

CANADA / JUDGMENT

R. v. Hernandez-Lopez

2020 BCCA 12

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 12 R. v. Hernandez-Lopez

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hernandez-Lopez,

2020 BCCA 12

Date: 20200114

Docket: CA45577

Between:

Regina

Respondent

And

Milton Gilberto Hernandez-Lopez

Appellant

Restriction on publication: A publication ban has been imposed under section 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant and witness referred to in this judgment by the initials AD. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated

August 3, 2017 (R. v. Hernandez-Lopez, 2017 BCSC 2555,

New Westminster Docket No. X079453).

Counsel for the Appellant:

M.E. Sandford, Q.C.

A. Tolliday

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

September 3, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 14, 2020

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Fisher

Summary:

The appellant, who was supervising a daycare, was alleged to have engaged in sexual touching of AD, a four-year-old child. The only evidence dealing with the touching came from AD; the appellant did not testify. The judge did not hear expert evidence on the assessment of child evidence, nor was any academic literature on that issue referred to by counsel. In his reasons, however, the judge referred to a law review article that made observations with respect to the evidence of children. He found AD's evidence convincing. In doing so, he noted that AD's answers to open-ended questions were more detailed and more probative than her answers to leading questions. He also commented on the witness's demeanour. He convicted the appellant. Held: Appeal dismissed. The law review article made observations with respect to the evidence of

children, but was not used as expert evidence. The judge used it as a convenient summary of common-sense observations with respect to child evidence, and such use was not improper. The judge's assessment of the weight to be given to particular answers and his observations of the witness's demeanour were within his purview, and did not give rise to reversible error. Finally, the judge's comment that the accused might have masturbated after the event was unnecessary, but was not used to draw an inference of guilt.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] Mr. Hernandez-Lopez appeals from his conviction on one count of sexual touching of a person under the age of 16, contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46. The offence was alleged to have occurred at a time when he was supervising a residential daycare operated by his wife. The victim, AD, was under five years old at the time of the offence and seven years old at the time of trial.
- [2] The allegations against Mr. Hernandez-Lopez are that, after getting AD alone within the residence, he licked his finger and inserted it into the child's vagina. After he withdrew his finger, it is alleged that he left the child and went into a washroom.
- [3] The only direct evidence of the touching was given by AD. Other evidence presented at the trial showed that Mr. Hernandez-Lopez was present at the daycare and alone with the children for approximately 30 to 45 minutes on the day in question, and that the victim suffered from inflammation of the labia majora that was consistent with the events that she described, though also consistent with other causes.
- [4] Mr. Hernandez-Lopez did not testify. The judge's finding of guilt turned on his assessment of the reliability and credibility of AD's evidence.
- [5] On this appeal, Mr. Hernandez-Lopez contends that the judge made four errors in his assessment. First, he says that the judge erred by improperly consulting and relying on a law review article that set out bases for assessing the evidence of children. Second, he contends that the judge erred in applying a principle that a child witness's answers to open-ended questions deserved greater weight than answers to leading questions. Third, he argues that the judge placed too much reliance on the demeanour of the child in making his assessments of credibility and reliability. Finally, he says that the judge erred in drawing an inference for which there was no evidence: the inference that the accused went into the washroom to masturbate after the touching incident.
- [6] For reasons that follow, I would dismiss the appeal. In terms of the four issues raised, it is my view that:
 - a) the judge's reference to the law review article was not inappropriate;
 - b) it was open to the judge to find that certain answers given by the child in cross-examination were of limited assistance and his findings were not the result of the adoption of any erroneous principle;

- c) the judge was entitled to consider the witness's demeanour, and did not, in this case, place undue reliance on demeanour in assessing credibility and reliability; and
- d) while the judge did, in finding that the accused masturbated after touching the child, draw an inference without an evidentiary foundation, the improper inference did not play any role in the verdict.

The Law Review Article

- [7] Counsel at trial did not provide the judge with any case law or legal articles dealing with the evidence of children, though they did make some common-sense observations and made suggestions as to how the judge should go about assessing AD's credibility and reliability. The primary issue on this appeal concerns the judge's use of a law review article that he came across on his own.
- [8] The judge recognized that the evidence of young children must be evaluated differently from the evidence of adults. He quoted from four authorities that discuss the special approach that should be taken to the evidence of children: *R. v. E.(A.W.)*, [1993] 3 S.C.R. 155; *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419; *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183; and *R. v. B.E.M.*, 2010 BCCA 602. The portions of those cases that he cited also included references to *R. v. B. (G.)*, [1990] 2 S.C.R. 30; *R. v. (W.R.)*, [1992] 2 S.C.R. 122. Finally, the judge referred to *R. v. Ceal*, 2012 BCCA 19.
- [9] After referring to these cases, the judge discussed an article published in the *Alberta Law Review*. I quote his discussion in full:
- [30] I also refer to Bala et al. "Judicial Assessment of the Credibility of Child Witnesses" (2005) 42 *Alta. L. Rev.* 995-1017 in which the learned authors refer to psychological research on child witnesses in addition to a review of Canadian legal authorities. Included in their publication are the following statements, which are apt in the case at bar:

13 A major concern with child witnesses is their potential suggestibility. As a result of repeated or misleading questions, the memory of a witness may become distorted. It is possible for a person who has been subjected to repeated, suggestive questioning to develop "memories" of events that did not in fact occur. While children, especially young children, are more suggestible than adults, there is great variation between individuals of the same age in suggestibility and in resistance to suggestion. There is a large body of experimental research about the suggestibility of children, as well as some research about the suggestibility of adults.

14 The way in which children are questioned can also greatly affect what they are able to communicate. Research studies reveal that children and adults generally provide more information in response to specific questions rather than to the open-ended questions that are typically posed during direct examinations of witnesses. Children, especially young children, may lack the cognitive capacity to provide meaningful and consistent answers to questions that involve frequency of events, time or size, or that require explanation of motive (why questions),

though if asked they will usually try to answer. In addition, "yes or no" questions are problematic as children, especially young children, may have a bias to produce "yes" answers, and when asked such questions by unfamiliar adults, young children will rarely respond with "I don't know".

15 Children, especially young children, are socialized to provide responses to questions, even if they do not fully understand what is being asked. Children who are asked questions that they do not fully understand will usually attempt to provide an answer based on the parts of the question that they did understand, so that a child's answer to a question may seem unresponsive or may even be misleading.[1]

The authors' comments about children's inability to estimate the frequency of events, time or size, as well as their tendency to try to answer questions that they may not fully understand might have affected AD and her responses to questions at trial. For instance, AD was unable to answer questions posed to her by defence counsel during cross-examination about what month she started attending or left the daycare, approximately how far the daycare was from her house or how old young SH was when the offence occurred. Defence counsel sometimes posed confusing questions, such as "that's probably not what happened, isn't it?" to which AD's answers may have seemed unresponsive, such as "I don't remember".

[10] Mr. Hernandez-Lopez argues that the judge's reliance on this article was improper. He characterizes the article as "extraneous expert opinions" that were not properly admitted or tested at trial. He suggests that this case is like *R. v. Bornyk*, 2015 BCCA 28, in which a trial judge independently researched publications on fingerprint evidence, and then relied on the expert evidence contained in those publications in preference to the evidence before him at trial.

[11] In my view, this case is not analogous to *Bornyk*. The judge in *Bornyk* was dealing with a highly specialized and technical area, in which opinions could only reasonably be drawn with the assistance of witnesses possessing specialized training and experience. The judge improperly used published articles as substitutes for expert opinion evidence. In contrast, the judge in this case was dealing with a subject very much within his own purview: the assessment of the credibility and reliability of a witness.

[12] I do not suggest that a judge is entitled, when assessing the veracity of a witness's testimony, to rely on expert evidence that is not properly before the court. Not every reference to a publication, however, amounts to reliance on outside expertise. Sometimes, a judge may refer to a publication because it provides a concise and easily understood discussion of a concept, or because it provides an accessible illustration of the judge's thinking.

- [13] A judge, for example, may explain why an overstated denial lacks credibility by quoting Queen Gertrude in Shakespeare's *Hamlet*: "The lady doth protest too much, methinks" (see, for example, *Hardinge J. in Shandro v. Central Guaranty Trust*, [1992] B.C.J. No. 1220, 1992 CarswellBC 1889; *G.C. Weatherill J. in Siddall v. Bencherif*, 2016 BCSC 1662 at para. 189). It cannot be said that Shakespeare is being used as an expert witness in those cases. Rather, the reference simply furnishes an illustration of a concept that is widely understood.
- [14] The use of the Bala article in this case falls somewhere between the clearly inappropriate use of published material in *Bornyk*, and the clearly innocuous references to *Hamlet* that I have referred to. The judge in this case was not referring to the Bala article merely as a literary analogy; neither, however, was he relying on it to furnish critical evidence.
- [15] The Bala article appears in a law review, but it does not restrict itself to legal analysis. It is interdisciplinary in nature, jointly authored by a law professor, two psychology professors and an articling student. The main part of the article (which was not relied on by the judge) presents the results of two studies: a) an empirical study that attempted to determine how well judges and other professionals are able to assess the honesty and reliability of child witnesses; and b) a study of how Canadian judges perceive child witnesses. The article includes references to and reports of experimental data and empirical studies. Parts of it lie within the realm of specialized expertise. Those parts could not properly have been relied on by the trial judge in this case, and he did not rely on them.
- [16] The judge's reference to the article is to an introductory portion headed "Psychological Research on Child Witnesses". That portion of the article deals with commonplace knowledge. The authors preface it with the following paragraph:
- There has been a significant amount of psychological research about the memory, suggestibility and communication capacity of children, and the discussion offered here is only intended to summarize a large and complex body of literature.
- [17] While the authors mention a number of studies in footnotes to the three paragraphs referred to by the trial judge, the paragraphs, themselves, do not refer to any particular empirical study. They simply describe generally accepted propositions that apply to the evidence of children.
- [18] The excerpts of the Bala article cited by the judge do not contain any information that is not already generally known by any person who has contact with young children. The ideas contained in those excerpts must, of necessity, be part of the basic toolbox that any judge hearing a case involving child witnesses must employ.
- [19] Indeed, if one parses the paragraphs quoted by the judge, it becomes apparent that the statements they contain are, for the most part, already reflected in judicial commentary and practice. The phenomenon of child witnesses being suggestible is well known. For example, this Court noted concerns with respect to the suggestibility of a child witness in *R. v. Horswill*, 2018 BCCA 148 at para. 49. The idea that repeated suggestions to a child can

implant memories was referred to in *R. v. E.A.L.* (1998), 130 C.C.C. (3d) 438 (Ont. C.A.) (appeal dismissed *R. v. Lance*, [1999] 3 S.C.R. 658). Forensic interviews of children where sexual abuse is suspected must be conducted in such a way as to avoid this difficulty.

- [20] The frequent inability of children to describe, with precision, the time and place of an event or even its details has been commented upon in numerous cases, among them *R. v. F.* (C.C.) at para. 47 and *R. v. B.E.M.* at para. 35, both of which were cited by the trial judge.
- [21] I do not read the judge's reasons as suggesting that he relied on the Bala article as an instruction manual for assessing the evidence of children. Rather, he used the three quoted paragraphs of the article as a convenient summary outlining generally-understood and common features of the evidence of children. The concepts that the judge relied on did not lie outside of the general knowledge that judges are required to apply in assessing the evidence of witnesses.
- [22] In short, the judge reached his conclusions as to how he should assess the child's evidence based on his own experience and knowledge, as well as on his reading of case authorities. His citation of the Bala article simply collected a number of observations in a clear and concise summary, and showed that the observations are generally known and accepted.
- [23] The use of published academic literature to show that certain concepts are generally accepted is not uncommon. The Supreme Court of Canada often refers to social science literature for that purpose (see, for example, *R. v. Oickle*, 2000 SCC 38 at paras. 34-36). A judge must exercise caution in making such use of articles, however, to ensure that trial fairness is not compromised.
- [24] Given the very general nature of the observations in the part of the article cited by the trial judge, and the notoriety of the information conveyed, I can see no possibility that trial fairness was compromised. It is safe to conclude that the judge's reference to the Bala article was only for the purpose of providing a convenient summary of generally-known concepts that he was bringing to bear on the case.
- [25] In the result, I am not persuaded that the judge made any error in his use of the Bala article.

The Judge's View that Answers to Leading Questions Deserved Less Weight

- [26] The second ground of appeal concerns the judge's preference for certain answers given by the complainant in her interview and in direct examination over answers given in cross-examination. This preference is first suggested in his summary of the Crown position:
- [32] The Crown submits that the following elements of AD's testimony, both in the statement given to Cst. Ellis and in her evidence at trial, reveal its credibility and reliability:
- a) The most weight should be given AD's answers to open-ended questions posed by Cst. Ellis and on direct examination at trial as opposed to her answers to leading questions posed during cross-examination. The Crown submits that AD gave direct and clear answers to

open-ended questions when she was not being prompted and submits that such answers are more trustworthy than her answers given to leading questions, which suggested particular answers. During submissions, the Crown gave several examples of the differences in AD's answers to such questions. My review of the transcripts supports the Crown's submission in this respect.

- [27] In his conclusions, the judge remarked that he was impressed by AD's responses to open-ended questions. Mr. Hernandez-Lopez, in his factum, takes issue with the judge's assessment of the evidence:

It is submitted that the trial judge's approach was erroneous. Answers to leading questions posed in cross-examination are not inherently of less weight or less trustworthy than answers to non-leading questions in direct or questions asked in an open-ended manner in a police interview of a child complainant.

The approach taken unfairly skewed the assessment of credibility and reliability in favour of the Crown. The adversarial system has incorporated cross-examination as an essential tool in the fact-finding process. In the oft-cited description of Wigmore it is "the greatest legal engine ever invented for the discovery of truth." If the trier of fact approaches the assessment of the evidence from the starting point that answers to leading questions posed in cross-examination are of lesser weight and are less trustworthy than those given in response to open-ended questions asked in direct, or open-ended questions asked in a police interview, that the latter two are in effect the "best evidence," then that engine is deprived of its most effective fuel.

- [28] I do not quarrel with the proposition that a judge is required to fully consider the quality of the evidence given in both examination-in-chief and in cross-examination. I also agree with the proposition that a judge must not approach the assessment of the evidence with a predisposition to accept answers given in direct examination over answers given in cross-examination. This does not mean, however, that a judge is precluded from reaching an honest assessment to the effect that a particular witness's responses to open-ended questions are more reliable than that witness's answers to leading ones.

- [29] Not all witnesses react the same way to questioning. Some are forthcoming and careful in their answers. Others are reticent to give information, or are imprecise. Suggestibility is a problem for some witnesses, while others are excessively suspicious of agreeing with any proposition put to them.

- [30] While it is not true of all witnesses, some are more cogent when they are responding to open-ended questions, giving clearer and more detailed answers to such questions.

- [31] Leading questions, on the other hand, can sometimes be ineffective in eliciting useful evidence from witnesses who are nervous, suggestible, or easily confused. In the case of child witnesses, these frailties are not unusual. While leading questions are permitted in cross-examination, cross-examination need not consist of only leading questions. An effective cross-examination will usually combine leading questions with questions that do not suggest an answer.
- [32] I do not read the judgment in this case as suggesting that the judge adopted a principle of favouring answers given in direct examination over those given in cross-examination. Rather, the judge simply found that AD's answers in direct examination and in response to direct questions in cross-examination were more helpful than her answers to leading questions.
- [33] A perusal of the transcript reveals that many of the questions put in cross-examination were complex, and some were convoluted. The child was asked questions that included the "probability" of events occurring, and questions that juxtaposed events in a confusing manner. It is evident that the child's intellectual capacity was not up to answering at least some of the questions. It is not surprising, then, that the judge did not find those answers useful.
- [34] The judge did not apply a "principle" that answers by a child to open-ended questions should be given more weight than answers to leading questions. Rather, he found that the answers that AD gave to certain leading questions in this case were of limited value, a finding that was open to him. I am not persuaded that the judge made any error in the relative weight that he gave to AD's answers to questions posed in direct examination and those posed in cross-examination.

The Judge's Treatment of Demeanour

- [35] The third ground of appeal relates to the judge's comments on AD's demeanour in giving evidence. At para. 37 of his reasons, the judge said:

Both in her statement to Cst. Ellis and in her testimony at trial, AD was clear and direct in her answers, consistent in describing the offending conduct of the accused and unambiguous when faced with open-ended questions. Especially during the statement, she was very consistent in describing the conduct of the accused, referencing him wetting his finger and placing it in her "parts". She never varied from that description. It was also apparent that she was very anxious towards the end of her cross-examination and upon being told she was free to leave, raised her arms and looked up in apparent relief. Her demeanour suggested to me that she may have agreed with some of defence counsel's suggestions out of sheer exhaustion.

- [36] While the paragraph appears under the subheading "demeanour", most of it is devoted to a discussion of the consistency and clarity of the witness's evidence and not with demeanour, per se. Only the portion dealing with the "exhaustion" of the witness is directed towards demeanour.
- [37] It is the judge's role to analyse the testimony of witnesses, and observing their demeanour is a part of that role. The judge did not emphasize demeanour to the exclusion of other considerations, nor did he give undue weight to demeanour as a factor in assessing the evidence.
- [38] The trial judge's description of AD agreeing with some of the defence counsel's suggestions out of "sheer exhaustion" may have been overstated given that AD's testimony was not long (having been completed within one afternoon). However, the judge was dealing with a seven-year-old witness, not an adult, and the transcript records him observing that AD looked "happy" at the conclusion of the questioning. It is apparent that the judge's view that AD was becoming exhausted with the questioning arose not only from her rather equivocal reaction when advised that she was free to leave, but also from the manner in which she answered questions. The judge had an opportunity to observe the witness and did not err in using his observations in assessing the weight to be applied to her answers. I do not see that this Court is in a position to second-guess his assessment.
- [39] In short, I am not persuaded that the judge erred in his use of the witness's demeanour as a factor in assessing her credibility and reliability.

The Inference that the Accused Masturbated after Touching the Victim

- [40] AD gave evidence that after the accused engaged in sexual touching, he went into a washroom to urinate. The judge referred to that evidence as follows:

AD also volunteered that the accused went to the bathroom after he touched her parts which again I find would be a description that only someone who had seen it would come up with. He likely at that point was masturbating in the bathroom as submitted by the Crown.

- [41] The accused contends that the judge improperly drew the inference that the accused masturbated and then used that inference to support a guilty verdict to the offence of sexual touching. I agree that if the judge had engaged in such reasoning, it would have been an error. Only if the judge was already convinced that the accused had engaged in sexual touching would there be any basis for an inference that he masturbated when he entered the washroom.
- [42] As I read the judge's reasons, however, he did not draw an inference that the crime was committed from the fact that the accused entered the washroom. Rather, the quoted excerpt of the judgment does no more than comment on the detailed nature of AD's account of events and on its plausibility.

- [43] The judge's comment on the probability that the accused masturbated was unnecessary and improper speculation, but nothing in the judgment suggests that he used that speculation to infer that the accused was guilty of the crime charged.
- [44] The judge convicted the accused based on his analysis of the evidence, and, in particular, on his finding that the evidence of AD proved the offence beyond a reasonable doubt. He did not base his finding on speculative inferences.
- [45] Accordingly, this last ground of appeal must also fail.

Conclusion

- [46] As the trial judge made no error in finding the accused guilty of sexual touching, the appeal should be dismissed.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Fisher"

- [1] The paragraph numbers used by the trial judge do not appear in the article as published. The judge omits reference to the article's footnotes. The quoted paragraphs appear at pp. 999-1000 of the published article.

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