Court of Queen's Bench of Alberta

Citation: R v Dauphinais, 2021 ABQB 29

Date: 20210114
Docket: 180584948Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Kenneth Dauphinais

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.5.
By Court Order, the name of "G "must not be published, broadcast, or transmitted in any way. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information, or submissions at the hearing of the application.
NOTE: This judgment is intended to comply with the identification ban.

Reasons for Decision for *Voir Dire*
of the
Honourable Madam Justice R.E. Nation

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[1] This is a decision on a *voir dire* to determine whether various statements made by a four-year-old child in 2002 are admissible as a principled exception to the hearsay rule in a trial to be held this year.

1. Introduction

[2] The accused is charged with the second-degree murder of Terri Ann Dauphinais (Terri Ann). The theory of the Crown is as follows. The accused and Terri Ann were in a domestic relationship, but estranged. The accused went to the former family home where Terri Ann and their three young children were living. In the early hours of April 29, 2002, the accused strangled Terri Ann. It is argued that the strangulation was intentional, and the accused intended to cause death, or intended to cause serious bodily harm likely to cause death and was reckless if death resulted.

[3] When Terri Ann's body was discovered on the main floor of the house that morning, the couple's three young children were locked in two bedrooms and a closet upstairs. One of the children, G, was four years old at the time.

[4] The accused was questioned in 2002, but no charges were laid at that time. As a result of further information, the police commenced an undercover operation in 2018, which resulted in this charge with a trial scheduled in March of this year.

2. The Statements

[5] Shortly after G was found locked in her room on the morning of April 29, she made a number of unprompted, spontaneous comments to Constable Barber. Constable Barber was changing diapers on the younger two children, and keeping them engaged upstairs, until the social services team could arrive to take the three children into care. The Constable spent about two hours upstairs with the children before removing them, so they would not see their mother's body which still lay at the bottom of the stairs. Constable Barber wrote down the following things as having been said to her by G. They were recorded in her notebook approximately two hours after they were said.

> "Daddy doesn't live here anymore."
>
> "Daddy came in and it was dark."
>
> "He had a blue flashlight."
>
> "He locked me in, and then took Mummy away."
>
> "Daddy was talking nasty and it made me scared."

[6] G was interviewed by two detectives and a social worker in the afternoon of April 29 and again on April 30, 2002. These videotaped interviews were approximately one hour and half an hour in length, respectively. During the interviews she made some statements which Crown counsel wish to be entered into the trial for the proof of their contents. As they are lengthy, I will set out the comments in general terms, using exact quotes for only some questions and responses.

[7] In the April 29 videotape, G stated words to the effect:

- I do not have a Mummy and a Daddy, my Mummy is lost: April 29 Transcript at 6;

- I couldn't sleep because I saw my Daddy, I thought he was a bad Dad: April 29 Transcript at 10–11;
- My Dad (the Cookie Monster) told me to get in my room, it was dark, I couldn't see, I heard my mother scream and cry: April 29 Transcript at 12;
- The Cookie Monster locked the door (to her bedroom): April 29 Transcript at 13;
- I thought my Dad was going to give me a spanking because he was bad: April 29 Transcript at 15;
- After my Dad locked the door, I hear my Momma crying and screaming and then my Mom and my Daddy were gone and it was all lost: April 29 Transcript at 18;
- My Dad looked like a monster, I knew it was my Dad because he looked like a bad guy and a monster: April 29 Transcript at 19.

[8] In the April 30 videotape, G stated words to the effect:

- The police officers are bumpy, Dad and Mom were downstairs, she was going to get dead: April 30 Transcript at 8;
- In response to "[w]here did you see the burnt flashlight?" she answered "[w]hen he was like a bad guy, he looked like a bad guy, look for the bad guy": April 30 Transcript at 9;
- Mom gave me hugs and kisses before she was supposed to be dead…Dad didn't burn me with a flashlight, I don't know what he did, it sounds like it burned: April 30 Transcript at 11.

[9] As recorded at page 23 of the April 30 Transcript, G also stated as follows:

Q: …when your Dad put you in your bedroom, where was your Mum?

A: He was going to kill her.

Q: And how do you know that?

A: I was looking and she, I don't know, just killed her with her clothes on.

Q: And how did that happen?

A: I don't know.

Q: Okay

A: Somebody beated her

Q: Did you see that?

A: No, I was in bed.

Q: Oh

A: It was dark.

[10] G is currently 23 years old and testified in the *voir dire*. She has no independent recollection of the events, and cannot recall her police interview. She cannot say if what she said in 2002 was true or not due to her complete lack of recall.

3. The Arguments of Each Party

[11] The Crown wishes to introduce the statements by G to Constable Barber and selected portions of the two video recorded statements at trial as principled exceptions to the hearsay rule to be used for the truth of their contents.

[12] The Crown argues that the child's evidence is hearsay, but it can be admitted if supported by indicia of necessity and reliability. The Crown argues that the admission of the evidence is necessary, as G does not recall any of the information she gave in the interview, so it is unavailable now, 18 years later. The Crown also argues that on the balance of probabilities it meets the test of threshold reliability and that the probative value of the evidence is greater than its prejudicial effect.

[13] The defence argues that the child's evidence should not be admitted as an exception to the hearsay rule at trial. The defence concedes that the test of necessity is met in this case, but argues that the evidence does not meet the test of threshold reliability. Also, it is argued that the prejudicial effect of the statements outweighs the probative value.

4. The Law

[14] Hearsay evidence is oral testimony or written evidence of a statement made out of court, when the statement is being offered as an assertion to show the truth of the matters asserted, and thus resting its value upon the credibility of the out of court asserter. The general rule is that all hearsay evidence is inadmissible. Hearsay evidence is excluded as the person making the statement is not available for cross-examination to test the accuracy of the statement. To be admissible in evidence, the hearsay statement must fall under an exception to the general exclusionary rule.

[15] The case of ***R v Khelawon***, 2006 SCC 57 [***Khelawon***] is instructive. The facts are somewhat parallel to these facts, in that an elderly person with some issues around his mental abilities gave a statement to the police and subsequently died. The issue was whether that statement was admissible for the truth of its contents, in a case where that statement was critical evidence for the Crown on that charge. The case points out that the hearsay rule is based on the inability to test the reliability of the speaker's statements. The rule is intended to enhance the accuracy of the court's truth finding role, it is not meant to impede its truth finding functions. There may be circumstances where a hearsay statement is admitted: (1) because of the way it came about, its contents are trustworthy; or (2) if the circumstances allow the ultimate trier of fact to sufficiently assess its worth: ***Khelawon*** at para 2. The Court was careful to point out that admissibility involves the judge in assessing the threshold reliability of the statement, the ultimate determination of any weight or worth given to the statements is up to the trier of fact. A trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of what is to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact.

[16] So, the court is involved in deciding, where cross-examination is not possible, if the evidence should nonetheless be admitted in its hearsay form in the interests of justice. The evidence is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. The circumstances may be such that the contents of the statement may be so reliable that cross-examination would add little to the process. In other cases, the circumstances will allow for sufficient testing of the evidence other than by cross-examination: ***Khelawon*** at para 49.

[17] The Court stressed that one has to consider what the dangers are from relying on the particular hearsay statements, and the available means of overcoming them. Are the facts surrounding the utterance of the statement sufficient circumstantial guarantees of trustworthiness to compensate for the dangers of admitting the evidence?

[18] ***R v Bradshaw***, 2017 SCC 35 discussed procedural reliability, looking to see if adequate precautions for taking the evidence were in place; for instance, video recording the statement, the presence of an oath, a warning about the consequences of lying: ***Khelawaon*** at para 28. Courts are to look at procedural substitutes that may be in place to address hearsay dangers that underlie the exclusionary rule.

[19] With regard to substantive reliability, ***Bradshaw*** states at paragraph 31:

> While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness,' does not require that reliability be established with absolute certainty" (***Smith*** at 930). Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (***Khelawon*** at para 49).

[20] In discussing substantive reliability in paragraph 56, the Court pointed out that there is no bright line rule restricting the type of corroborative evidence that a trial judge can rely on to determine substantive reliability. The trial judge must consider the specific hearsay dangers raised by the evidence, and corroborative evidence as a whole and the circumstances of the case, to determine whether the corroborative evidence (if any) can be relied on to establish the substantive reliability.

[21] A trial judge should firstly identify the material aspects of the hearsay statement that are tendered for their truth; secondly, identify the specific hearsay dangers raised by those aspects of the statement in the particular aspect of the case; thirdly, based on the circumstance and the dangers, to consider alternative, even speculative explanations for the statement; and fourth, to determine, whether, given the circumstances of the case, the evidence led at the *voir dire* rules out the alternative explanation such that the only remaining likely explanation for the statements is the declarant's truthfulness about or the accuracy of the material aspects of the statement: ***Bradshaw*** at para 57.

[22] Justice Moldaver expressed that threshold reliability can be met in one of three ways: (1) where the statement has sufficient features of substantive reliability, (2) where the statement has adequate features of procedural reliability, or (3) where the statement does not satisfy either of the first two ways, but incorporates features of both, which in combination, justify its admission ***Bradshaw*** at para 107.

[23] The case of ***R v Khan*** [1990] 2 SCR 531 [***Khan***] should be noted, as it involved a hearsay statement. The mother was reporting what her 3-and-a-half-year old child told her about events that might amount to a sexual assault. The Court stressed that reliability could be assessed on many considerations, including timing, demeanor, the personality, intelligence and understanding of the child, as well as any reason to fabricate. The Court in that case admitted the statement, finding the child had no reason to falsify her story, it emerged naturally and without prompting. Also, her statement was corroborated by real evidence, and the child could not be expected to know about sexual act she had described. The immediacy after the event and the confirmation of the semen stain were factors considered by the court, going to substantive reliability.

[24] ***R v U (FJ)*** [1995]3 SCR 764 [***U (FJ)***], dealt with a situation where a witness was recanting a statement. The Court was clear that the focus at the admissibility stage requires an assessment of the threshold reliability of the statement. The Court noted that the decision about admissibility is not a final determination about the ultimate reliability and credibility of the statement: ***U (FJ)*** at paras 50, 52). At this stage the trial judge need only be convinced that on the balance of probabilities the statement is likely to be reliable.

[25] It should be noted that section 715.1 of the *Criminal Code*, RSC 1985, c C-46 allows witnesses who were under the age of 18 at the time of the offence to adopt previous video recordings of their evidence while testifying, as long as the recording was made within a reasonable time of the alleged offence. This section was not argued in this case, due to G's inability remember the questioning or events, much less to adopt it. However, the section shows the increasing realization that child witnesses are different that adults, and the best evaluation of evidence may be done with a videotaped statement made close to the event. However, it is usually accompanied by a cross-examination of the witness. The section has been used to allow the witness to adopt previous video testimony even if they only remember the interview and their attempt to be honest and truthful; having an independent recollection of the subject matter discussed in the interview is not necessary: ***R v Meddoui*** (1990), 61 CCC (3d) 345 (Alta CA); ***R v F(CC)***, [1997] 3 SCR 1183.

[26] A final consideration is the probative value of the evidence versus its prejudicial effect. ***R v B(L)*** [1997] OJ No 3042 (CA) considered the weighing of the prejudicial value by looking at questions of how discreditable it was, the extent to which it may support an inference of guilt based solely on bad character, and the extent to which it may confuse issues and the accused's ability to respond to it: at para 34.

5. The Application of the Law to the Facts

5.1 Necessity

[27] The issue of necessity is the same for both the statements to the Constable and the two videotaped interviews. G is now 23 years old. She testified at the *voir dire*. She cannot recall her interaction with the police at the house, and has no current memory of the events of April 29 or 30, except possibly being taken out of the house with a blanket over her head. She does not recall talking to the police in the videotaped sessions. Watching the videos does nothing to refresh her memory. She has no memory of making the statements and cannot say if they are true or false.

[28] In this circumstance, the test of necessity is met. The witness has no current memory or independent memory of events, but clearly as a four-year-old did have some information to convey immediately after the event.

5.2 Threshold Reliability

[29] A child is a very different witness than an adult, and the "cross-examination" of a four-and-half-year-old raises in itself some unique questions. One has to consider the age of the child, that child's ability to recall and describe events and the child's ability to understand the need to tell the truth. These are questions that lead to a decision if the statements can be adequately tested, so a trial justice can make a decision as to their truth and any weight to be given to them. Issues that may be considered in considering threshold reliability are: timing of the statement; demeanor and personality of the child; intelligence of the child; absence of a motivation to lie; absence of bias; spontaneity of the responses; whether the questions are non-leading; absence of manipulation, suggestion or coaching; and consistency over time.

[30] Are the statements trustworthy in themselves? Do the circumstances allow the trier of fact to assess the worth of the statements? The danger to the hearsay evidence that the Crown wishes to enter in this case is that there is no clear explanation of events to know exactly what the child saw. There are contradictions on material issues in the videotaped statements, for instance who locked her in her room. There is also a confusion as a result of G's introduction of comments about material matters (e.g., other third parties at the home taking her mother away) that were not clarified by those questioning her. As cross-examination is not available, the evaluation of the child's memory, narration and perception, has to be based solely on what is said to the Constable or in the context of the videotaped interviews.

[31] Procedural reliability should be concerned with whether there is a satisfactory basis to rationally evaluate the statement. Substantive reliability is concerned with whether the circumstances, and any corroborative evidence provide a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness and accuracy: ***Bradshaw*** at para 40.

5.3 Statements to Constable Barber

5.3.1 Procedural Reliability

[32] These statements were close in time to the events, before G had interacted with any other adult than Constable Barber, and she had no knowledge that her mother was dead. There was no prompting to her utterances, and she was not pressed or questioned. This is the time the child would be most spontaneous in any statement she made pertinent to the investigation. There was no videotape to see the way the words were spoken, and no caution in terms of telling the truth. The statements were made orally to the police officer and recorded by police officer not contemporaneously but approximately 2 hours later. The police officer testified that she did not want to question or get information from the child, so merely acknowledged hearing the statement and then changed the subject. The rest of her interaction with the children was about toys, dresses, and play objects. Constable Barber was a trained professional. She had no information about the investigation, her task was to make sure the children were safe until taken by the risk response team.

5.3.2 Substantive Reliability

[33] There is corroboration that exists for some part of G's statements: her mother and father had separated, her father by his own admission was at the house the night before. She was locked in her room. There is no corroborative evidence of a flashlight, there is some evidence of a power problem in the house (darkness).

5.3.3 Probative Value Versus Prejudicial Effect

[34] To be admissible, the probative value of these declarations to Constable Barber must have a probative value that outweighs the prejudicial effect. G's observations have some probative value, some of her statements have a prejudicial effect, especially those that state that her father took Mummy away and that he was talking nasty.

5.3.4 Decision on the Statements to the Police officer

[35] There are concerns about the procedural reliability for these statements, as there is no discussion about telling the truth, no videotaping, and a later recording of those statement from memory of the police officer. On the other hand, the timing was close to the event, there would be no motivation to lie, these are spontaneous utterances, and there was no manipulation by the police officer, who was a trained professional.

[36] There is some reliability to the statements, as there is some corroborating evidence.

[37] These are statements that fall under the third category as expressed by Moldaver J in ***Bradshaw,*** where the statement has features of both procedural and substantive reliability, which alone may not be sufficient, but taken in combination justify the admission of the statements. A trial judge can take these utterances, and consider them, in the context of all the evidence and decide what, if any, weight should be given to them in the trial, in light of the statements made, the circumstances, the detail or lack thereof and the fact they are uttered by a four-year-old child.

5.4 Videotaped Statements

5.4.1 Procedural Reliability

[38] During the first video Detective Minnikhuis explained to G that she was in the police station. He explored with her that she went to church. He asked her questions about the color of her shoes to discuss the difference between a truth and a lie. He asked if something would happen if she lied to which she replied "I get spanked". He impressed on her that it was important to tell the truth. I am satisfied the proper steps were taken to explore her ability to describe matters and to understand the need to tell the truth. The interview was videotaped and viewed in court, there is the ability to observe her demeanor.

[39] There is no discussion of the importance to tell the truth at the second interview.

[40] The first interview was attended by two police officers, Detective (then Constable) Robertson as notetaker, Detective Munnikhuis as primary questioner; and a social worker, Ms. Ruby Leong -Mueller. All three of these adults testified in the *voir dire*. For several hours before the first interview, Ms. Leong-Mueller had been with the G feeding her breakfast and as became apparent in the video, she and G had previously discussed some of G's observations. G had been informed within a few hours before the first videotaped statement that her mother was dead, a difficult concept for a four-year-old. Although her role was to be a support person, half way through the interview Ms. Leong-Mueller did start to interject questions to the child, based on

reminding her of previous statements she had made (of which there is no record), and prompting her to give details to the Detectives of matters not previously or spontaneously raised by the child in the interview, for example the flashlight and that G had mentioned something in her mother's mouth. Defence counsel correctly raised concerns that leading questions were used at that point in the interview.

[41] Both Detectives Robertson and Munnikhuis in their evidence at the *voir dire* confirmed that open ended questions should be used with a child, and that new topics of information should not be suggested to them. Both in cross-examination confirmed that was not always done in the interview, leading questions were asked at times, especially questions by the social worker.

[42] In addition, there are things that G brought up that were not explored or followed up with by the Detectives; her description of her father being naked, comments she made about someone else kicking her into her room, and the whole confusion about something as simple as the size of the flashlight she reported seeing which she described at one point as smaller than a pen, and at another point as larger than a Kleenex box. Each Detective acknowledged that certain items the child brought up during the interview, for instance statements about the bad guy in the house that was not her mother or her father; other people being in the house; that her father was naked; and that a number of people came in a van with cars were not followed up with further questions, leaving a sense of confusion around these matters.

[43] Detective Robertson was in training at the time. Detective Munnikhuis was in the child abuse unit from October 2001, but did have any formal training in methods of interviewing children until October 9 and 10, 2003. Detective Munnikhuis was clear that he had not been involved taking of a statement in a homicide investigation before this, and he and Detective Robertson became involved only because it was a young child who needed to be interviewed.

[44] There is a higher level of procedural reliability for the first videotaped statement than the second, where no assurances were gathered about telling the truth. The leading questions are obvious on the videotape, as well as the instances where the adult questioners introduce new material to the child, which she has not raised in open-ended questioning. These are both concerns when a child is being interviewed.

5.4.2 Substantive Reliability

[45] The interviews illustrate the limitations on questioning a four-year-old child. She would often lapse into matters that concern a four-year-old; her toys; the game she wanted to play with her feet; how her mother did her hair, or her brother's hair. She started to laugh during the second interview. She was far more interested in colouring than answering questions in the second interview. Her attempts to draw or describe the torch that was "burnt" were not helpful.

[46] In addition, G was inconsistent with several matters that would be relevant evidence. These internal inconsistencies have to be viewed with the knowledge she is a young child, but they do raise concerns. To illustrate this concern, the following are examples of things she said:

- When asked where the last place was that she saw her father, she answered "I didn't see him";
- When asked how she got into her bedroom, she answered "[s]omebody kicked me in there";
- When asked who kicked her in her bedroom, she answered "[d]on't know";

- When the interviewer circled back and asked "[r]emember you said that somebody put you in your bedroom and locked the door" she answered "[n]obody did";
- When then asked who put her in her bedroom, she answered "Dad, he did not let me go potty."

5.4.3 Probative Value Versus Prejudicial Effect

[47] To be admissible, the probative value of these videotaped statements must have a probative value that outweighs the prejudicial effect. Without cross-examination to clarify pertinent matters, G's observations have limited probative value, and they have significant prejudicial effect, especially if the statements the Crown wants admitted for truth of their contents are taken at face value, as accurately reporting what occurred the evening/early morning of the offence.

5.4.4 Decision on the Videotaped Statements

[48] The evidence of this four-year-old was not always on point. She had a limited attention span and limited comprehension of the total situation. Any cross-examination of a child this young is not to aggressively confront the child, it would be to assess her powers of observation, and to try to clarify the timing of certain events. Also, cross-examination might explain the context of some of her confusing statements, which could be exculpatory to the accused (for example, some guy kicking her into her room and the bad guy in the house that was neither her mother or her father). The investigators asking her questions had somewhat of a tunnel vision in talking to her as they were only interested in what she was saying about her father. The lack of ability to cross-examine on this evidence, leaves one facing some irreconcilable contradictions and confusion about several of her statements. There are some procedural safeguards, but there is significant leading in the questioning, which taints those safeguards.

[49] Here, there is almost no corroboration on key aspects of the evidence which the Crown wishes to be introduced for the truth of its contents. There is nothing like the DNA corroboration available to the one-line statement by the child to her mother in the ***Khan*** case.

[50] On the one hand, one can say that a trial judge can look at this evidence and assess it for weight and truthfulness by looking at the videotape and evidence in totality. On the other hand, the background of this application is that hearsay evidence is inadmissible. One has to be alive to elevated concerns about admitting hearsay evidence as truth of its contents, when it is the evidence of any four-and-a-half-year-old, and there are significant issues with the procedural reliability factors, and internal inconsistencies that raise issues with the substantive reliability test.

[51] ***Khelawon*** was clear that courts must guard against the admission of hearsay evidence when the reliability of it is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the trier of fact. Trial fairness is also a consideration: ***Khelawon*** at para 3.

[52] When I consider the videotaped statements, although there is some procedural reliability for the first videotaped statement, there was no reference to truthfulness in the second. There is a concern about leading questions in the videotapes, which was acknowledged by the police officers involved when they reviewed the videotape in court (in fairness, 18 years later). In addition, the statements have significant parts that are confusing and unexplored.

[53] I am unable to say the videotaped statements which the Crown wishes admitted into the trial for the truth of their contents meet the threshold test, as the reliability is neither readily apparent from the trustworthiness of their contents, nor from the circumstances in which they were made. Without cross-examination, the statements which the Crown asks that I admit as truth of their contents are not capable of being meaningfully tested by the ultimate trier of fact.

6. Conclusion

[54] The statements made by G to Constable Barber are admissible in the trial, as a principled exception to the hearsay rule. The two videotapes are not admissible in evidence in the trial.

Heard on the 16th, 17th and the 26th day of November, 2020.
Dated at the City of Calgary, Alberta this 14th day of January, 2021.

R.E. Nation
J.C.Q.B.A.

Appearances:

Ken McCaffery, QC and Adam Drew
for the Crown

Balfour Der, QC and James F. McLeod
for the Accused