Citation: *R. v. Parker*, 2023 YKTC 56

Date: 20230710
Docket: 20-00869
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

PATRICK ALLAN PARKER

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Neil Thomson — Counsel for the Crown
Kevin W. MacGillivray — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] PHELPS T.C.J. (Oral): Mr. Patrick Parker is before the Court on a three-count Information that alleges offences contrary to ss. 151, 271, and 286.1 of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*") for offences against a young person.

[2] Crown has brought an application before the Court pursuant to s. 715.1 of the *Criminal Code*, which states:

> (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.

[3] The complainant at the time of the offence in question, which is alleged to have occurred in February 2020, was 15 years old. She gave a statement to the RCMP when she was 16 years old, some 13 months after the alleged incident.

[4] The complainant testified on the s. 715.1 *voir dire* application. She did so by closed circuit television ("CCTV'), during which time she adopted the video in her testimony and confirmed the truth of the contents.

[5] She also testified that her initial disclosure was to a social worker and, in turn, to the RCMP some or, as she referenced, "a couple of months" before the statement was provided. No details of the incident were provided to the social worker or the RCMP until the actual statement was taken other than the name of the accused and a general nature of the incident.

[6] The video was played in court. I note that the audio was low but can be heard clearly. The video is of relatively poor quality. For example, one would not be able to identify the complainant by viewing the video alone, given the lack of clarity of her facial features on the video recording.

[7] I note that, on review, the Court was able to see her actions clearly. She was fidgeting and wringing her hands. Her physical movements could be made out, such as the use of a tissue and her physical response to certain questions.

[8] The test to be applied to a s. 715.1 application is set out by the Prince Edward Island Court of Appeal in the case of *R. v. R.A.H.*, 2017 PECA 5, at paras. 23 to 25:

> 23 At the admissibility stage the court is considering threshold reliability, not ultimate reliability. Threshold reliability is concerned with whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. Ultimate reliability on the other hand is what the trier of fact then decides to do with the admitted hearsay evidence including what weight if any to attach to it (***R. v. Napope***, 2015 ABCA 27, at para.30). Both L'Heureux-Dubé J. in ***L. (D.O.)***, pp.462-463, and Cory J. in ***F. (C.C.)***, paras.51 and 54, state that a *voir dire* must be held in order to ensure that the statements conform to the rules of evidence and to confirm the requirements of s.715.1 are met. Failure to hold a *voir dire* is not necessarily fatal if no substantial wrong results therefrom (***F. (C.C.)***, para.54).
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> 24 The conditions which must be met before a video statement is admissible under s.715.1, in addition to the fact that the complainant/witness was under the age of 18 at the time of the offence, are:
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> 1) the video was made within a reasonable time after the alleged offence;
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> 2) the video describes the acts complained of; and
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> 3) the complainant adopts the contents of the video.
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> 25 The onus falls on the Crown to establish the conditions on a balance of probabilities (***R. v. S.G.***, 2007 CanLII 20779 (Ont.S.C.)).

[9] I note, with respect to these conditions, that the defence challenge is whether the video was taken within a reasonable time.

[10] The Court in *R.A.H.* continues at paras. 28 and 29:

> 28 Even if the conditions have been met, the trial judge still has a discretion to exclude the video if the trial judge is of the opinion that its admission would interfere with the proper administration of justice. L'Heureux-Dubé J. set out various factors to be considered in ***L. (D.O.)***, p.463, in exercising one's discretion to exclude:
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> a) the form of questions used by any other person appearing in the videotaped statement;
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> b) any interest of anyone participating in the making of the statement;
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> c) the quality of the video and audio reproduction;
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> d) the presence or absence of inadmissible evidence in the statement;
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> e) the ability to eliminate inappropriate material by editing the tape;
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> f) whether other out-of-court statements by the complainant have been entered;
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> g) whether any visual information in the statement might tend to prejudice the accused, for example, unrelated injuries visible on the victim;
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> h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;
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> i) whether the trial is one by judge alone or by jury; and
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> 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.
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> 29 If the trial judge determines that the 715.1 conditions are met and the court is not of the opinion that its admission will

> interfere with the proper administration of justice, then the video is admitted into evidence. It, together with whatever *viva voce* evidence the child gives, becomes the child's whole evidence-in-chief. The child may then be cross-examined in the trial proper.

[11] As noted, the defence argued both that the statement was not taken in a reasonable time and that the factors just outlined from *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, weigh in favour of its exclusion.

[12] I will address first the issue of admissibility and reasonable time. I am going to reference the *L.(D.O.)* decision of the Supreme Court of Canada, at paras. 64 and 75, where it states:

> 64 Section 715.1, in my view, has been carefully crafted to leave room for the application of this principle, in allowing for judicial discretion to reject evidence where its probative value is outweighed by its prejudicial effect. All relevant evidence must be admissible unless it is excluded for compelling policy reasons. La Forest J. expressed the view in Corbett, supra, at p. 745, that:
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> > ... "fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.
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> ...
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> 75 Beyond the facts of this case, however, what should the determination of the reasonableness of the length of delay take into consideration? In reaching a conclusion as to the reasonableness of time, courts must be mindful of the fact that children, for a number of reasons, are often apt to delay disclosure. As McLachlin J. wrote in *R. v. W. (R.)*, *supra*, at p. 136:

> ...victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed.

[13] The Prince Edward Island Court of Appeal, in *R.A.H.,* goes on to discuss a reasonable time as well at paras. 33 and 34:

> 33 What is a reasonable time after the alleged offence is fact-driven. Appeal courts should not lightly interfere with findings of fact unless the appeal court concludes that the trial judge made an error either by failing to recognize or misinterpreting an important and relevant piece of evidence or by reaching an erroneous conclusion (***L. (D.O.)***, p.467).
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> 34 In ***L. (D.O.)*** there was a five-month delay between the alleged offence and the video statement. The Supreme Court of Canada found this to be reasonable. The Supreme Court of Canada noted in that case that there is a tendency of children to delay disclosure (p.468). That observation would, in my view, support a finding that a longer period of time would be reasonable. On the other hand, the Supreme Court of Canada also noted that children's memories may fade faster than those of adults (p.468). This factor would, in my view, tend to support a shorter period of time as being reasonable. There is also a suggestion from Paciocco and Stuesser, previously quoted at para.18 herein, that a shorter period of time between the alleged offence and the statement serves to ensure that the statement is free from subsequent influence or suggestion.

[14] The Court then cites a number of cases and a range of delays that were found to be reasonable:

- *R. v. S.M.*, 1995 ABCA 198, from the Alberta Court of Appeal: 17 months of delay was found to be reasonable;

- *R. v. T.J.A.*, 2016 OJ No. 2876 (Ont. C.J.): a delay of 20 months after the alleged offence was found not to be reasonable, particularly in that case

because there had been earlier disclosure to the mother of the incident that was not acted upon;

- *R. v. S. (P.)*, 2000 CanLII 5706 (Ont. C.A.): where it was found by the Ontario Court of Appeal that approximately two years was reasonable in the circumstances, but was a "border-line case";

  R. v. S.G., 2007 CanLII 20779 (Ont. S.C.): wherein a delay of three years was found to be reasonable; and

- *R. v. A.G.B. (No.3)*, 2011 ABPC 260, from the Alberta Provincial Court: where a statement taken after four years was found to be inadmissible.

[15] The defendant argues that when initially contacted by the police, which I note was approximately 11 months after the alleged incident, the state, being the RCMP, should have acted faster. However, I note that the age of the complainant being 15 years old at the time of the incident and 16 years old at the time of the subsequent statement, at a time when she was living quasi-independently and without family, and at a time when she was addicted to crack cocaine. Thus, coupled with her testimony where she candidly explained her attempt to first forget the incident in question and then the later realization that she was unable to do so, which caused her to come forward, all militate in favour of finding that the time for the disclosure was reasonable in the circumstances.

[16] The defence argument with respect to the factors set out in *L. (D.O.)* begins with the form of the questions used by the investigating officer, suggesting that there were

numerous leading questions that should give pause to the Court with respect to the reliability of the statement. I note from observation that at the outset of the statement, the complainant was encouraged to and, in fact, did give a full accounting of the incident in question without any interruption by the RCMP officer. There were follow-up questions that may be considered as leading in nature, but they were to clarify the events that were outlined by the complainant without prodding.

[17] There were concerns raised in *R.A.H.* at para. 28 item (c), of the quality of the video and audio reproduction. I have addressed that to some extent, and certainly, the Court is concerned that the government sees fit to use substandard video equipment for such important investigations. However, as indicated, I feel that the Court can observe enough on the video with respect to demeanour without the actual facial expressions. This is punctuated by the fact that the audio is clear. Overall, I would suggest that it weighs in favour of admission.

[18] The defence highlighted under (h) that other methods to facilitate the giving of evidence were made on behalf of the complainant, including CCTV and a support person in the room, which would suggest to weigh against the admission of the video, and (j), given the amount of time that has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.

[19] Particularly with respect to (j), I have some issue with respect to the application and this test, given the nature of the s. 715.1 application and the purpose of that section. I would suggest it would weigh in favour of the admission of the video should the witness not be able to remember, but certainly, I do not take it as far as the defence

suggests that there must be evidence that the complainant would not be able to have the emotional capacity to testify at trial on the nature of the evidence within the video. That would, in my opinion, be contrary to the purpose of s. 715.1.

[20] In the circumstances of the evidence before me, I find that the prejudice to Mr. Parker does not outweigh the probative value in this case, and I will admit the video pursuant to s. 715.1 of the *Criminal Code*.

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PHELPS T.C.J.