

CANADA / JUDGMENT

R. v. Williams

2020 BCSC 1983

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1983 R. v. Williams

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Williams,

2020 BCSC 1983

Date: 20201209

Docket: 25252

Registry: Smithers

Regina

v.

Derrick Johnson Williams

Restriction on publication pursuant to s. 486.4(2.2) of the Criminal Code

Before: The Honourable Madam Justice Murray

Oral Reasons for Judgment

Counsel for the Crown:

A.K. Reed and L.A. Vizsolyi

Counsel for the Accused:

I.B. Lawson

Place and Date of Trial:

Smithers, B.C.

October 29-31, 2019 and

December 7-8, 2020

Place and Date of Judgment:

Smithers, B.C.

December 9, 2020

Introduction

- [1] Mr. Williams is charged with three counts: sexual assault and sexual touching of A.L., a person under the age of 16, and communicating with her via telecommunication (in this case electronic messaging) for the purpose of facilitating same. The sexual assault and sexual touching counts are alleged to have happened July 12, 2018; the luring between July 12 and 14, 2018.
- [2] The case turns on the evidence of the complainant, A.L. who was 14 at the time of the incidents. Pursuant to s. 715.1 of the Criminal Code A.L.'s evidence of the sexual assaults was led in this trial through a videotaped statement she gave to police on September 21, 2018.
- [3] Given the circumstances of this case and the arguments raised by defence, I must start by discussing the admission of evidence under s. 715.1 and the evidence of children.

Section 715.1 and the Evidence of Children

- [4] Section 715.1(1) provides for the admission of a young person's video recorded statement at trial as a statutory exception to the hearsay rule. The section reads as follows:

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.

- [5] After a voir dire in which A.L. adopted the statement as true, on October 30, 2019, I ruled the videotaped statement admissible.
- [6] I stated the following in my reasons for judgment:
- [3] As can be seen, s. 715.1(1) contains four mandatory statutory prerequisites to admission of a video-recorded statement. To introduce the statement, the Crown must establish on a balance of probabilities that:

- 1) the video-recorded statement was provided by a complainant or witness who was under the age of eighteen years "at the time the offence is alleged to have been committed";
 - 2) the video recording was made "within a reasonable time after the alleged offence";
 - 3) the complainant or witness describes the "acts complained of" in the video recording; and
 - 4) while "testifying", the complainant or witness "adopts the contents of the video recording".
- [4] In addition even where the four statutory prerequisites to admission have been met, s. 715.1(1) requires exclusion where the "admission of the video recording in evidence would interfere with the proper administration of justice". Put another way, the court retains a residual discretion to exclude statements on the basis that their probative value is outweighed by their prejudicial effect. In *R. v. L. (D.O.)*, [1993] 4 SCR 419 at p. 463, Madam Justice L'Heureaux-Dube set out a number of factors that should be taken into account in exercising the discretion to exclude the statement. According to the SCC those cases will be relatively rare: *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183 at para. 51.
- [5] In this case the four prerequisites are readily satisfied- the complainant is under 18, the accused concedes that the videotape was made within a reasonable time, the complainant describes the acts complained of in the video and in her evidence on the voir dire she adopted the contents of the videotape as true.
- [6] The accused challenges the admissibility of the videotaped statement on the residual ground arguing that to allow an unsworn statement to police to be received as the direct evidence of a complainant is a significant interference with the administration of justice and affects trial fairness. In making this argument the accused asserts that the only way to get to the truth is in the courtroom, not in a police station. He further contends that there is no evidence of injury to the complainant that would allow this court to admit the video into evidence. Without such evidence the accused argues that we should go what he calls "the proper route" that is having the complainant testify in open court.
- [7] As succinctly stated by Griffin, J as she then was in *R. v. Quash*, 2013 BCSC 2498 at para 18, there are two legislative goals behind s. 715.1 of the Code:

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.

- [8] In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419 the Supreme Court of Canada unanimously held that s. 715.1 neither infringes an accused's fair trial rights nor the rules against hearsay and prior consistent statements.

[9] Chief Justice Lamer, as he then was, addressed the issue of cross examination at para 2 as follows:

as there is no constitutionally protected requirement that cross-examination be contemporaneous with the giving of evidence, the respondent has failed to show that his fundamental right to cross-examine has been violated. The admission of the videotaped evidence does not make the trial unfair or not public, nor does it in any way affect an accused's right to be presumed innocent.

[10] In my view the accused's argument against an "unsworn" statement becoming evidence is without merit. The statement only becomes evidence if the Crown satisfies the prerequisites set out in s. 715.1. That includes the complainant or witness accepting the contents under oath or affirmation in court. Once the trial judge rules the statement admissible, the video becomes sworn evidence as if the child were giving the statements on the videotape in open court. The adopted videotaped statement along with the viva voce evidence given at trial, comprises the evidence-in-chief of the complainant. And the whole of the complainant's evidence, including the adopted statement is subject to cross-examination. In the end the trier of fact will determine the weight to be attributed to the evidence and its reliability taking into account the circumstances in which the video was made, the veracity of the witnesses' statements. Just like with any other witness. Parts of the video contradicted during cross-examination are not rendered inadmissible but may well be given less weight in the final determination of the issues.

[11] I am satisfied that the videotape meets all of the prerequisites as set out in s. 715.1. I am further satisfied that subject to some excision its admission would not interfere with the proper administration of justice. Mr. Lawson pleads that it is in the courtroom that we get to the truth. The admission of the videotaped statement does not interfere with that in any way.

[7] In closing submissions the defence argued that no weight could be attributed to A.L.'s videotaped statement for two reasons:

- 1) First, in cross-examination A.L. testified that she "did not remember most" of what happened; and
- 2) Also in cross-examination A.L. agreed that she only told the police officer "a part of what really happened with the accused".

[8] The defence submits that given that evidence A.L. could not possibly attest to the truth of what she said in the video. Nor can the court be satisfied with its accuracy.

[9] These very issues which are at the core of s. 715.1 are not fatal to the admission or acceptance of videotaped evidence under s. 715.1.

- [10] It is well recognized that children's evidence must be dealt with differently than the evidence of adults. Generally, children have trouble articulating their evidence. And over time they are prone to forgetting details of events. As stated by the Supreme Court of Canada in *R. v. C.C.F.*, [1997] 3 S.C.R. 1183 [F.(C.C.)], the primary purpose of s. 715.1 is to capture a child's memory of events, in a more comfortable, less threatening environment, while it is fresh in their minds.
- [11] In *C.C.F.*, the nation's highest court recognised that children may have no memory of the event when they come to testify in court months or longer after an event. They may only recall going to the police station and doing their best to truthfully tell a police officer what happened to them: *F.(C.C.)* at para. 21.
- [12] The Supreme Court of Canada held that a child does not need to remember the details of the event in order for the videotaped statement to be admitted. To be admissible the child must recall giving the statement and testify that she intended to be honest when she gave the statement: *F.(C.C.)* at paras 36-37. As Cory, J. explained, even with a forgetful child, there are factors present in s. 715.1 that guarantee reliability of the videotaped evidence:

44 I recognize that the Meddoui approach to "adoption" gives rise to another problem. Specifically, a witness who cannot remember the events cannot be effectively cross-examined on the contents of his or her statement, and therefore the reliability of his or her testimony cannot be tested in that way. However, it was recognized in *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915, and *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, that cross-examination is not the only guarantee of reliability. There are several factors present in s. 715.1 which provide the requisite reliability of the videotaped statement. They include: (a) the requirement that the statement be made within a reasonable time; (b) the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanor, and assess the personality and intelligence of the child; (c) the requirement that the child attest that she was attempting to be truthful at the time that the statement was made. As well, the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was made. These indicia provide enough guarantees of reliability to compensate for the inability to cross-examine as to the forgotten events. Moreover, where the complainant has no independent memory of the events there is an obvious necessity for the videotaped evidence. In *Meddoui*, it was recommended that in such circumstances, the trier of fact should be given a special warning (similar to the one given in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811) of the dangers of convicting based on the videotape alone. In my view, this was sage advice that should be followed.

- [13] The *Vetrovec* warning referred to above applies to witnesses whose evidence must be approached with caution. Mr. Justice Watt provided this concise summary of the warning in *R. v. Roks*, 2011 ONCA 526 at paras. 63-66 (adopted in *R. v. Khan*, 2011 BCCA 382 at para. 43):
- [63] Among the essential elements of a *Vetrovec* caution is an instruction about the essential characteristics of confirmatory evidence. Jurors are to be told that, in determining the veracity of the suspect evidence, they should look for evidence from another source tending

to show that the untrustworthy witness is telling the truth about the guilt of the accused: Khela, at para. 37; R. v. Kehler, [2004] 1 S.C.R. 328, at paras. 17-19; R. v. Sauvé (2004), 182 C.C.C. (3d) 321 (Ont. C.A.), at para. 82, leave to appeal refused, [2004] S.C.C.A. No. 246, [2005] 1 S.C.R. xv. The trier of fact is to look for confirmation from some other source (the independence requirement) that the suspect witness is telling the truth in some part of his story that goes to show that the accused committed the offence charged (the implicative quality or materiality requirement): Kehler, at para. 19; R. v. Vetrovec, [1982] 1 S.C.R. 811, at p. 829.

- [64] The independence requirement insists that to be confirmatory, evidence must not be "tainted" by connection to the Vetrovec witness: Khela, at para. 39.
- [65] To satisfy the materiality requirement, confirmatory evidence need not implicate the accused: Khela, at paras. 40-41; Kehler, at para. 16. The materiality requirement is met where the confirmatory evidence, in the context of the case as a whole, gives comfort to the trier of fact that the Vetrovec witness can be trusted in his or her assertion that the accused is the person who committed the offence: Khela, at para. 42; Vetrovec, at p. 833. Where the only issue in dispute is whether the accused committed the offence, to be confirmatory, evidence must comfort the trier of fact that the Vetrovec witness is telling the truth in that regard before convicting on the basis of the Vetrovec witness' evidence: Khela, at para. 43.
- [66] It is worth reminder that a trier of fact is entitled to convict on the evidence of a Vetrovec witness in the absence of confirmatory evidence where the trier of fact, cautioned about the danger of doing so, is satisfied that the witness is telling the truth: Khela, at para. 37; Kehler, at para. 22; Sauvé, at para. 82.

[Italics in original.]

[14] I take the following from the above:

- 1) A.L.'s videotaped statement will form part of her direct evidence;
- 2) The reliability and accuracy of that statement will be assessed as it is in every case, taking into account among other things A.L.'s demeanour, cross-examination and all of the other evidence;
- 3) A.L.'s evidence is to be assessed with the understanding that as a child she is not expected to have a perfect memory or be able to articulate her evidence with precision; and
- 4) I must be cautious about convicting the accused based on the videotaped evidence alone.

[15] I will now outline the evidence.

The Evidence

[16] The Crown called three witnesses: A.L., her mother, L.S. and the investigating officer.

- [17] A.L. testified that on July 12, 2018 she was babysitting for her cousin all night. She started at around 11:00 p.m. (July 11) and finished at about lunchtime the next day. When she arrived at her cousin's house, her aunt, M. was there with the accused. A.L. has known the accused since she was very young as he was a friend of A.L.'s mother. When M. left, so did the accused.
- [18] Several hours later, at 3:34 a.m. the accused started messaging A.L. The messages were entered as exhibits at the trial. He began by telling A.L. not to look outside as there were "30+ kids playing manhunt" outside. He asked A.L. if she smoked. He told her that he had left his charger at M.'s house. At 5:31 a.m. he texted "Get to bed before I spank you", then "Wicked spanks coming" "LOL". At 5:54 a.m. he texted "Should i keep you compney (sic)". A.L. replied "I am bored". The accused asked "What do you want to do..Movie". A.L. replied "Yes".
- [19] In her videotaped statement A.L. said that the accused showed up a few minutes later. He sat beside her on the couch. When she tried to move away, he would move closer. He then got "touchy" by "tickling" and "bugging" her. It made her uncomfortable. He put his hand on her thighs and pulled her closer to him. He started kissing her on the lips. She showed how the accused put his hand on top of her head and twisted her head toward him to kiss her. A.L. told police that she tried to tell him to stop but he did not listen.
- [20] The accused started asking her to go into another room. She said "I can't, I'm babysitting here". She described how she was able to put the accused off for a while by saying that and watching TV and eating, and said "the chocolate was pretty good". Eventually the accused took her hand and led her into a bedroom. A.L. described the room. In the room he took off "my bottom part of the clothes" and all of his clothes. Then he had sexual intercourse with her, without a condom. A.L. described that she was lying on her back and the accused was on top of her. A.L. told police that she was "too scared to tell him no cause you never know what he might be like what he might be capable of".
- [21] When asked by Cst. Clark how it ended A.L. clearly had difficulty answering. She looked uncomfortable. She stammered for several seconds and finally said that it ended "with him squirting all over me". She asked the police officer "Do you know what I mean by that?" A.L. indicated that the accused squirted all over her chest and abdomen area. She said it was "cum". She said that the accused put his clothes on then he watched her put on hers. She said that that made her feel "even more uncomfortable". A.L. said that she tried to wash most of the cum off. She then went back to the couch in the living room and "act like nothing happened". She told police that the accused finally left. He returned while she was sleeping. He came in through the back door and told her that he came to see her before he went to work. He was cuddling her. She got out of bed. He finally left the house. M. finally got home around lunchtime.

- [22] A.L. told police that the accused started messaging her asking her to come over to watch a movie. She said no. She stated, "he's like harassing me to come over and watch a movie but actually I already knew what he's talking about when he said watch a movie".
- [23] When asked by Cst. Clark if she told anyone what happened, A.L. answered that she told her mom that they kissed but that she was too scared to tell her everything that had happened.
- [24] A.L. told Cst. Clark that the accused knew how old she was "but he didn't care".
- [25] As I stated earlier, the messages exchanged between the accused and A.L. were photographed by the police officer and filed as exhibits in this trial. The messages corroborated what A.L. told police. On July 13, 2018 at 4:20 a.m. the accused was messaging A.L. "Come join me. Come here lol. To wrestle lol." On July 14, 2018 at 4:09 a.m. he messaged "Come visit if you can" then "Hugs. Hugs hugs".
- [26] There is no doubt that the messages were sent to A.L. by the accused. The sender's profile picture is of the accused. When you click on the photo the profile identifies the sender as Derrick Johnson Williams who lives in Kispieux. There is a larger photo of the accused with an older gentleman. Plus after the first exchange of messages on July 12, 2018, it was the accused who showed up.
- [27] The cross-examination of A.L. was centered on what she told her mother- whether she told her that she and the accused kissed or said that nothing happened. A.L. was not cross-examined or challenged in any way about her evidence regarding the sexual assaults or any of the events of that morning.
- [28] A.L.'s mother, L.S. testified that as a result of what her M. told her, she asked A.L. twice if anything happened while she was babysitting. Both times A.L. answered no. L.S. said that she was not going to pressure her daughter so she left it at that. Months later, she noticed that the accused was sending A.L. messages. She then asked A.L. why Derrick was sending her messages. AL replied she did not know. L.S. then messaged the accused attaching copies of the messages asking what he meant by them. The accused responded that A.L. smokes weed. L.S. responded "no she does not". A printout of this exchange was marked as an exhibit. L.S. then took A.L. to the police station to find out what really happened. L.S. testified that she did not tell A.L. what to say or pressure her. Nor was she angry with A.L. That fits with what A.L. told the police officer.
- [29] I found L.S. to be a credible witness. She gave her evidence in a straightforward manner. She was not hostile toward the accused. I accept her evidence.
- [30] The question is whether I accept A.L.'s evidence.
- [31] The video of A.L. telling the police officer what happened offers a unique opportunity to assess A.L.'s credibility and reliability. According to the evidence, this was the first time A.L. had talked about the incident to anyone. In the video, A.L. not only looks young, she presents as young. She is soft spoken and at times speaks very quickly. She comes across as

genuine. She was doing her best to tell the truth. Her face was open and showed her emotions. Her body language changed throughout the interview. When she was being asked about sex she clearly looked uncomfortable.

- [32] She at times articulated her thought processes. For instance, when asked about how it ended in the bedroom, she was saying things like "how should I say this". She made gestures as she was describing what happened. For example she demonstrated how the accused put his hand on her head to turn her face toward him so he could kiss her. And she indicated with her hand where the accused "squirted" on her. She showed how she moved away on the couch. It was like she was reliving the incident. She offered details that had the ring of truth, like how it made her feel "even more uncomfortable" when the accused watched her get dressed after the sexual intercourse. And how she wanted to clean herself up after but the accused wanted to use the bathroom first. And how she tried washing most of "it" off. She described how she felt throughout, such as after the bedroom she was wondering to herself when her aunt would get home. And how she felt when the accused texted her after: "I knew what he meant when he said watching movies".
- [33] Overall I find A.L.'s videotaped statement compelling.
- [34] A.L. was clearly less comfortable when she testified at court. She was fidgety and nervous. But her videotape evidence was not contradicted in any material way.
- [35] The defence argues that A.L. is an unreliable witness because in the cross-examination of what she told her mother she "flip flopped" and contradicted her mother's evidence. I disagree. A.L. was clearly confused by the series of questions and answers the defence points to. I was confused as well. In my view, there is nothing in the cross-examination that causes me to doubt the accuracy or reliability of A.L.'s evidence. The inconsistency between A.L.'s evidence and her mother's regarding what A.L. reported is in my view, immaterial.
- [36] Of significance, A.L.'s evidence does not stand alone. It is corroborated by the messages sent by the accused. The messages are sent in the early morning hours- 3, 4, 5 a.m. They are flirtatious and suggestive: "Come join me", "come wrestle". The only reasonable conclusion from all of the evidence is that the accused wanted to have sex with A.L. again. Even A.L. at 14 years old knew that that is what the accused meant when he asked her if she wanted to watch a movie.
- [37] Having regard to all of the evidence, I accept A.L.'s evidence. It makes sense, it was unshaken in all material ways and it is corroborated by the accused's messages.
- [38] In all of the circumstances, I am satisfied that the Crown has proved all three counts beyond a reasonable doubt.

"The Honourable Madam Justice Murray"

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