

CANADA / JUDGMENT

R. v. B.J.

2020 BCSC 2252

COURT

Supreme Court of British Columbia

DECIDED

26 August 2020

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2020 BCSC 2252 R. v. B.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.J.,

2020 BCSC 2252

Date: 20200826

Docket: 28298

Registry: Vancouver

Regina

v.

B.J.

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Before: The Honourable Madam Justice Matthews

Oral Ruling on Voir Dire No. 5

Re Crown application to lead evidence of prior disclosures

Counsel for the Crown:

M. Myhre

Counsel for the Accused:

T. Anderson

T. Au (Articling Student)

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 14 and 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2020

- [1] I delivered these reasons for judgment orally. I have edited them without changing the substance.

Overview

- [2] The accused, B.J., is charged with sexual assault, sexual interference, invitation to sexual touching, and incest in relation to his daughter R.J. between January 1, 1999 and December 31, 2005[1].
- [3] I will refer to the accused as B.J. and the complainant as R.J. because of the publication bans in this proceeding.
- [4] The Crown alleges that B.J. sexually abused R.J. from when she was age nine or ten until she was age 16. Around age 16, R.J. told her sister that their father had been having sex with her for many years. In 2013, when R.J. was 24, she wrote herself an email about it entitled "[R.J.]'s Story". In 2014, she told her best friend. In 2015, she told her brother by sending him the "[R.J.]'s Story" email. After she told her brother, she and her siblings, except her younger brother whom she had not told, cut off contact with B.J.
- [5] In November 2017, she sought counselling and went to the police to report the abuse, because she had a child and she realized that she had anger issues. She said she wanted to start the process of dealing with what had happened to her. The police interviewed her, her brother, her sister, and her best friend. They read the email she had written herself in 2013 describing the abuse.
- [6] The Crown seeks to lead evidence of the complainant's gradual disclosures of her allegations to her sister, her best friend, her brother, counsellor, and finally to the police, as well as evidence about why R.J. did not tell her mother. The Crown submits that without this evidence, the jury will assume that R.J. did not say anything for 12 years and then told the police. The Crown differentiates between evidence of prior disclosure--the content of which is the fact of the disclosure, not the details of the disclosure--and prior consistent statements, which include the details of the prior statements and seek to demonstrate consistency in the allegations. The Crown says that evidence of prior disclosures is

admissible as part of the narrative.

- [7] B.J. agrees that the disclosure to the police and the circumstances around her decision to go to the police may be introduced into evidence as part of the narrative. The defence argues that the mere fact of disclosure to her siblings, her best friend, and her counsellor are prior consistent statements that are presumptively inadmissible unless the defence is arguing recent fabrication (which B.J. is not).
- [8] The issues are whether evidence of the fact that R.J. made disclosures to her sister, her brother, her best friend, and her counsellor, as well as the reasons she did not tell her mother, are admissible.
- [9] I have concluded that this evidence is admissible under the narrative as circumstantial evidence exception to the inadmissibility of prior consistent statements.

Legal Principles

- [10] Prior consistent statements are inadmissible for two reasons: first, they lack probative value and second, they constitute hearsay (R. v. Dinardo, 2008 SCC 24 at para. 36).
- [11] Prior consistent statements lack probative value because they are self-serving: R. v. Stirling, 2008 SCC 10 at para. 5; R. v. Khan, 2017 ONCA 114 at para. 25, leave to appeal ref'd [2017] S.C.C.A. No. 139. As quoted by the Supreme Court in Stirling, "a concocted statement, repeated on more than one occasion, remains concocted" (at para. 7, citing R. v. Divitaris (2004), 188 C.C.C. (3d) 390 (Ont. C.A.) at para. 28).
- [12] Because prior consistent statements are also hearsay, such statements must either satisfy the principled exception to the hearsay rule or a specific exception, such as *res gestae*, to be admissible for the truth of their contents: see Khan at paras. 15-24. The Crown does not seek to have the statements admitted for the proof of their contents and so potential exceptions to the hearsay rule need no further discussion.
- [13] The distinction the Crown promotes by describing its application as being about prior disclosure as opposed to a prior consistent statement was discussed in Khan:
- [26] prior consistent statements are an amalgam of two elements - the hearsay element and the declaration element. The hearsay rule takes care of the hearsay element. The prior consistent statement rules generally exclude the declaration element. Where admissible, the declaration element is proof that a statement was made, and allows a trier of fact to derive appropriate inferences from the fact and context in which the statement was made:
- [citation omitted].
- [14] There are two exceptions to the basic rule that prior consistent statements as declarations are inadmissible: first, to rebut an allegation of recent fabrication and second, as narrative evidence. B.J.'s counsel advised the court that he will not be arguing recent fabrication.

- [15] There are two potential sub-categories of the narrative evidence exception. The first is what is referred to as the pure narrative exception. Statements admitted as pure narrative carry no weight because permissible use of the evidence is only to explain how the complaint came before the court. The second is referred to as narrative of circumstantial evidence, where the "circumstances surrounding the making of the prior consistent statement are such that the statement assists in assessing the reliability and credibility of a witness's in-court testimony, giving prior consistent statements admitted as 'narrative' a more substantive use": Khan at para. 31, citing Dinardo at para. 39 and R. v. Evans, [1993] 2 S.C.R. 629, at para. 32.
- [16] The Crown argues that prior disclosures as pure narrative are admissible, relying on R. v. Murray, 2020 BCCA 42 at para. 100; and R. v. C.B., 2008 ONCA 486, at para. 38. In these cases, the content of the prior disclosures was not admitted into evidence. The pure narrative exception is devoid of any content. The focus of this exception is on the chronology of the prior consistent statements as an aid to the trier of fact because it helps provide an understanding of how the case came before the court.
- [17] The second use, narrative as circumstantial evidence, has been described as demarking a fine line between the permissible and impermissible uses of prior consistent statements: Khan at para. 35. The Supreme Court of Canada described the challenge with this use in Dinardo:
- [37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility" McWilliams' Canadian Criminal Evidence (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see also R. v. F. (J.E.) (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).
- [18] In R. v. G.C., [2006] O.J. No. 2245 (C.A.), the Ontario Court of Appeal discussed the limited permissible use of prior consistent statements as circumstantial evidence of the reliability, and therefore credibility, of the complainant's evidence, explaining that prior inconsistent statements can be a useful tool by "adding or detracting from the logical cogency of the child's evidence" (at para. 22). In Khan at para. 33, the court said the same principles apply to adult complainants.
- [19] The trier of fact may not use the prior statements for the impermissible purpose of confirming the truthfulness of the complainant's allegations: Dinardo at paras. 37 and 40. In some cases, this means a limiting instruction to the jury is required.

Discussion

- [20] The Crown relies on *Murray*, a case about the sexual assault of a complainant who was 14 at the time of the assault and an adult when she made the complaint to the police, 23 years later. Mr. Justice Fitch, writing for the court, concluded that "[t]he fact that a prior complaint, when it was made, and why it was or was not made in a timely fashion, are all matters that are relevant and admissible to establish the conduct of the complainant. This evidence may assist the trier of fact in assessing the credibility of the complainant's evidence": *Murray* at para. 100, citing *Dinardo* at paras. 37-38.
- [21] Because the Crown relies on this passage from *Murray*, I understand the Crown's application to be that the evidence should be admissible as part of the narrative as circumstantial evidence to assist the jury in assessing the credibility of R.J.'s evidence. The Crown seeks to introduce the fact and nature of the disclosures, but not the details of the contents of the disclosures. It also seeks to adduce evidence of how the process of disclosure affected R.J.'s views on whether disclosure would help her or not and to explain why she did not tell her mother. The Crown argues that if the content of the disclosures is not included, there is no risk of impermissible reasoning.
- [22] In considering the admissibility as an aid to assessing credibility, the overarching question is whether the narrative evidence provides important context for assessing the complainant's credibility. It is a matter of its probative value, as Fitch J.A. explained in *Murray*. The timing and nature of disclosure and non-disclosure can assist in finding facts about whether an event occurred. In *R. v. Ay* (1994), 93 C.C.C. (3d) 456 (B.C.C.A.), relied on by the Court in *Murray*, the Court of Appeal held that evidence of prior disclosures, reasons for not reporting to authorities at the first opportunity, and what precipitated the report to authorities when it was made is necessary to avoid the trier of fact having incomplete evidence. The trial judge must make this determination, bearing in mind that the fact that a witness has made prior consistent statements is of no assistance in determining the credibility of that witness.
- [23] The Crown submits that because the complainant did not tell her mother about the sexual abuse and because B.J. was arrested in January 2018, after R.J. went to the police in November 2017, the jury will assume that she did not say anything for 11 years after the alleged abuse stopped and then reported it. They may draw inaccurate inferences due to the lack of information about the prior disclosures and the fact that she did not tell her mother. The Crown asserts that the fact of the disclosures and R.J.'s evidence about the reactions of her sister, her friend, and her brother to the disclosures are part of the reason she did not tell her mother. The Crown submits that the fact of these disclosures, the timing of them, and R.J.'s perception of how the disclosure would affect her mother, based on her experience with telling her siblings, is important evidence for the jury to have when assessing her credibility.

- [24] B.J. argues that the evidence of the disclosure to the police in November 2017 is evidence of the beginning of the steps R.J. took to report this to the police. He submits that this evidence is properly admissible for the narrative and is all that is necessary or appropriate. He submits that in the absence of an allegation of recent fabrication, the risk that the jury will draw inappropriate inferences without the evidence of prior disclosures is less than the risk that the jury will engage in impermissible reasoning that because R.J. told other people, her allegations must be true.
- [25] I conclude that the evidence that R.J. made prior disclosures is probative because it will assist the trier of fact in understanding that she did not stay silent for many years. It will assist the trier of fact in understanding that she wrestled whether to tell her mother, but did not do so in part because of the reaction of others when she told them. I am of the view that the risk that the jury could draw inaccurate inferences if this evidence is not led is greater than the risk that the jury will impermissibly reason that the fact of disclosure is evidence that what was disclosed is true. I reach this conclusion in part because the jury will not hear evidence of the details of what R.J. disclosed and because I will receive submissions from counsel on an appropriate limiting instruction.
- [26] The Crown has outlined the summary of evidence it intends to lead on these prior disclosures and R.J.'s reasons for not telling her mother. The outline is appended to its Notice of Application. The anticipated evidence appropriately respects the line between probative evidence of the fact of disclosure and the nature of the disclosure, as well as the reactions to the disclosure, without details of the content of the disclosure.

Conclusion

- [27] The Crown may lead evidence of prior disclosures by R.J. to her sister, her brother, her friend, her counsellor, and Detective Travis Fraser in a manner consistent with the outline of anticipated evidence appended to the Crown's Notice of Application filed June 22, 2020.

"Matthews J."

- [1] The dates on the indictment are January 1, 1999 to December 31, 2005 on counts 1 and 4 (sexual assault and incest) and January 1, 1999 to March 2, 2003 on counts 2 and 3 (sexual interference and invitation to sexual touching). In the reasons delivered orally on this voir dire reasons, the dates were incorrectly stated with respect to counts 2 and 3.

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