
CANADA / JUDGMENT

R. v. Tom

2007 BCSC 914

COURT

Supreme Court of British Columbia

DECIDED

22 June 2007

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2007 BCSC 914 R. v. Tom

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tom,

2007 BCSC 914

Date: 20070622

Docket: 132269-5

Registry: Victoria

Regina

v.

Ellen Tom and Lenard Tom

Before: The Honourable Mr. Justice Macaulay

Ruling Re Admissibility of Child Statement

Counsel for the Crown

N. Jensen

Counsel for Ellen Tom:

C. Massey

Counsel for Lenard Tom:

A. Tam

Date and Place of Trial/Hearing:

20070622

Victoria, B.C.

- [1] The Crown sought, at trial, to tender, for the truth of their content, the hearsay statements of a child made to the child's foster parent. It was common ground that the statements do not fall within any of the classic exceptions to the hearsay rule. Instead, the Crown tendered the evidence under the principled exception to the hearsay rule on the twin bases that the statements are necessary and reliable.
- [2] I concluded that the Crown failed to establish necessity and dismissed the application on that basis without addressing the issue of reliability. These reasons are accordingly limited in scope. I will not address the question of reliability unless events unfold at the trial in such a way that it becomes necessary for me to do so.
- [3] The child, whom I will refer to, for convenience, as the declarant, is now almost age five. The statements in question relate to events that the Crown says transpired in July 2005 at the home of the child's biological parents in the presence of the child. Both parents are accused of offences arising out of the alleged physical abuse of another younger child also in the home at the time.
- [4] The statements relate particularly to conduct that the Crown attributes to the mother. As described by the foster parent, the initial statement refers to the mother throwing a toy at the other child that struck him in the forehead.
- [5] The declarant was almost three years old at the time of the events. He lived with the foster parent at the time and made the statements to her after a visit to his mother's home. The declarant is available to testify but the foster parent and the Crown do not wish him to do so.
- [6] The foster parent testified that she picked up the declarant and another older brother, also in her care, at the end of the visit and took them home. At home, the declarant appeared sad. He was upset, shaking and began crying uncontrollably. The foster parent asked the declarant what was wrong and a conversation ensued about the events. Two days later, and finally 11 days later, the declarant repeated portions of the statement made the first day.
- [7] When asked about the declarant, the foster parent described him as a very bright boy who could probably testify but added that he cannot remember the incident. The events occurred, as set out above, almost two years ago. The Crown relied on that evidence, coupled with concerns that the child would potentially be traumatized if required to testify in the presence of his parents, in deciding not to call the child to testify.
- [8] While the Crown's decision is understandable, it prevents favourable judicial consideration of the necessity requirement in the circumstances. There are, in my view, two reasons for this.

- [9] First, I point out that the child is deemed to be a competent witness. It is only in exceptional circumstances that a decision can be made about lack of testimonial competence without first calling the child to testify. In *R. v. Parrott*, 2001 SCC 3, Binnie J., for the majority, stated (para. 77):

In my view, if the witness is physically available and there is no suggestion that he or she would suffer trauma by attempting to give evidence, that evidence should generally not be pre-empted by hearsay unless the trial judge has first had an opportunity to hear the potential witness and form his or her own opinion as to testimonial competence. I say generally because there may arise exceptional circumstances where a witness is available and not called and the out-of-court statements may be nevertheless admitted. The Court was careful not to close the door to this possibility in *R. v. Hawkins* and *R. v. Rockey*. ...

While this statement leaves the door open for exceptional circumstances, I do not consider this to be such a case.

- [10] The declarant is a bright, almost five year old, who has lived most of his life with his foster parent rather than his biological parents. The event that the Crown says he witnessed involved his mother throwing a toy at his younger brother, hitting him on the forehead, when his brother touched some DVDs. While I expect witnessing such an event would be upsetting for a child, I doubt that it caused any long-term trauma lasting through to the present. There is certainly no expert evidence to that effect and I do not consider it to be a self-evident proposition necessarily applicable here. Any trauma generally associated with testifying in the presence of the parents can be avoided by applying the privacy and protective measures of the Criminal Code relating to children testifying.

- [11] Finally, on the first point, I observe that the Canada Evidence Act was amended in January 2006 concerning the competence of child witnesses. Section 16.1 now provides:

16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

- (2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
- (3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
- (4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
- (5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

- (6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
- (7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
- (8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

As a result of these changes, child witnesses, regardless of age, are now presumed to have testimonial capacity and the evidence of a witness younger than 14 shall be admitted so long as he or she is "able to understand and respond to questions". This may be contrasted to the former s. 16 which required, in part, that the child be "able to communicate the evidence". This was, arguably, a broader requirement capable of including lack of continuous memory. Counsel did not address the issue so I will not pursue it.

[12] The second reason arises from the evidence of the foster parent that the declarant had no present memory of the events. A child may be otherwise competent but have no present memory. This may give rise to the necessity of relying on the child's earlier statement. See *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 76 C.C.C. (3d) 10 (Ont.C.A.). Absent an opportunity to hear from and assess the declarant, it is not possible for me to safely determine whether he, in fact, has no present memory. It is not enough to rely on the foster parent's statement that the child has no present memory when the ultimate effect is to deprive the defence of any opportunity to cross-examine the declarant.

[13] For these reasons, the Crown failed to establish necessity. The statement of the declarant is accordingly inadmissible.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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