
CANADA / JUDGMENT

R. v. Quash

2013 BCSC 2498

COURT

Supreme Court of British Columbia

DECIDED

6 June 2013

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2013 BCSC 2498 R. v. Quash

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Quash,

2013 BCSC 2498

Date: 20130606

Docket: 30122-3

Registry: Terrace

Regina

v.

Kelly David Quash

Restriction on publication of names of complainants: Pursuant to ss. 486.4(1) and 486.4(2) of the Criminal Code of Canada

Before: The Honourable Madam Justice Griffin

Oral Ruling on Voir Dire #1: Videotaped Statements

of Child Complainants

Counsel for the Crown:

Barry N. Zacharias

Counsel for the Accused:

Timothy D. Klaassen

Place and Dates of Voir Dire:

Terrace, B.C.

June 3-6, 2013

Place and Dates of Trial:

Terrace, B.C.

June 6-7, 10-14, 17-21, 2013

Place and Date of Ruling:

Terrace, B.C.

June 6, 2013

- [1] THE COURT: In this case, the accused is charged with seven counts relating to alleged sexual assault, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [the "Code"], and sexual interference, contrary to s. 151 of the Code.
- [2] The charges relate to separate incidents with three female child complainants who I will refer to by initials: S.R. in relation to Counts 1 to 3; B.L. in relation to Counts 4 and 5; and S.Q. in relation to Counts 6 and 7.
- [3] The accused was born on January 10, 1987, and was ages 20 through 24 in the timespan covered by the counts.
- [4] A voir dire has been held at the start of this jury trial to deal with three pieces of video-recorded evidence, namely, videotaped statements taken separately from each of the complainants. When I refer to "videotape", I do so in the common use sense, meaning to include digital video recording as well as simultaneous audio recording.
- [5] Crown applies to introduce these videotaped statements into evidence pursuant to s. 715.1(1) of the Code. The defence opposes the admission of these statements.
- [6] The Crown proposes that the videotaped statements would be subject to some editing to take out potentially prejudicial and non-probative portions.
- [7] I will deal with the admissibility of the videotaped statements separately, one by one, but first I will briefly set out the applicable legal principles.
- [8] Before I do so, for ease of reference, I will set out the ages of the complainants at the relevant time periods.
- [9] S.R. was born October 29, 1995. The time period in the counts relating to her run from June 1, 2007, to October 27, 2011. Her age during that time span would have been 11 through 15. Her age at the time of the videotaped statement of June 16, 2011, was 15. Her age at the time of the voir dire was 17.

- [10] B.L. was born June 15, 1999. The time period in the counts relating to her runs from June 14, 2009, to September 15, 2010. She was ages ten through 11 during that time period. Her videotaped statement was made April 5, 2011, when she was age 11. She was 13 at the time of the voir dire.
- [11] S.Q. was born June 15, 1997. The time period in the counts relating to her runs from June 14, 2009, to September 15, 2010. She was ages 12 to 13 during that time. The videotaped statement the Crown seeks to introduce was made April 6, 2011, when she was age 13. She was 15 at the time of the voir dire.
- [12] The age span I have given for both B.L. and S.Q. in relation to the counts is less one day at the start of the time frame, as the indictment range starts one day before their birthdays.

Legal Principles: Videotaped Statements of Child Complainants

- [13] The Criminal Code pursuant to s. 715.1 allows a videotaped statement of a child complainant or witness to be introduced into evidence when certain conditions are met. It reads, at subsection (1):

715.1(1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

- [14] The requirements of s. 715.1 are that:

- a) the complainant was under the age of 18 at the time of the offence;
- b) that the videotape is made within a reasonable time after the alleged offence;
- c) in the videotape, the complainant describes the acts complained of;
- d) the complainant, while testifying, adopts the contents as true; and
- e) the trial judge is not of the opinion that admitting the evidence would interfere with the administration of justice.

- [15] The assessment of those factors is on a balance of probabilities.

- [16] With respect to the last requirement of s. 715.1, the case law establishes that the trial judge must review the statements in the videotaped evidence to ensure that they otherwise conform to the rules of evidence. The trial judge retains a discretion to exclude the evidence if the prejudicial effect of its admission would outweigh its probative value. As held in *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183 at para. 51 [*R. v. F. (C.C.)*], those cases will be relatively rare.

- [17] Factors to be considered in the trial judge's exercise of discretion to not admit the videotaped evidence were summarized by Madam Justice L'Heureux-Dubé in the Supreme Court of Canada case of *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419 [*R. v. L.(D.O.)*], and subsequently adopted in *R. v. F.(C.C.)* as including:
- a) the form of questions used by any other person appearing in the videotaped statement;
 - b) any interest of anyone participating in the making of the statement;
 - c) the quality of the video and audio reproduction;
 - d) the presence or absence of inadmissible evidence in the statement;
 - e) the ability to eliminate inappropriate material by editing the tape;
 - f) whether other out-of-court statements by the complainant have been entered;
 - g) whether any visual information in the statement might tend to prejudice the accused, for example, unrelated injuries visible on the victim;
 - h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;
 - i) whether the trial is one by judge alone or by jury; and
 - j) the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.
- [18] There are two legislative goals behind s. 715.1 of the Code. These were summarized in *R. v. F.(C.C.)* and repeated by the British Columbia Court of Appeal in *R. v. J.A.*, 2006 BCCA 258 at para. 30 [*R. v. J.A.*], as follows:

The dual purposes of s. 715.1 are to preserve an early record of the complainant's evidence so as to aid in the discovery of truth and, as well, to make participation in the criminal justice system less stressful and traumatic for child and adolescent complainants [citations omitted]. The former goal is achieved by obtaining an account of the event while it is fresh in the complainant's mind and more likely to be full and accurate, and the latter by permitting that account to be given in an environment that is more comfortable and non-threatening for the complainant.

- [19] I would observe that the two goals of s. 715.1 may overlap. When a child is in a more comfortable environment, the child may be more likely to be talkative and provide a full account of the events at issue than might happen in the formal setting of a courtroom. The videotaped statement may, if properly conducted, facilitate in the discovery of truth because of the more relaxed setting.

- [20] Section 715.1 was initially limited to evidence in certain sexual offence cases, including offences of the nature at issue here. However, effective January 2, 2006, it was amended to apply to any offence, emphasizing the importance Parliament places on making such evidence available.
- [21] In the present case, the secondary purpose of s. 715.1 remains quite prominent as there can be little doubt the child victims of sexual offences, if their evidence is true, are vulnerable, and the evidentiary rule, if the requirements are met, is there to protect them from the further trauma of having to repeat the description of the event over and over again.
- [22] As for the effect of admission of the evidence, if it is introduced, it will stand as part of the complainant's evidence in chief: *R. v. F.(C.C.)*. It is not evidence of a prior consistent statement and cannot be used as such to bolster the complainant's evidence or as corroboration: *R. v. J.A.* at para. 36.
- [23] Challenges to the reliability of the evidence on the voir dire through cross-examination of the complainant or other witnesses will not necessarily result in the evidence being inadmissible. If such cross-examination shows inconsistencies, for example, the trial judge in his or her discretion may conclude that this is simply a matter that goes to weight if the evidence is admitted but does not render it inadmissible: *R. v. F.(C.C.)* at paras. 47-48.
- [24] As held by the Supreme Court of Canada in *R. v. F.(C.C.)* at para. 52:

The discretionary power to exclude evidence should not be used to determine issues of weight. In cases where there is conflicting evidence and opinion as to how useful the videotaped statement may be in providing an honest and complete account of the complainant's story, the statement should be admitted unless the trial judge is satisfied that it could interfere with the truth-finding process.

- [25] One of the matters that may go to weight is the extent to which there may have been a pre-video interview of the complainant: see *R. v. F.(C.C.)*.
- [26] Although a single voir dire was held in the present case at the request of the defence for convenience and because of some common evidence, the admissibility of each videotaped statement must be examined independently. I will now turn to analyze each of them.

Videotaped Statement of B.L.

- [27] First, the videotaped statement of B.L.
- [28] The videotaped statement of B.L. at issue was made on April 5, 2011. The interviewer was then Constable now Corporal Wenda Leask who met with B.L. at the RCMP detachment in Terrace.
- [29] B.L. was born on June 15, 1999. She was 11 years old when she made her videotaped statement.

- [30] Counts 4 and 5 on the indictment relate to a single occasion when the accused is alleged to have committed sexual offences against B.L.
- [31] At the time of the voir dire, B.L. was 13 years old, just a matter of days before her fourteenth birthday. She seemed to understand the questions she was being asked, and she promised to tell the truth.
- [32] On the voir dire, B.L. recalled making the videotaped statement, and after watching it, she adopted the contents of it as true.
- [33] Corporal Leask also testified on the voir dire. Both she and B.L. testified that there was no pre- or post-videotaped interview of B.L. about the matters that are the subject of this case. To put it another way, the videotape captured the whole of the interview of B.L. by the police.
- [34] In the interview, B.L. did describe the acts complained of, including the surrounding circumstances.
- [35] What remains to be considered, then, is whether the video statement was made within a reasonable time of the alleged offence and whether or not it would interfere with the proper administration of justice to admit the recording.

Was the Videotaped Statement Within a Reasonable Time of the Offence?

- [36] Turning to the first of those questions, there is some question as to in what year the alleged sexual incident by Mr. Quash against B.L. took place.
- [37] During her testimony in the voir dire, before the videotaped statement was played, B.L. said that the incident happened after she turned 11, and she thought it was two weeks after her birthday. She turned 11 years old on June 15, 2010.
- [38] Her evidence is that she was visiting a friend in Telegraph Creek around the time of their mutual birthday, June 15. That friend is another complainant, S.Q., in relation to Counts 6 and 7.
- [39] When B.L. gave her videotaped statement, she was less than exact on the time when the incident occurred except that it had occurred when she was visiting her friend S.Q. in Telegraph Creek. She initially said she was 11 and the accused was 23, which would place it within ten months of giving her statement consistent with her evidence in the voir dire. She later said she was "ten, I believe, turning 11. I think it was like last year during the summer " which would also put it within ten months of giving her statement, in the summer of 2010.
- [40] But there were inconsistencies in the videotaped statement of B.L. as to whether the incident happened before or after her eleventh birthday, which was on June 15, 2010, or happened one year earlier. Inconsistencies can be noted in linking the timing to other events and observations.

- [41] At the preliminary inquiry, B.L. testified at one point that she was nine when it happened, and at another point she said she was ten turning 11. Cross-examined on this prior evidence during the voir dire, she said she was wrong at the preliminary inquiry and it was just after her eleventh birthday, that she connects it to getting her period after she turned 11, and also, she did a written timeline before this trial to help her remember.
- [42] During cross-examination in the voir dire, the complainant B.L. denied that the incident could have occurred when she was nine or ten years old and said it happened after she turned 11, which would place it after June 15, 2010.
- [43] In her evidence during the voir dire, B.L. also connected her memory of the date of the incident to when she started floor hockey.
- [44] Also during her cross-examination, B.L. was taken to evidence she gave at the preliminary inquiry regarding when she began exchanging messages with the accused on MSN, which she said was three years earlier in 2009. In the voir dire, B.L. said that date was wrong. She said she thought it was in May of the same year that she went to visit S.Q. that she became friends with the accused on MSN.
- [45] The Crown referred me to many authorities which discuss delays of various lengths between an alleged offence and the taking of a videotaped statement. A delay of a certain time period in one case might be reasonable, and the same delay might be unreasonable in another case depending on all the circumstances, including the age of the child and what may or may not have happened in the meantime to potentially affect the reliability of the child's evidence.
- [46] In *R. v. S.(P.)* (2000), 144 C.C.C. (3d) 120 (Ont. C.A.) [*R. v. S.(P.)*], Mr. Justice Moldaver (as he then was) addressed the factor of reasonable delay in taking a videotaped statement pursuant to s. 715.1 at para. 71 as follows:

In considering whether a videotape has been made within a reasonable time, the court must balance a number of factors, the most important being the reasons for the delay and the impact of delay on the child's ability to accurately recall the events in issue (see *R. v. L.(D.O.)* at 323). In this case, there was evidence in the record, although not referred to by the trial judge, to explain the delay.

- [47] In the same case of *R. v. S.(P.)*, the delay between the time of the alleged assault and the videotape could have been as much as two years. The alleged victim was unresponsive to questioning at trial, which was when she was 11 years old. The Crown sought to introduce into evidence, pursuant to s. 715.1, a videotaped statement taken from her by a police officer when the child was nine. In cross-examination, the child admitted that the incidents occurred long before the videotaped statement, perhaps as much as two years prior. She also said she had told her parents about the incident at the time. In addition, the police office had interviewed the child three days earlier, taking an audiotaped statement, which statement ended up being inaudible, thus leading to the videotaped statement.

- [48] Despite the time lapse between the incidents and the videotaped statement in *R. v. S.(P.)*, and the prior discussions between the child and her parents and the child and the first police officer, the trial judge admitted the statement into evidence before the jury. The Ontario Court of Appeal upheld that ruling. The Court found that it was open to the trial judge to rely on the child's delay in disclosure to police to justify the finding that the videotape was made in a reasonable time. The Court found that the record supported the inference that the complainant was timid and found it difficult to communicate about the incident because of fear and embarrassment (at para. 72).
- [49] The Court in *R. v. S.(P.)* further noted that there was no suggestion in the evidence that anything had happened in the two-year time frame that may have affected the reliability of the statement, such as influence on the child or something creating a motive (para. 75).
- [50] Asked in the voir dire about why she delayed in reporting what happened, B.L. said she was scared and did not know what would happen if people found out. She told some friends, including the other complainant S.Q., and five months later told her sister, although she was scared about how her sister might react, but she did not want to tell an adult.
- [51] The defence submitted on the voir dire that there is a possibility that there was collusion or tainting of the evidence in the discussions that B.L. had with other friends before the videotaped statement. However, there is no evidence of that. Certainly, if the defence wishes to explore that possibility, the defence could do so in cross-examination of B.L. at trial if the videotaped statement is admitted, and that could go to weight.
- [52] In the videotaped statement, B.L. appeared to find it difficult to talk about the details of what happened at first, and the police officer took some time to establish a rapport with her. B.L. described what the accused did as "gross" and asked the police officer if she had to talk about it. She then used obscuring language to describe what happened and to describe body parts, and the police officer had to ask follow-up questions to find out the details of the sexual contact. B.L. said she had not told her mother because she was afraid her mother would get mad at her. She also did not want a friend who found out to tell that friend's mother because "it's really bad and I love her mom". Asked if she felt responsible for what had happened, B.L. said, "Sort of".
- [53] Having observed B.L. on the videotaped statement and during the voir dire, a reasonable inference is that B.L. felt deep shame about what had happened, perhaps even some responsibility, was worried that she would get in trouble and so did not want adults to know what had happened to her and so only told a few close friends, and did not report the incident. Eventually, those friends told other people, and in the small community gradually the word got out, leading to the police investigation.
- [54] The reason for the delay was B.L.'s reluctance to disclose, even to her mother, for fear of getting in trouble herself and because what had happened was "gross", to use her words in the videotaped statement. These would be understandable reactions for a girl her age.

- [55] On the evidence on the voir dire, there is evidence that the alleged incident between B.L. and the accused occurred in the summer of 2010, sometime in the second half of June or in July. In this time frame, B.L. had just turned 11 years old. There is also evidence that the incident could have happened the summer earlier in 2009. If in the earlier time frame, she was either a nine-year-old or just about to turn ten on June 15, or she had already just turned ten years old and it was in later June or July 2009.
- [56] Considering all of B.L.'s evidence, I find it more likely that the incident occurred in the more recent time frame after her eleventh birthday in June or July 2010. Either way, B.L.'s videotaped statement in April of 2011 was either ten months later or one year and ten months later, approximately, from the time of the alleged sexual incident involving the accused.
- [57] I find that this delay, whether ten months or one year and ten months, was not so long in the context of B.L.'s age at the time to affect her ability to remember the facts of the event. She would have been old enough to remember the facts of any unusual event such as a sexual offence of the nature she described even with such a gap in time.
- [58] Furthermore, there was no evidence of any coaching or any other event that occurred in between the alleged incident and the videotaped interview that might undermine her natural recollection of what happened. There was no suggestion in the evidence of anything arising during that time which might create a motive for her to concoct a story.
- [59] I conclude that the video statement was recorded within a reasonable time after the alleged offence.

Will Admitting the Evidence Interfere with the Administration of Justice?

- [60] I will now consider whether or not admitting the evidence will interfere with the administration of justice.
- [61] Considering the several factors mentioned in L.(D.O.) listed above, I find there were several aspects to the videotaped statement that weigh in favour of its admission:
- a) The interviewer, Corporal Leask, asked non-leading questions for the most part and allowed B.L. to describe the incident in her own way and without suggestion.
 - b) Corporal Leask had no personal interest in the content of the statement and seemed to take some time to establish a relaxed rapport with B.L. This relaxed atmosphere will have allowed B.L.'s evidence to unfold more naturally than it would in a courtroom today, which is another two years later after the alleged offence.
 - c) The quality of the video and audio recording is good. It is not excellent as B.L. is in shadows part of the time, and the defence complains about this. I find, however, that the picture is of sufficient quality to identify who is being interviewed and by whom, what she is saying, and what her general demeanour is as the camera catches her body movements. The quality of the image might be improved somewhat by brightening the monitor screen when showing

the video, and I encourage counsel to try that. Even if it is not brightened, I find it is of sufficiently good quality to be of evidentiary value.

- d) There is very little evidence in the statement that would otherwise be inadmissible if it was called at trial.
- e) The inadmissible content can be edited without creating a false impression with the remainder.
- f) No other out-of-court statements by B.L. have been entered, and there is no visual information in the statement that might tend to prejudice the accused such as unrelated visible injuries.

[62] The interviewer, Corporal Leask, did not conduct any off-record pre-interview with the complainant B.L., nor is there evidence that any other police officer did so.

[63] There were inconsistencies in B.L.'s evidence, as pointed out by the defence, concerning the date of the alleged incident.

[64] I did not find the inconsistencies about the date of the incident to make the statement so inherently unreliable that it ought not to be admitted. These inconsistencies were in line with how a child the complainant's age might think of time without the same certainty or markers of events that an adult might have. A child the age of 11 does not usually mark time by the calendar. The markers of time that this child appeared to be trying to think of were when she was out of school and her birthday. She was consistent in reaching for those time markers even if she was not exact in her evidence in relation to them or other markers.

[65] I also note that in all of the questioning of B.L., no one asked this child if it would help her to write down a timeline showing her age when she gave the statement in April 2011, her age as of June 15, 2010, and her age as of June 15, 2009, and so she did not have this visual assistance or the assistance of a calculator when answering questions. B.L. was born in 1999, an odd-numbered year, in roughly the middle of the year, and trying to work backwards, she might not have been able to add or subtract years very quickly when thinking of past events under the pressure of answering questions from a person in authority. Furthermore, for a child, numbers and dates might be quite easily mistaken or confused.

[66] For all these reasons, I did not consider the confusion or uncertainty about dates in the statement so significant as to make the statement so unreliable that it would be contrary to the administration of justice to admit them.

[67] I find that B.L.'s inconsistencies in her evidence go to weight and can be weighed by the jury along with the rest of her testimony.

Inadmissible Portions of the Videotaped Statement

[68] There are some portions of the videotaped statement of B.L. for which the prejudicial effect outweighs the probative value. These portions can be dealt with by careful editing without affecting the jury's ability to fairly assess the remaining content along with the rest of B.L.'s evidence.

[69] Counsel, you might want to pull out your transcripts. The easiest way to note these is by reference to a rough transcript of the statement marked Exhibit B or also BB for identification.

[70] Starting at the top answer at page 113, third line down, after the word "S. [name of other complainant redacted]", there is a passage that was focused on by the Crown in submissions, reading:

and she knew this all along, she wanted me to lose my virginity because she did too. And I didn't want to cause I was so young.

[71] The Crown suggests this could be highly prejudicial to the accused. It is hearsay, in any event, and should come out. The defence argues that this should stay in as the defence would like to explore it in cross-examination of B.L.

[72] I find it is not admissible as part of her evidence in chief, which the videotaped statement is supposed to represent. I agree with the Crown that it should be excised as potentially highly prejudicial to the accused and being hearsay in any event.

[73] Next, also at page 113, the last full question and answer on that page, beginning "It's okay" and the answer following it, ending "going on", in that passage, there is reference to girls who lost their virginity to Kelly, the accused. The Crown suggests this should come out for the same reason. Defence does not oppose this coming out. I agree that it should come out.

[74] Next, page 118, all of that page, continuing to the top four questions and answers on page 119, ending "and then it stopped right there". In this section, B.L. referred to the accused sending her photographs of his penis by messaging on MSN. The Crown says this should come out as highly prejudicial, and the defence does not disagree. I agree it should come out.

[75] Next, the last full question and answer on page 129, the question beginning, "Okay, so do you know what it means to be a virgin?" continuing to the top of page 130, the first full question and answer and the second question, ending, "so what do you remember?". All of this dealt with questions about losing virginity. The Crown wants this to come out for the same reasons and the defence does not disagree. I agree that this should come out.

[76] Next, page 131, the third full question and answer on that page, the question beginning, "Yeah, why do you think it hurt?" where B.L. explained why the sexual interaction hurt because she was a virgin and the size of the accused's penis. The Crown submits this should come out as too prejudicial to the accused. The defence disagrees because it explains where

she said she hurt. I disagree with the defence submission as I am of the view that the jury can draw inferences as to where B.L. hurt from her previous answer that it was "down there". I agree with the Crown's submission that this exchange could be highly prejudicial and that it should be removed. I would add that the two exchanges immediately following it are part of the same line of questions and could be misleading if not also excised, and so I would excise the following two exchanges as well, ending "um, I went home".

- [77] Next, page 132, the ninth exchange dealing with what B.L. told Caitlyn. The defence argues this should come out as B.L. is saying she told someone else about something being true. The Crown does not disagree. I agree that this should come out.
- [78] Page 134, last question on that page to over the page and to the end of the fifth question on page 135, that question being, "L.G., what's that?". This passage deals with B.L. seeing a commercial about losing virginity between people who love each other and being mad about it. The Crown submits that this should come out as too prejudicial; the defence does not disagree. I agree with the Crown that it should come out.
- [79] Next, on the same page, 135, the last eight questions and answers, beginning "So B. [name redacted] have you had sex since that time?" over to page 136, the top nine questions and answers dealing with questions about B.L.'s sexual history after the incident, which of course is inadmissible due to other reasons. The Crown submits this should come out, and the defence does not disagree. I agree that it should come out.
- [80] MR. ZACHARIAS: Can we get the last words that come out, My. Lady?
- [81] THE COURT: You had wanted it to go all the way down to --
- [82] MR. ZACHARIAS: So it's the exchange before I had marked?
- [83] THE COURT: Yes.
- [84] MR. ZACHARIAS: Thank you.
- [85] THE COURT: It is the exchange you marked.
- [86] MR. ZACHARIAS: Sorry, My Lady. It includes all of the exchange I had marked or --
- [87] THE COURT: All of the exchange you marked, ending "to me it means a certain thing. To you it might mean something different. Yeah."
- [88] MR. ZACHARIAS: Thank you.
- [89] THE COURT: Page 137, starting at the sixth full question and answer, the question is, "Okay, what else do you remember about you and Kelly?" through the thirteenth question and answer, ending "sex with him", where B.L. was speculating about what S.Q. did and thought. The Crown submits that B.L.'s speculative evidence is inadmissible. The defence wants it left in but, in my view, has not clearly articulated why it is relevant or admissible as part of evidence in chief. I agree with the Crown's position that it is inadmissible and should come

out.

- [90] Page 139, the first eight full questions and answers, the question beginning "Do you not think he should get in trouble?" down to two past what the Crown suggested, which is the question beginning "Well, I think you are being very brave by telling". All of that section should come out as it deals with whether the accused should get into trouble. Both sides agree it should come out, and I agree.
- [91] MR. ZACHARIAS: My Lady, if I may, so do the words well, I think you, is that in or out?
- [92] THE COURT: That is out. That little passage is out too. It --
- [93] MR. ZACHARIAS: And the um-hum?
- [94] THE COURT: And the um-hum.
- [95] MR. ZACHARIAS: Thank you.
- [96] THE COURT: Page -- sorry. I am not sure you have time to make notes.
- [97] MR. ZACHARIAS: Thank you.
- [98] THE COURT: Next page, 140, last full question, beginning "Now, when you were talking to him" over to page 141, all of the questions and answers except the last three, so the questions end with the word "Facebook". These deal again with the accused sending photographs of his penis to B.L. The Crown submits that this should come out. The defence does not disagree. I agree that it should come out.
- [99] That is the end of the excisions for your note-taking purposes.
- [100] The Crown did not ask to remove references by B.L. in the videotaped statement to having told friends about the incident afterwards. The defence position did not ask for these to be removed either. I understand that these are introduced as part of the narrative to explain what happened that led to the police investigation but are not to be used for prior consistent statements to bolster credibility.
- [101] The interview was lengthy, and the suggested edits, if made, will not substantially eviscerate it or change the overall impression of the interview. The balance of the interview will not be too choppy, will not mislead the viewer or listener as to the substance of what is left, and will still present a good picture of the complainant's demeanour during the interview.
- [102] These edits ought to be made before the videotaped statement is admitted. The jury will need to be cautioned that some deletions of material have been made so that they are not left wondering about any strange gaps.

Conclusion Regarding Videotaped Statement of B.L.

[103] In conclusion, I find that the requirements of s. 715.1 have been met, and it would not interfere with the administration of justice to admit the majority of the videotaped statement of B.L. made April 5, 2011. It can be admitted into evidence as part of her evidence in chief. The only exceptions are those portions that I have already indicated.

Videotaped Statement of S.Q.

[104] I turn now to the videotaped statement of S.Q.

[105] You are looking, Crown. Did I miss any that were addressed?

[106] MR. ZACHARIAS: No, My Lady. Thank you.

[107] THE COURT: Okay.

[108] I turn now to the videotaped statement of S.Q.

[109] The videotaped statement of S.Q. which the Crown seeks to have admitted was made on April 6, 2011. The interview was conducted by then Constable now Corporal Eric Chrona of the RCMP in Telegraph Creek.

[110] S.Q. was born on June 15, 1997. She was 13 years old when she made her videotaped statement.

[111] Counts 6 and 7 on the indictment relate to a single occasion when the accused is alleged to have committed sexual offences against S.Q.

[112] At the time of the voir dire, S.Q. was 15 years old, just before her sixteenth birthday. She was affirmed to tell the truth.

[113] On the voir dire, S.Q. recalled making the videotaped statement, and after watching it, she adopted the contents of it as true.

[114] Corporal Chrona also testified on the voir dire and gave evidence about how he came to take a videotaped statement from S.Q.

[115] Corporal Chrona had been stationed in the Telegraph Creek detachment since July of 2009. Telegraph Creek is a small community of between 300 to 400 people roughly. Corporal Chrona was an engaged member of the community and regularly participated in activities at the local school.

[116] On April 6, 2011, Corporal Chrona knew that Corporal Leask was doing an investigation and wanted to interview S.Q., although he did not know the details. He was asked to get S.Q., and he did so, going to the school and bringing her to the detachment in Telegraph Creek for the interview by Corporal Leask. He then returned S.Q. to school after the interview. He was not actively involved in the investigation then and did not speak to S.Q. about the subject of the investigation when he transported her.

- [117] Corporal Chrona was not a witness to S.Q.'s interview by Corporal Leask. Corporal Leask was following up from her interview the day before of B.L., inquiring of S.Q. about some of the details regarding the incident with B.L. In the course of Corporal Leask's interview with S.Q., S.Q. was asked several times about whether she had any sexual contact with the accused, and she denied that she had.
- [118] For purposes of providing full background, the Corporal Leask interview of S.Q. was also played during the voir dire. The Crown does not seek to admit it at trial but acknowledges that it is possible that the defence will seek to make use of that interview in cross-examination of S.Q. at trial to impeach her.
- [119] When taking S.Q. back to school after the interview with Corporal Leask, he asked S.Q. how she liked the experience, and she told him she did not like it. He questioned her about not liking to talk to a female member of the RCMP, and she said she did not like it because she did not know her. Corporal Chrona told her that she knew him, so she could always talk to him. S.Q. did not indicate to him that she had anything to talk about.
- [120] Later that day, in the late evening around 11:00 pm or 11:40 pm, S.Q.'s uncle contacted Corporal Chrona and told him that S.Q. wanted to speak to him. He drove to her aunt's house, which was close by, and saw her sitting outside on the step crying. He asked her what was wrong, and she told him something to the effect of she had been raped by the accused. He told her he would need to take her to the detachment. She was permitted to bring her uncle with her for support.
- [121] The videotape captured the whole of Corporal Chrona's interview of S.Q. about these matters, other than her brief earlier disclosure to him that she had been raped by the accused. He did not pursue any questioning after this disclosure until he began conducting the video-recorded interview.
- [122] S.Q. did not talk to any other police officer about the alleged incident that happened to her.
- [123] In the Corporal Chrona video-taped interview, S.Q. did describe the acts complained of, including the surrounding circumstances.
- [124] What remains to be considered, then, is whether the video statement was made within a reasonable time of the alleged offence and whether or not it would interfere with the proper administration of justice to admit the recording.

Was the Videotaped Statement Within a Reasonable Time of the Offence?

- [125] Dealing with the first question, S.Q.'s evidence in the voir dire and in the Chrona videotaped statement was that the sexual incident between her and the accused occurred when she was either 12 or 13. She seemed to relate the incident to occur in the summer before the interview and then thought about the fact that she had turned from 12 to 13 that summer on June 15. Her evidence was it happened close in time to when B.L. was visiting her.

- [126] In the Chrona videotaped statement, S.Q. explained that the accused told her not to tell anyone about the incident. When this was explored in cross-examination, she explained that she was only 12 and tiny and he was so much bigger than her, and she was traumatized by the incident and so did not want to confront, meaning tell the truth about, what had happened to her.
- [127] In the voir dire, she explained that she did not tell Corporal Leask when asked about the matter earlier that same day because she was scared, she was so young when it happened, and she did not think anyone would believe her. She said that she did not know Corporal Leask and did not trust her or feel comfortable with her, and so she was not honest in her interview with Corporal Leask.
- [128] In the voir dire, S.Q. explained that she was repeatedly questioned by her aunt on April 6, 2011, after the interview by Corporal Leask until she finally broke down and told the truth, telling her that she had been raped but not going into further details because she did not want to talk to a family member about it except she was okay with her uncle coming with her to the detachment when Corporal Chrona interviewed her.
- [129] The evidence of S.Q. puts her sexual assault close in time to that of B.L., a matter of weeks. Thus the delay between the offence and her videotaped statement is roughly the same as the delay in respect of B.L.'s statement.
- [130] S.Q.'s reason for not reporting the sexual incident earlier was understandable for all of the reasons she mentioned. She was a very timid witness, was young and scared, was afraid that she would not be believed, and was afraid of the accused who told her not to tell anyone.
- [131] As S.Q. was two years older than B.L., like with B.L., I find the delay not to be such as to so affect the threshold reliability of her memory of events recorded in the videotaped evidence.
- [132] No proposition was put to S.Q. in cross-examination during the voir dire that would suggest that there was any event or apparent motive in the time period that passed from the date of the incident that might suggest a reason to concoct the statement.
- [133] The defence position is that the interview of S.Q. by Corporal Leask before the interview by Corporal Chrona in a sense corrupted the interview by Corporal Chrona and so the Chrona interview should not be admitted. I disagree.
- [134] There was nothing about the interview of S.Q. by Corporal Leask that could be said to be a rehearsal of the statement subsequently given to Corporal Chrona. If the argument can be made that suggestions were planted in S.Q.'s head during the interview by Corporal Leask, these suggestions can be dealt with in cross-examination of S.Q.
- [135] I find that the Chrona interview of S.Q. was within a reasonable time after the alleged offences against S.Q.

Will Admitting the Evidence Interfere with the Administration of Justice?

- [136] As to the next question, will admitting the evidence interfere with the administration of justice, the defence position seems to be that it will because of the first interview by Corporal Leask.
- [137] S.Q. was an extremely timid and reticent witness in the voir dire. The first day that she testified, she cried during the playing of the interview with Constable Leask and looked upset. She continuously looked down and tried to pull her sweater up to tuck her chin in it as though she wanted to hide. The next day when her interview with Corporal Chrona was played in court, she did not want to look at it other than as initially directed. She seemed to struggle to compose herself in the witness stand by taking deep breaths as she listened to it being played.
- [138] I accept that S.Q. has a very difficult time talking about the incident that happened to her which, on her description, was a forcible rape by the accused.
- [139] S.Q. appears to be a highly vulnerable witness for which s. 715.1 is designed to assist.
- [140] Returning to the several factors mentioned in L.(D.O.), there were several aspects to the videotaped statement that weigh in favour of its admission.
- [141] Corporal Chrona asked non-leading questions for the most part and allowed S.Q. to describe the incident in her own way without suggestion. Corporal Chrona asked her to tell him everything that happened and not to leave anything out. This is similar to asking a witness to tell the whole truth. He had no personal interest in the content of the statement and had a rapport with S.Q. She was more comfortable talking to him than she appears to be in the courtroom now, which is another two years later.
- [142] While S.Q. took a support person into the interview room with her, her uncle, he remained completely passive during the interview with his head looking down and clasping his hands in his lap. He did not encourage her and did not interfere in the interview in any way.
- [143] The quality of the video recording is good, but it did not pick up the audio very well. This is partly because of poor equipment at the detachment and partly because the witness spoke so softly about the matters. However, this was addressed by the fact that Corporal Chrona also made an audio recording with a handheld audio recorder at the same time as he video-recorded the interview. Both were played at the same time in court and did not appear to distort the accuracy of the interview. This process can be followed if the videotaped statement is admitted into evidence. The defence did not submit that the quality was too poor to allow it to be introduced.
- [144] There is very little evidence in the S.Q. statement that would be otherwise inadmissible if it was called at trial. The inadmissible content can be edited without creating a false impression with the remainder.

- [145] The defence argued that if the Corporal Chrona interview of S.Q. is admitted, so too should be the Corporal Leask interview as part of the Crown case. The Crown disagrees.
- [146] I find that one way to look at this issue is to consider how one would instruct the jury about the use of these videotaped statements. The videotaped statements sought to be introduced by the Crown have a very different use than the Corporal Leask interview of S.Q. The former is a way to partly introduce evidence in chief under a narrow exception provided by s. 715.1. The latter is a prior inconsistent statement introduced to impeach a witness. These different uses are telling and support the conclusion that one is not like the other and they do not have to be introduced at the same time. Indeed, I am of the view it will be easier for the jury to understand instructions as to the different uses of these statements if they are introduced at different times rather than together.
- [147] The Corporal Leask interview of S.Q. is not part of the Corporal Chrona interview. Furthermore, much of it would be inadmissible as part of S.Q.'s evidence in chief as much of it was seeking hearsay evidence about B.L.
- [148] The fact that S.Q. was questioned first by Corporal Leask is a matter that may affect the weight of the videotaped statement taken by Corporal Chrona and is something that can be explored in cross-examination of S.Q. at trial if the defence sees fit and lays the proper groundwork. The defence will not be prejudiced by admission of the videotaped statement taken by Corporal Chrona given the right to cross-examine S.Q. about these matters.
- [149] I conclude that the existence of S.Q.'s earlier videotaped statement to Corporal Leask denying any sexual encounter with the accused does not affect the admissibility of the videotaped statement taken by Corporal Chrona. I also conclude, contrary to the defence submissions, that the Crown is not required to introduce the former statement into evidence as a condition of introducing the latter statement into evidence.

Inadmissible Portions of the Videotaped Statement

- [150] I now turn to inadmissible portions, if you want to get your transcripts out, counsel.
- [151] The Crown identifies two portions of the videotaped interview of S.Q. by Corporal Chrona that it says should be excised. By reference to a transcription of the statement marked Exhibit G or GG, these are (a) at page 65, the second and third lines from the top of the page when S.Q. refers to the rape of B.L., and (b) at page 68, two question and answers in the middle of the page, beginning with the question "Okay, now, when did you find out about B. [name redacted]?" which also refers to the incident with B.L., and ending with the word "Internet".
- [152] The defence does not want these passages excised.

[153] I am concerned that the highlighted passages introduce hearsay evidence about what one complainant may or may not have said to the other, and the first one uses the loaded word "rape". If the defence wishes to cross-examine the complainants B.L. and S.Q. about what they told each other, that is a matter for the defence to raise, but I conclude that its probative value is outweighed by its prejudicial effect in the context of these passages forming part of the Crown evidence in chief of one of the complainants.

[154] I, of course, keep in mind that I must instruct the jury that when these statements are introduced and adopted as true, they become evidence of that witness in chief. I therefore conclude that these passages should be excised.

[155] I am satisfied that excising the above statements from the videotaped statement will not distort the remainder of the statement such that it would mislead the jury and that these excisions should be made so as to not prejudice the accused.

Conclusion Regarding Videotaped Statement of S.Q.

[156] I conclude that it is my finding that the requirements of s. 715.1 have been met and that it would not interfere with the administration of justice to admit the majority of the videotaped statement of S.Q. taken by Corporal Chrona on April 6, 2011. It can be admitted into evidence as part of her evidence in chief. The only exception is that some small portions are to be excised as I have indicated.

Videotaped Statement of S.R.

[157] I turn now to the videotaped statement of S.R. which was made on June 16, 2011. The interviewer was then Corporal Chrona who met with S.R. at the RCMP detachment in Telegraph Creek.

[158] S.R. was born on October 29, 1995. She was 15 years old when she made her videotaped statement.

[159] Counts 1 through 3 on the indictment relate to a series of incidents over a time when the accused is alleged to have committed sexual offences against S.R. The incidents were ongoing, with the last alleged sexual offence prior to the interview being only a couple of months prior, up to just a day before the statements taken from S.Q. and B.L. in early April 2011.

[160] At the time of the voir dire, S.R. was 17 years old.

[161] On the voir dire, S.R. adopted the contents of the videotaped statement as true.

[162] Corporal Chrona also testified on the voir dire. Both he and S.R. testified that there was no pre- or post-videotaped interview of her about the matters that are the subject of it. To put it another way, the videotape captured the whole of the interview of S.R. by the police.

[163] In the interview, S.R. described the acts complained of, including the surrounding circumstances.

Was the Videotaped Statement Within a Reasonable Time of the Offence?

[164] I turn to the question of whether the videotaped statement was within a reasonable time of the offence.

[165] The evidence of S.R. indicates that when she was 12 in the summer of 2008, the accused began a sexual relationship with her that continued after that with some frequency over the years. The sexual interaction continued up to just a matter of a couple of months prior to her videotaped statement in June of 2011.

[166] This explains the timing of the video-recorded statement which was a result of the police investigation asking S.R. questions as a result of the interview of one of the other complainants.

[167] The videotaped statement was within a reasonable time of the offences. The defence does not challenge that this factor is met.

Will Admitting the Evidence Interfere with the Administration of Justice?

[168] The next question is whether admitting the evidence will interfere with the administration of justice.

[169] The defence suggested in submissions that because S.R. is 17 years old and will be turning 18 later this year, that she is close to being at the stage where s. 715.1 does not apply. Also, since she will have a screen to block her vision of the accused when she testifies, he argues it is not necessary for her videotaped statement to be relied upon as a testamentary aid as well.

[170] The first point to make is that s. 715.1 is not limited to witnesses who are under the age of 18. Rather, it applies to witnesses who are under age 18 at the time of the alleged offence. Here, S.R. was aged 12 when the alleged offences against her started.

[171] The second point is that s. 715.1 is not limited to witnesses who do not have a screen in place to block their view of the accused.

[172] It was my observation that S.R. was an extremely reticent and timid witness, even more so than the other two complainants, which is saying something. It appeared that her body was rocking or shaking the whole time she was in the witness box during the voir dire, and she barely made eye contact with anyone and only occasionally lifted her head from looking down. It was hard to hear her speak. She was prone to shrugging and had to be cued to use words, and even when she did use words, she used as few words as possible to reply to questions.

- [173] I do not consider S.R. to be the type of competent witness that was apparently before the court in *R. v. Rohrich*, 2009 CanLII 51510 (Ont. S.C.J.) [Rohrich] a decision of the Ontario Superior Court of Justice made September 1, 2009, an authority relied on by the defence. There, the alleged offence took place when the witness was 17 years old. The witness gave two statements, one five months after the offence that was lost and one 14 months later. The Court noted that she was now 20 years old, and the Court was confident she could give a full and candid account in the courtroom without any aids, at para. 10. These are all factors that distinguish the facts in that case from the case at bar.
- [174] The defence criticizes the interview because Corporal Chrona did not tell the witness to tell the truth. This was a concern and, indeed, a focus of the court in *Rohrich*. I note that this is not a requirement of the Code. It is not a concern I share here with these witnesses.
- [175] Corporal Chrona asked S.R. to tell him everything that happened, in her words. It is clear to me, from the context of the interview of S.R. in a police detachment by a police officer asking to be told what happened, that he was asking for the truth. The fact that the evidence was not sworn or affirmed true can be addressed by the process for introducing the evidence at trial. S.R. will be sworn in as a witness at trial and will be asked whether or not what she said in the videotaped interview was true.
- [176] When S.R. gave her statement to Corporal Chrona, she appeared more relaxed and more talkative than she did in the courtroom.
- [177] Corporal Chrona did not ask S.R. leading questions, for the most part, other than to, at times, try to clarify what she had already said. For the most part, he asked S.R. open-ended questions in a nonjudgmental way to try to get her to describe what happened regarding the accused's alleged sexual interactions with her over time.
- [178] Corporal Chrona had no personal stake in the matter, and the video recording was of good quality.
- [179] I am of the view that the quality of the evidence in the video recording will be better than S.R. will be able to speak to in direct evidence at trial due to her present nervousness or reticence. I am of the view that the two purposes of s. 715.1 will be well served in the circumstances of this witness, considering her age at the time of the alleged offences against her and considering her present demeanour.
- [180] There are small portions of the interview that should be edited out as otherwise inadmissible, but this does not negatively impact the rest of the evidence in the interview.
- [181] I find nothing about the circumstances of the making of the video recording that would bring the administration of justice into question if it was admitted.

Inadmissible Portions of the Videotaped Statement

- [182] As for excisions, the Crown submits that one portion of S.R.'s videotaped statement should be excised as potentially prejudicial to the accused. This can be found in the transcript Exhibit I or Exhibit II as follows: at page 83, three lines in the middle of the page beginning with S.R.'s answer "and then he hooked up with [S.Q. and B.L.]", the Constable's "mmhmm", and then the witness's next answer. This passage refers to the accused hooking up with four other girls, including the other two complainants.
- [183] The defence says it wants this passage before the jury and will seek to introduce it in evidence if it is excised.
- [184] While I must give considerable weight to the position of the defence that it considers the probative value to outweigh any prejudice, I nevertheless conclude that this is inadmissible hearsay evidence as part of S.R.'s evidence in chief. While it might form part of the narrative, I consider that it is too potentially prejudicial to the accused to be admitted on that basis.
- [185] The defence submits further portions should be excised. These all refer to some fight that the accused had with his then girlfriend Cecilia which resulted in the "cops" being called and charges being laid. Both sides agree that these should come out. These can be found at:
- (a) page 73, second question through sixth question and response. The question begins, "The first time A.B. [name redacted]", and the passage ends with the witness saying, "I don't think so. I don't know";
 - (b) page 77, the first four lines which are really the first two questions and answers, so it begins with the very top question on that page and ends with the witness saying "yeah";
 - (c) page 80, in the middle of the page, in part of S.R.'s answer where she states, after the word "Cecilia", "when they said he was going to get charged", the words "when they said he was going to get charged" should be excised; and
 - (d) page 90, the top three exchanges beginning with the witness saying "'cause that's when Cecilia started" and ending with the witness saying "getting the cops involved", I agree that these should come out.
- [186] Lastly, I am also of the view that the comment at the front of the transcript towards the bottom of page 70 where the witness said, "I was dating his cousin A. [name redacted]" should be excised. Given the witness's choice of language in the next part of the interview describing dating the accused, which when described appears to consist merely of having sex with him, this could be suggestive of a sexual history and it has no probative value. The parties do not argue that it should be left in and have no issue with it being excised, and so I conclude it should be taken out.

Conclusion Regarding Videotaped Statement of S.R.

[187] In conclusion, I find that the requirements of s. 715.1 have been met and it would not interfere with the administration of justice to admit the majority of the videotaped statement of S.R. taken by Corporal Chrona on June 16, 2011.

Other Comments

[188] I have a couple of other comments. I should note that in considering the issues on this voir dire, I have not considered hearsay evidence from the other complainants to bolster the reliability of each other's statement or when reflecting on timelines. I did not receive submissions in that regard but thought it safest to approach it that way.

[189] I also made some observations that apply to each of the three complainants.

[190] While there was a screen in the courtroom between the complainants and the accused, the complainants nonetheless knew that he was in the room and were required to identify him. It would be understandable, given the allegations in this case, that his presence in the formal courtroom context may add to their stress and, in part, may explain the reticence they all appeared to have in communicating in the courtroom.

[191] Furthermore, it must be appreciated that the complainants each come from a small and thereby closely knit community. They each appeared extremely shy, rarely making eye contact, and speaking only with few words. Being in a formal courtroom facing a judge they have never met, being questioned by lawyers, having to talk about very intimate things that they claim happened to them, has to be very difficult for them, and I can readily infer that it will be even more difficult when they have to sit across from and face a jury of twelve adult strangers.

[192] Considering this and all of the circumstances I have reviewed, I have concluded that the videotaped statements of each complainant sought to be admitted by the Crown may be admitted with the editing I have directed.

[193] I do intend to give the jury an opening caution regarding the use of the videotaped statements and will caution them again at the end of the trial in my concluding charge.

[194] The Crown suggests that transcripts of the videotaped statements could be handed out to the jury as an aid during the playing of the statements but also as edited to excise the portions discussed. The defence position is that this could distract the jury from hearing and watching the videotaped statements as they are being played, but the defence is fine with handing out the transcripts to the jury later and having them take them into the jury room with them. I am concerned with this latter suggestion as the jury could focus too much on the content of the videotaped statements if they only have the transcripts to look at and not the entire witness's evidence at trial. I also noticed a number of errors in the transcripts.

[195] Given that the defence and Crown are not of like mind regarding the use of the transcripts, except for the fact that they cannot be made exhibits, I conclude that the transcripts should not be handed to the jury as an aid. The jury can take their own notes of the videotaped evidence just as they are free to take notes of any other evidence.

[196] That concludes my ruling with one caveat. If I failed to address any proposed excision because I overlooked it in the pressures of time, I ask counsel to just draw that to my attention. Did you notice any?

[197] MR. KLAASSEN: No, My Lady.

[198] MR. ZACHARIAS: I did not, My Lady.

[199] THE COURT: All right. Thank you.

"S.A. Griffin, J."

The Honourable Madam Justice Susan A. Griffin

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Prepared on 26 October 2026 · Esheria