Justice Wilson said that a court:

> 26 ... should take a common sense approach when dealing with the testimony of young children ...

and also said:

> ... that there should be a somewhat greater tolerance for inconsistencies and mistakes when assessing the evidence of young children, while nevertheless not relaxing the standard of proof.

[19] Justice Wilson also stated in that same case:

> ... a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. ... While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. ...

[20] I note that in that case, *R. v. R.G.B.*, the complainant was five years old.

[21] In another leading case, *R. v. W. (R.)*, [1992] 2 S.C.R. 122, a 1992 decision of the Supreme Court of Canada, Justice McLachlin, as she then was, said that a court would fall into error if it automatically discounted a child's evidence without regard to the particular circumstances of the case. She said that a court should approach a child's evidence not from the perspective of rigid stereotypes but on what Justice Wilson called

"a common sense basis" taking into account the strengths and weaknesses in each case.

[22] Justice McLachlin also noted in that decision the emergence of a new sensitivity to the peculiar perspectives of children. She wrote:

> ... Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. …

[23] She wrote:

> ... Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. ...

[24] It is also crucial to emphasize what we are doing in this *voir dire*. The test here is one of admissibility. As a result, the threshold of reliability is low. The determination of the weight to be accorded to the statement is a different consideration than what is done to determine whether the statement should be admitted. Now is not the time to engage in a full reliability assessment.

[25] Turning to the s. 715.1 elements at issue in this case, first, was the videotape made within a reasonable time after the alleged offences?

[26] During the RCMP interview, D.G. was asked after she set out the allegations:

> Q: ... was this just a little bit ago or how long ago?
> A: Long
> Q: So it's been a little bit?
> A: Yeah
> Q: Yeah and did you say anything when that was going on?
> A: I said stop and stop and stop.
> Q: Um hem and what happened?
> A: Long ago he did not hear me and he keeped doing it.

[27] Also, in answer to the police officer's questions about where the allegations happened, D.G. answered at Dad's house and in her room on her bed. She also said it happened 10 times by holding up both hands.

[28] This evidence is relevant, as the evidence of D.G.'s mother was that the father moved into his Yukon housing home where D.G. visited in or around September 2018. I also note that the interview with the RCMP occurred within three to four days of disclosure of the allegations to the mother and the grandmother. I am aware that the test is the time from the date of the alleged offence, not the disclosure, but this timing does factor in to my overall assessment.

[29] Defence counsel says that the failure to articulate a time makes it impossible to know whether the time between the offence or offences and the statement is reasonable or not.

[30] The Crown says that the age of the complainant must be considered, both the general developmental stage as it relates to time and memory, and the specific ability of D.G. to assess time and remember things, as demonstrated through her evidence.

[31] I am guided by the principles set out in *R. v. L. (D.O.)* and their application by the courts. In that case, the accused was charged with three counts of sexual assault alleged to have occurred between September 1985 and March 1988, and three counts of sexual interference alleged to have occurred between January 1988 and March 29, 1988. The complainant was six years old in 1985 and nine years old in 1988 when the police videotaping of the statement occurred. Disclosure occurred in March 1988 and the videotaped statement occurred in September 1988. The complainant testified that the acts in question happened lots of times.

[32] The trial judge's assessment that the requirement of reasonable time was met in this case was upheld by the Supreme Court of Canada. The Supreme Court held that what is or is not reasonable depends entirely on the circumstances of a case. The Supreme Court of Canada quoted from the trial judge's ruling on the *voir dire* as follows:

> ... I simply observe that ... in this context, [s.] 715.1, where you are dealing with young children, what is reasonable in one case may not be in the other. But the boundaries of reasonableness are indeed almost as variable as the historical boundaries of Poland. But I do think in this case ... given the age involved, that the tape satisfies the test of [s.] 715.1 ...

[33] In this case here, it is clear from D.G.'s testimony that she is not able to tell time nor is she able to identify days of the week. This is normal for a child her age. We are therefore necessarily dealing with an imprecise articulation of a time period.

[34] I also note from D.G.'s testimony that she required significant prompting about events that occurred over a year ago, such as her fourth birthday party and the Run from Mom walk with her dad in May 2019 — and her fourth birthday party was February 2019. For some events occurring around the time of May 2019, she had no memory, such as her dad buying her a bike or riding her bike with her brother — and that was even with prompting with Picture #4, noting that the picture was small. She did, however, recall her fifth birthday party without prompting. This occurred in February 2020.

[35] I note that she is very focused on the present, on the here and now, and if an event had not happened relatively recently (that is, within the past weeks or recent months) then she would not have talked about it.

[36] Defence counsel argues that the fact that her past memory of events was revived in some cases by prompting with pictures but was not revived about the allegations after

watching the video suggests that the requirement of reasonable time has not been met. I do see a distinction between the revival of memory by photos of the actual event and people involved in it and a video statement of a narration of an event or events without photos of the actual event. In my view, it is more likely to have a memory revived by actual photos of events versus watching a videotape description of an event.

[37] As a result, I assess her evidence of the incidents happening long ago in her bedroom at her father's house and that it happened many times (that is, 10 times) in the context of her own memory and sense of time as well as that of a four-year-old generally, which I take judicial notice of.

[38] Given that in *R. v. L.(D.O.)*, a statement taken five months from the disclosure of offences that occurred starting three years earlier was considered to be reasonable, albeit in the total circumstances of that case, I find that in this case the statement was taken within a reasonable period of time.

[39] The second issue is whether D.G. adopted the statement. In this analysis, I am guided by the principles set out in *R. v. F. (C.C.)*, the 1997 decision of the Supreme Court of Canada, in which the court largely agreed with the reasoning in *R. v. Meddoui*, 1990 CanLII 2592 (ABCA). In that case, the Alberta Court of Appeal held that a witness adopted her statement within the meaning of s. 715.1 when she recalled giving that statement and testified that she was then attempting to be honest and truthful. The complainant did not need to have present recollection of the events discussed.

[40] In this case, as I have noted, D.G. has made it clear in her testimony that she has no present recollection of the allegations described in her statement to the police officer. However, after watching the video, D.G. clearly identified herself and the

policewoman. She testified she recalled going to the police station with her mom and grandma and spontaneously added that M. was there, too. She called it a big house. She recalled walking there. She recalled having popcorn after the talk, recalled talking to the policewoman and specifically recalled the references to her bellybutton.

[41] She also replied easily and spontaneously to the Crown's question after replaying part of the interview about the allegations that she was telling the truth to the policewoman, even using her own words "it was all true" and not just yes. While I agree with defence that at times during the Crown's questioning he struggled to get answers to his questions, I disagree that these questions were one of those times.

[42] As a result, I do find that D.G. has adopted the video statement — and I do recognize the dangers inherent in basing any conviction on a videotaped statement alone, if that is what I am left with in this case.

[43] The last issue is whether I should exercise judicial discretion and exclude the videotaped statement because its prejudicial effect outweighs its probative value.

[44] Defence counsel urges me to do this because of the absence of a specific timeframe of the alleged offences, the leading nature of the questions by the police officer, and the failure of the police officer to ask more and better questions in an attempt to elicit more detailed answers about the context and surrounding circumstances. Defence says that these factors make it difficult for the accused to defend himself against the allegations.

[45] I note that there were no submissions made about the presence of inadmissible evidence in the statement that may or may not be able to be excised from the statement.

[46] I agree that the interview questions could have been better framed and more details and clarifications attempted to be elicited from D.G. during the course of the interview. But I am of the view that these arguments go to the weight to be accorded to the statement. They do not affect the requisite threshold degree of reliability for the statement to be admitted. Again, I turn to a reference made by the Supreme Court of Canada in *R. v. L. (D.O.)* to *R. v. Corbett*, [1988] 1 S.C.R. 670, and then Chief Justice Dickson's observation about rules of evidence:

> ... [the] basic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little weight or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion and our efforts in my opinion, consistent with the ever-increasing openness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion.

[47] In this case, I do not see the existence of a very clear ground of policy or law sufficient for me to exercise my discretion to exclude the videotaped statement.

[48] In conclusion, the statement will be admitted into evidence. Due consideration of course will be given to all arguments with respect to weight to be accorded to it for the purposes of trial.

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DUNCAN C.J.