

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. A.W.H., 2016 NSPC 69

Date: November 17, 2016

Docket: 8015595, 8015596

Registry: Halifax

Between:

Her Majesty the Queen

v.

A. W. H.

DECISION ON THE SECTION 715.1 VOIR DIRE

Restriction on publication: Section 486.4 of the <i>Criminal Code</i>
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Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Anne S. Derrick

Heard: November 17, 2016

Decision: November 17, 2016

Charges: Sections 151, 271 of the *Criminal Code*

Counsel: Rick Woodburn, for the Crown

Brad Sarson, for A. H.

By the Court:*Introduction*

[1] G.M., the complainant in this case, gave a video-taped statement to police on February 12, 2016, in which she alleged that Mr. H. had touched her sexually. The Crown is seeking to have this statement admitted into evidence under section 715.1 of the *Criminal Code* against Mr. H. on charges of sexual assault and sexual interference.¹

[2] Mr. H. acknowledges that three of the four statutory requirements under section 715.1 have been met – G.M. was under 18 at the time of the alleged offence – she was almost 4 – and, while testifying on the *voir dire*, she adopted the contents of the video recording, in which she had described the acts complained of. However, Mr. H. submits that the Crown’s application to have the February 2016 video admitted into evidence should fail because the video recording was not made, as admissibility under section 715.1 requires, “within a reasonable time after the alleged offence.”

Determining the Time of “the alleged offence”

[3] The first issue to be addressed is when the alleged offence can be said to have occurred for the purposes of determining when the clock started to run on “reasonable time.”

[4] I find the answer in the evidence of M.M., G.M.’s mother who testified on the *voir dire*. M.M. testified to having informed G.M. in October 2014 that Mr. H., whom she had been dating for about a year, would be driving G.M. to preschool the next day. G.M. started crying and objecting and told her mother she did not want Mr. H. touching her “anymore” and did not want him “tickling” her.

[5] I understand from the evidence that Mr. H. had driven G.M. to preschool previously. It is reasonable to infer from M.M.’s evidence of G.M.’s negative reaction to the news he was going to do so the next day that whatever happened to cause G.M.’s reaction had occurred recently. Therefore I am taking September or October 2014 as the time when the alleged offence occurred. As I noted, the video recording in issue under section 715.1 has to have been “made within a reasonable time after the alleged offence.”

[6] This means that the Crown has to establish on a balance of probabilities that the period between October 2014 and February 2016 – 16 months – was a reasonable time, on the facts of this case, in which to obtain the video recording of G.M.’s disclosure of sexual touching by Mr. H..

Section 715.1 and the “Within a Reasonable Time” Requirement

[7] Section 715.1 is a statutory exception to the prohibition against hearsay evidence. Its constitutionality has been upheld. The goals of section 715.1 have been described as “multifaceted”. The section is aimed at preserving an early account of the child’s complaint and providing a procedure for the introduction of the child’s story into evidence at trial. It is also “designed to diminish the stress and trauma suffered by child complainants as a byproduct of their role in the criminal justice system.” (*R. v. L.(D.O.)*, [1993] S.C.J. No. 72, paragraphs 34 and 35)

[8] The section 715.1 criteria, including the requirement for a video recording within a reasonable time, serve the need to ensure such evidence is reliable. Hearsay evidence is presumptively inadmissible because it is considered inherently unreliable. Satisfaction of the section 715.1 requirements addresses reliability concerns for the purposes of the admissibility of the evidence. The matter of weight has to be addressed independently in a trial, not a *voir dire*, analysis.

[9] Mr. H. submits that 16 months falls well outside what can be considered as “a reasonable time” under section 715.1 particularly in a case where the complainant was not quite 4 years old at the time of the alleged offence. It is Mr. H.’s submission that 16 months between the time the alleged offence is said to have occurred and the video recording of evidence about those allegations is simply too long a time for such a young complainant as G.M. He says 16 months in this case is an unreasonable amount of time and undercuts the reliability rationale for a “reasonable time” requirement.

[10] Mr. Woodburn points to the case law that has discussed how children tend to disclose, that is, in a delayed and often, incremental fashion. In *L.(D.O.)*, the Supreme Court of Canada held that: “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.” (*paragraph 77*)

[11] As *L.(D.O.)* also says, “What is or is not “reasonable” depends entirely on the circumstances of the case.” (*paragraph 75*) What, then, are the circumstances of this case, in addition to G.M.’s age at the time of the alleged offence?

The Circumstances of this Case

[12] I have described G.M.’s disclosure to her mother in October 2014 about not wanting Mr. H. to touch her anymore. M.M. broke off her relationship with Mr. H. as a result of what G.M. said to her. M.M. testified to what she did between October 2014 and February 2016 in relation to G.M.

[13] I will indicate here that I found M.M. to be a credible witness in relation to the evidence she gave in the *voir dire*. I accept her testimony about what she did and didn’t do.

[14] M.M. testified that she did not question G.M. about Mr. H.. She contacted the police to find out how she could go about determining what had happened to G.M. As a result, G.M. was interviewed in February 2015. M.M. testified that she made no suggestions to G.M. before the February 2015 video.

[15] In the February 2015 video-taped interview, G.M. made no disclosures of any criminal wrong-doing by Mr. H.. She also said she had secrets with Mr. H. which she did not reveal. She offered that Mr. H. was “not nice” and didn’t “tickle right.” After these statements, at approximately 14:38 on the video, G.M. said spontaneously; “I’m scared.” When asked where Mr. H. “didn’t tickle right”, G.M. indicated her neck, back, front and sides. After being asked if she knew what her vagina was, which she said she did, G.M. denied that he tickled her vagina.

[16] G.M. was also asked in the February 2015 video if Mr. H. was nice and if she felt safe and comfortable around him and she said he was and she did. She told the interviewers she was fine with him not coming around anymore.

[17] In July 2015, M.M. started taking G.M. to a counsellor. She thought it would be beneficial for G.M. to talk to a professional and told G.M. it could be good to talk to someone who was not a parent to get things off her chest. For the first six months, G.M. went once a week to therapy. By then Mr. H. was in custody charged with breaching his Long Term Supervision Order. M.M. testified that G.M. was scared and so she reassured her at the counselling appointments

when Mr. H.'s name would come up that Mr. H., "the bad man", was in jail and couldn't hurt her and she was safe.

[18] M.M. did not discuss with G.M. the concerns she had in her mind and said nothing more to her than the reassurance that she would not let anyone hurt her.

[19] In February 2016, just before an appointment with the therapist, G.M. told her grandmother, M.M.'s mother, that she had a secret with Mr. H. that she couldn't tell the counsellor. M.M. passed this information on to the therapist without inquiring of G.M. about the secret. G.M. had not told M.M. about a secret. M.M. testified that she left it to the therapist to "figure it out."

[20] It was a few days later when G.M. told M.M. that she could not tell her the secret because "you don't tell secrets." M.M. says it was probably a week after that, still in February, when G.M. talked to her which led her to call the police. The police suggested a re-interview. The re-interview was the February 12, 2016 interview in which G.M. made a disclosure of sexual touching by Mr. H..

[21] I accept M.M.'s evidence that she did not ask G.M. questions about what happened to her. She says she followed the direction of the police who had told her not to. M.M. says she did not want to "put ideas in her head...I didn't want to make her any more uncomfortable than she already was."

Mr. H.'s Submissions on the "Within a Reasonable Time" Issue

[22] Mr. H. has raised two central points in relation to the "reasonable time" issue. He says that with such a young complainant and the faster degradation of memory in young children, the "reasonable time" requirements in section 715.1 have to be shorter than the 16 months in this case. He also says that the longer time between the alleged offence and the video recording affords more opportunity for reliability-undermining influences on the child. He notes that G.M.'s attitudes about him had hardened considerably by the time of the February 2016 interview. In February 2015 she was fine with him no longer being part of her life; in February 2016 she wanted to stomp his face and poke him in the eye. Mr. H. says as she had had no contact with him between these interviews, "something had changed." He submits G.M. became unduly influenced by being reassured that he was a bad man who was in jail.

Analysis

[23] I have looked very carefully at the context and circumstances of this case. G.M.'s age makes it imperative to consider the "within a reasonable time" issue very thoughtfully. Sixteen months is a long time. Is it an unreasonably long time?

[24] On the facts of this case, notwithstanding G.M.'s very young age, I find it is not. I find this to have been a case where a very young child needed considerable time to unfold her story. She first reacted to her mother telling her Mr. H. would be driving her to preschool. At the February 2015 interview she talks about a secret she refuses to disclose. She says spontaneously, without prompting, that she is scared. The interview produces nothing. She goes to therapy. She is reassured in therapy when she says she is scared that she is safe. In February 2016 she tells her grandmother she has a secret she can't tell the therapist. She tells her mother "you don't tell secrets." She is re-interviewed. She makes the disclosure of sexual touching.

[25] Several aspects to the evidence have been particularly influential in my decision that the Crown's section 715.1 application should succeed. (1) There are recurrent themes expressed by G.M. of being scared and having a secret with Mr. H.. (2) G.M. opened up in a logically progressive fashion. (3) She was in therapy for 8 months before she said to her mother she had a secret with Mr. H. she could not reveal. (4) There is no evidence that during the overall 16 month period M.M. or anyone else did or said anything that would have unduly influenced G.M. to make the disclosure she made in the February 2016 interview.

[26] There are certainly circumstances where 16 months would fall outside of the "within a reasonable time" requirement of section 715.1. Even given how young G.M. was during this time, I am satisfied on a balance of probabilities that the circumstances of this case support a finding that the February 2016 video interview was recorded "within a reasonable time" in accordance with the reliability-safeguarding requirements of section 715.1.

Conclusion

[27] The Crown's application to have G.M.'s February 12, 2016 videotaped interview is allowed and the videotape will be admitted into evidence.

¹ The Crown made the section 715.1 application after the complainant, G.M., now six years old and called as the first trial witness, would not describe her allegations against the accused. The video of her February 12, 2016 interview was played during the *voir dire*. G.M. identified herself in it and said she had been telling the truth in the interview. The Defence acknowledged that this satisfied three of the section 715.1 criteria: that the witness is under 18, that the video recording contains her description of the "acts complained of" and that she adopted the contents of the recording.