

Citation: *R. v. P.G.*, 2016 YKTC 73

Date: 20160914
Docket: 15-00289A
15-00289B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

P.G.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Leo Lane
J. Robert Dick

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM J. (Oral): It is alleged that P.G. sexually abused three children under the age of 14 resulting in six *Criminal Code* offences, namely, sexual assault and sexual interference, with respect to each of the three complainants. P.G. denies these allegations.

[2] Three witnesses under the age of 14 testified as part of the Crown's case. In each case, the witness had previously provided a statement to police, which had been video recorded. The video recording of the witness' statement was played in court during the respective testimony of the child witness. In each case the child, while

testifying, adopted the contents of the video recording. The recordings became evidence in the proceedings pursuant to s. 715.1 of the *Criminal Code*.

Relevant Facts

S.V.

[3] S.V. is 12 years of age. She was visiting her friend D.P. on August 12, 2015.

S.V. was to stay at her friend's house for a sleepover. She was 11 years of age at the time. S.V., D.P., and D.P.'s younger brother, M.P.B., were to sleep in the same bedroom.

[4] In the early morning hours, P.G. came to the bedroom to have the three children settle down and go to sleep. Ultimately, he told the children a bedtime story. The three children were in the same bed.

[5] S.V. explained that she later awoke to P.G. touching her inappropriately with his hands. He touched her on her breasts, stomach, and vaginal area. She explained that he touched her breasts and vaginal area over her clothing but that he touched her directly on the belly, as this area was exposed. The touching lasted for about 30 seconds, during which time she remained silent. When she then noted him rubbing D.P.'s buttocks, she told him to get out of the room. P.G. replied that he was only trying to prevent M.P.B. from falling out of bed. S.V. then woke up D.P. and disclosed the incident to D.P.'s father.

D.P.

[6] D.P. was 11 years of age at the time she made the allegations to the police. She indicated that her friend S.V. was at her house. D.P. said she was feeling sad and disclosed to S.V. that P.G., her step-grandfather, had been touching her.

[7] D.P. indicated that she had spent time with P.G. over the course of a number of years and that the inappropriate touching started when she was as young as six. He would touch her breasts, thighs, and vaginal area. She had been thinking of telling her parents prior to S.V.'s visit. She had learned in school that it was wrong for people to touch you in that way. When S.V. explained to her what had happened after the incident in the bedroom, D.P. felt scared because she knew she would finally have to tell her parents what P.G. had been doing to her.

L.B.

[8] L.B. is the father of D.P. and M.P.B. He had fallen asleep in the living room area on the first floor of his home when S.V. came downstairs to awake him. She was very distraught, crying and shaking, when she disclosed to him that P.G. had inappropriately touched her upstairs. L.B. had known S.V. for many years and he testified that he had never seen her before in this type of emotional state.

[9] D.P. arrived downstairs shortly thereafter. She appeared calm and initially did not make any allegations against P.G. She appeared reluctant to say anything but did so upon S.V.'s urging.

[10] L.B. described P.G. arriving within a few minutes. P.G. pleaded with the girls, saying, "Please, please, I was moving M.P.B. up in the bed." He later stated, "Please, I'm sorry. Don't do this." P.G. was crying and upset. L.B. had never seen him like this before. L.B. described him as being "submissive" as opposed to angry.

M.P.B.

[11] On February 1, 2016, M.P.B. provided a statement to police, indicating that he had been inappropriately touched on one occasion by his step-grandfather, P.G. M.P.B. is eight years of age. He indicated that P.G. touched his penis on one occasion when he was going to sleep. He does not recall when it was, but says it happened in the bedroom of his sister, D.P., when he was half asleep. D.P. was in the room asleep at the time of the incident.

P.G.

[12] P.G. testified that he never inappropriately touched any of the three complainants. He described his relationship with his stepson prior to the allegations. He indicated that he had not been close to L.B. for a number of years after L.B. had left home, however, that changed around 2012. P.G. started visiting L.B.'s residence, came to know L.B.'s three children, and babysat for L.B. and his wife.

[13] P.G. described his recollection of August 12, 2015, and the early morning hours of August 13. He noted that the children, S.V., D.P., and M.P.B., were to sleep in the same bedroom on the second floor. S.V., D.P., and M.P.B. were still awake into the early morning hours. P.G. checked on them. After telling them to settle down and go to

sleep, S.V. asked that he tell them a bedtime story. He agreed to do so but said it would be of short duration.

[14] When he finished the first story, M.P.B. asked that he tell them another story. He again agreed to do so. P.G. was seated on the floor with his back to the bed. He heard movement behind him, at which time M.P.B. accidentally moved his leg and hit P.G. in the head. P.G. was upset by this. He stood up and attempted to move M.P.B. In doing so, he swatted or pushed S.V.'s leg so that he could move M.P.B. He told the children that they had to settle down and sleep otherwise he would go downstairs and tell L.B. about what was happening.

[15] At this point, S.V. said that if he did that, she would tell L.B. that P.G. had touched her. P.G. thought she was referring to him having swatted her leg when he stood up to reposition M.P.B. in the bed. He was upset with her and swore at her.

[16] When S.V. subsequently came downstairs and complained that he had inappropriately touched her, P.G. said he became very upset. He attempted to explain to L.B. what had actually occurred but L.B. would not listen. He remembers saying, "Please, let me speak." L.B. told him to leave the house. P.G. did so and then drove home.

[17] The police arrested P.G. the next morning. Late that afternoon, P.G. provided a warned statement. He indicated that he was very drunk when he was arrested and that he was still drunk when he provided the statement some six hours later. He indicated that in addition to drinking whiskey, he was taking painkillers for a sore leg.

P.A.G.

[18] P.A.G. is the adult son of P.G. He was in the living room area with L.B. on the evening of August 12, 2015, and into the early morning hours. He recalls the three children, D.P., M.P.B., and S.V., being up very late. They were making a lot of noise upstairs. At one point, his father went upstairs to check on them. Approximately 20 minutes later, his father came back, indicating that the children were not sleeping. He then observed S.V. come downstairs to make the allegations of P.G. having touched her inappropriately. He became upset and left the home.

[19] P.A.G. and his sister, M.G.B, provided character evidence for P.G. Both indicated that he had never acted inappropriately towards them and that he had been a good father to them.

Analysis

[20] This is not a credibility contest between the Crown and defence witnesses. The burden is, of course, on the Crown to prove the charges beyond a reasonable doubt. This burden never shifts to the defence.

[21] A number of young witnesses have testified in this matter. When assessing the evidence of younger witnesses with respect to credibility, I am not to hold them to adult standards. As the Supreme Court of Canada stated in *R. v. W. (R.)*, [1992] 2 S.C.R.

122:

... Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be

assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. ...

[22] This does not lead to a different standard of proof in criminal cases involving a child witness. It does mean that in assessing a child's evidence, I should be cognizant of the child's mental development in taking a common-sense approach to his or her testimony, *R. v. B.(G.)*, [1990] 2 S.C.R. 30. I should assess a child's evidence in the context of his or her age at the time of the events and at the time of testifying.

[23] This case requires an analysis of the principles set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[24] I have serious concerns regarding P.G.'s credibility. Although it is not unusual for there to be inconsistencies in a witness' testimony, a number of inconsistencies in P.G.'s testimony are significant.

[25] As noted, P.G. testified that all the children were awake when he told them the bedtime stories. As a result of the children not doing as he had requested, he indicated he would advise L.B. as to the children's unruly behaviour. S.V. purportedly replied that if he did so, she would allege to L.B. that P.G. had touched her. He was angry with her and responded with profanity. However when interviewed by police, P.G. said that when he had moved M.P.B. in the bed, S.V. woke up and stated, "What the fuck are you doing?"

[26] This is a significant inconsistency with respect to how the events unfolded in the bedroom. I note that the version that P.G. gave to police is more consistent with what S.V. stated, in the sense that she awoke to something that prompted her to yell at him.

[27] P.G. also detailed varying descriptions of where the children were located in the bed. Also, I note that his description to police was consistent with that of S.V. and D.P. His description at trial was different.

[28] P.G.'s explanation for such inaccurate information given to police is that he was extremely impaired at the time of his statement, as a result of having taken alcohol and painkillers prior to his arrest at 9:44 a.m.

[29] P.G. did advise police in his statement, which commenced at 4:07 p.m., that he had consumed four to five shooters of whiskey prior to his arrest. At trial, he testified to having consumed at least 20 ounces of whiskey before his morning arrest in addition to taking painkillers for a sore leg.

[30] The videotape of P.G.'s statement to the police was used by the Crown for the purposes of cross-examination. Having viewed portions of the video during his cross-examination and having observed P.G. testifying in court, it is my view that he was not impaired when he gave his statement to the police. Contrary to his testimony, his mannerisms, speech pattern, lucid nature, and his responsiveness to questions at the time of the statement are consistent with what I observed during his testimony at trial. I can only conclude that P.G. was being dishonest about his state of sobriety at the time of the police interview to attempt to explain away answers that he now perceives as contrary to his interest.

[31] P.G. testified that he tickled D.P. and M.P.B. from time to time until 2014, when he ended the tickling, because he considered each to be too old. He stated that he "refused M.P.B." because of his age. When confronted with the fact that he had been

tickling D.P. at age 9 yet he stopped tickling M.P.B. at age 7 due to his age, P.G. responded that M.P.B. was precocious and maturing. He also said that he did not tickle the youngest child, who is five, because she did not ask for it. His responses to this simple question struck me as odd and contrived.

[32] Therefore, I find P.G.'s evidence to be incredible and I reject it.

[33] I have also considered the other evidence led by the defence. The evidence of P.G.'s good character was not with respect to his general reputation in the community, but dealt with his good parenting and his appropriate conduct in raising his now adult children.

[34] It should be remembered that courts have held that good character evidence is of diminished probative value in cases of sexual misconduct. (*R. v. Profit*, (1992), 11 O.R. (3d) 98 (CA), dissenting reasons of Griffiths J. aff'd [1993] 3 S.C.R. 637)

[35] I also note that, in the matter before me, P.G. was in a position of trust to the complainants. As has been done by other courts in such circumstances, I give this character evidence little weight (*Profit*).

[36] S.V. displayed a very detailed recollection of what occurred on August 12 and 13, 2015. S.V. remembered a conversation that occurred on the afternoon of August 12, where D.P. and P.G. were present. S.V. could not understand why D.P. was upset in P.G.'s presence. D.P. disclosed to her that P.G. had been inappropriately touching her.

[37] P.G. said that when D.P. was younger, she was touching herself and he had found this cute. In his evidence, P.G. confirmed that he had teased D.P. about masturbating and this was a conversation in which S.V. was present.

[38] S.V. described the sensations she felt when P.G. sexually touched her. She stated that the touching gave her butterflies and made her feel ill. Her description was compelling and not challenged in any significant manner.

[39] She was also measured in the manner in which she described P.G. For example, she explained that P.G. had seemed "like a really nice guy".

[40] I accept the evidence of S.V.

[41] D.P. indicated that she had felt upset by what P.G. was doing to her but she did not want to talk about it with others. When S.V. told her what P.G. had done to her in bed, D.P. indicated she felt angry and scared. She explained that she felt scared because she knew, at that moment, that she would finally have to tell her father what P.G. had been doing to her. This explanation makes logical sense.

[42] She also indicated that prior to August 13, she had been thinking about his abuse of her. She had learned in school that people are not to touch children in that manner.

[43] There was one discrepancy between D.P.'s statement to police and her evidence at trial which has to be considered. When she spoke to police, she indicated that all the touching had taken place over her clothing. At trial, she stated that she wished to add to her statement that P.G. sometimes touched her underneath her clothing.

[44] I note that in the statement to police, D.P. appeared shy and reticent. Some of her answers were made by means of nodding her head to indicate “yes” and shaking her head back and forth to indicate “no”. The police officer who interviewed her described her as appearing afraid and very timid. Her father, whom she was worried about telling, was also present. At trial, she appeared much more at ease when discussing the matter.

[45] Although the discrepancy is significant, I am of the view that with the passage of time she became prepared to outline fully the extent of the sexual touching.

[46] I have also considered D.P.'s evidence with respect to P.G. teasing her about matters of sexual nature. As indicated, P.G. confirmed he had done so. The defence's suggestion that she made up these allegations in response to his teasing is, in my view, without any merit.

[47] Balancing all that I heard and observed, I find D.P. to be a credible witness.

[48] M.P.B. indicated that P.G. touched him inappropriately on one occasion. As indicated, he did not remember when this had occurred. He said that he was in bed in his sister's room and half-asleep at the time. He did not describe the duration of the touching. He believed that this occurred at the family's house in Copper Ridge, which would have been prior to June 2015. He does not recall seeing his grandfather at their new house, although there is evidence that he did.

[49] In my view, the evidence of M.P.B. is insufficient to prove the charges, in relation to him, beyond a reasonable doubt.

[50] The Crown has asked me to consider the evidence of each child as evidence of similar acts to support the credibility of each child. It is well-known that similar fact evidence is, as a rule, inadmissible. The evidence sought to be entered may, however, constitute an exception if the probative value outweighs its prejudicial effect.

(see *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717)

[51] Based on my findings of credibility with respect to D.P. and S.V., in my view, I need not resort to similar fact evidence.

[52] Regarding the application to use the evidence of D.P. and S.V. to bolster the credibility of M.P.B., although I am mindful that the proposed evidence need not be strikingly similar to the offence alleged, I find that, on the facts of this case, that the prejudicial effect would outweigh the probative value.

[53] Regarding the allegations involving S.V. and D.P., based on all the evidence I accept, the Crown has proved its case beyond a reasonable doubt and I convict P.G. of the four counts for which he has been charged in relation to these two girls.

[54] I acquit him of the two charges involving M.P.B.

[55] The accused is guilty, therefore, of counts 1, 2, 3, and 4, and not guilty of counts 5 and 6 of the Information.

[56] Counts 2 and 4 are conditionally stayed pursuant to the *Kienapple* principle.