CR 02678

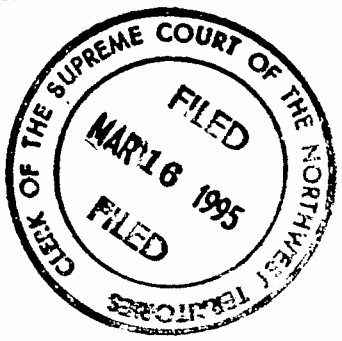
IN THE SUPREME COURT

OF THE NORTHWEST TERRITORIES

HER MAJESTY THE QUEEN

- and -

D P



Ruling on the Voir Dire given by The Honourable Mr. Justice J.E. Richard, at Rankin Inlet, Northwest Territories, on the 16th day of February A.D. 1995.

APPEARANCES:

L. Rose, Esq.,	Appeared for the Crown
D. Blais, Esq.,	Appeared for the Defence
Cheryl Mendryk, Ms.,	Court Reporter

(Charged under Section 271 of the Criminal Code)

RICHARD, J. (orally): Before I give my ruling on the voir dire, I'm going to make an order pursuant to Section 486(3) of the Criminal Code prohibiting the publication or broadcasting in any way of the identity of the complainant in this case or any information that could disclose her identity.

Also, I will state for the record that pursuant to Section 648 of the Criminal Code, it is a criminal offence for anyone to publish or broadcast any information regarding any portion of this trial that is held in the absence of the jury until the trial is over.

In this case of a charge of sexual assault being tried by a jury, the Crown seeks a ruling on the admissibility of certain hearsay evidence.

Hearsay is a statement made to a witness by a person who is not himself or herself called as a witness, and is a statement being put forward to establish the truth of what is contained in that statement.

The hearsay being put forward in this case is the statement made by the then 4-year-old complainant, E A , to her sister and to her mother to the effect that the accused, D P , touched her in a sexual manner.

Hearsay is usually not admissible, especially

in a criminal case when the hearsay is being put forward by the Crown against an accused person. One reason that it is inadmissible is because the person making the statement is not before the Court so that the jury can observe the person's demeanor in telling what happened and can assess the person's credibility.

Another reason is that the accused person or rather his counsel is unable to cross-examine the maker of the statement to determine possible errors, omissions, confusions, et cetera.

However, in recent years, particularly since the 1990 decision of the Supreme Court of Canada in Khan, the courts have been using a new exception to the rule against hearsay, an exception in the nature of a residual exception where the case does not come within one of the classic categories of exceptions to the hearsay rule, but in which the circumstances of the out-of-court statement meet the requirements of necessity and reliability.

In the present case, counsel are agreed that the necessity requirement is satisfied, as counsel agree that the child, E , now 5 years old, is incompetent to give evidence. I did not examine E on the voir dire; however, I accept counsel's joint submission on the necessity

criterion.

The main issue on the voir dire is whether the requirement of reliability has been shown on a balance of probabilities. Reliability or a circumstantial guarantee of trustworthiness is said to exist when the circumstances of the out-of-court statement are such as to negate the possibility that the child making the statement was untruthful or mistaken.

It is in this context that I examine the evidence of the two witnesses on the voir dire, E 's 12-year-old sister, I A , and her mother, R A .

I gave evidence under oath after I conducted the inquiry that is mandated by Section 16 of the Evidence Act. The evidence indicates that there was an incident which occurred at the A home here in Rankin Inlet on a certain date in March 1994 involving injury or pain to the genital area of young E .

The evidence indicates that the accused, D P , who is the 25-year-old cousin of R A , was visiting in the A home for a short time during the afternoon of that day. Apparently he was a frequent visitor in that home.

Mrs. A was absent from the home for

one hour or so in the afternoon, visiting another home from about 3:00 to 4:00. There were a number of people present in the A home that afternoon and evening, both visitors and the A children.

It was while Mrs. A was gone in the afternoon that D P came to the house to visit. He was there when Mrs. A came home at 4:00 or 4:30 and he left around 5:00.

Mrs. A made supper for her children, and then she got ready to go to work at the Safe Shelter here in Rankin. She said goodbye to her children before she left, as was her habit, and in particular, she gave a customary embrace to her 4-year-old daughter, E . She did not notice anything unusual about E . In her testimony she said E seemed her normal happy self.

When Mrs. A left for work at 6:45 p.m., there were three young adult men still present in the house - her brother, A K , 21 years of age; I E , 25 years of age; and E U , 24 years of age. Another man, H I , 36 years of age, Mrs. A 's uncle, had also been present in the house, but Mrs. A says that H left before she herself left for work.

On the other hand, it was I 's testimony that H was there in the house after her mother left for work. I testified that I testified that sometime later that evening, it would appear to be 9:00 or so, E appeared to be sad or upset about something and told her, I , that she had pain in her paniks. E spoke to her sister, I , in Inuktitut, and I understand paniks to be a baby talk word in Inuktitut for the vagina.

I said in her direct examination that E said somebody had touched her there and that she said it was D who touched her. I was asked if E said anything else, and she replied no. However, later in cross-examination, I was asked if E had not also spoken at length about H I touching her, and she replied yes. In fact, she testified that E talked more about H touching her than about D touching her. When questioned further, I stated she can't remember, she has forgotten exactly what it was that E said to her.

I telephoned her mother at work to tell her mother what E had said. Her mother told her to examine the child, and when Isabelle did, she noticed the child's v area was

red.

Mrs. A testified that she received this telephone call at work around 10:00. After talking to I , she spoke to the younger daughter, E , who told her mother that D and H had done that to her. Mrs. A also acknowledged that E talked more about H touching her and less about D touching her.

In determining the reliability portion of the Khan test for admissibility, the Supreme Court of Canada stated that the Court is to consider many factors, among which are the following: the timing of the statement made by the child; the demeanor of the child; the personality of the child; the intelligence and understanding of the child; and the presence or absence of any reason for the child to fabricate.

I have not seen the child, so I have no evidence as to her demeanor. The only evidence I have as to her personality and other characteristics is that she was, prior to this incident, at least, a happy child and had a normal close relationship with her older relative, D P .

I find that on the whole of the evidence on the voir dire that I have a real concern about the

reliability of this out-of-court statement inasmuch as it implicates this accused, D P .

The initial statement appears to have been made at a time shortly after something happened to this young girl. The only reasonable inference from the evidence presented is that something happened to her between 7 p.m. and 9 p.m. D P , according to the evidence, was not present during that time. The child not being present at trial as a witness, she cannot be examined or cross-examined as to exactly when she was touched.

A more important concern is the obvious uncertainty or ambiguity in the statement as to who touched her. We do not know why the child mentioned two names. Was she saying firstly that H did it, and then being confused, corrected herself and said that D did it, or was it vice versa? Or was she saying that both H and D did it? Did either or both of these names come unprompted from her or in response to a question by her 12-year-old sister? We do not know the answers to these questions.

Cross-examination of a complainant will often give answers to these questions to the trier of fact, the jury, so that they can determine what,

if anything, causes the child to give two different names or to be confused or to be ambiguous. A cross-examination, however, is not available here in a situation where it would appear to be essential.

In my view, at this stage on this reliability "threshold test," the Crown must show on a balance of probabilities that the out-of-court statement has such a degree of reliability, has such a level of guarantee of trustworthiness that cross-examination of the declarant would be superfluous or of marginal utility. That can hardly be said about E 's out-of-court statement to her sister and to her mother in which she implicates D P . It is not a discrete stand-alone statement implicating this accused unmingled with any other scenario. Her statement begs for clarification.

In my view, the most dangerous aspect of hearsay is present here, and that is the lack of proper cross-examination. There is no special reason to assert that E 's statement implicating D P is particularly trustworthy; or put another way, the circumstances here are not such as to substantially negate the possibility that this child was mistaken or untruthful about the involvement of D P .

In my respectful view, the interests of justice will not be served by admission of these out-of-court statements before the jury. This is not, in the form presented, reliable evidence that can assist the jury in determining the truth. To admit this evidence, in my view, will jeopardize the accused's right to a fair trial and will interfere with his right to put forward a full answer and defence to the charge.

To conclude, then, I find that the Crown has not met the threshold test of reliability, and I rule that the proposed evidence is inadmissible.

MR. ROSE: Thank you, My Lord. In light of your ruling on the voir dire, I can advise Your Lordship that the Crown will indeed be calling no evidence.

THE COURT: Then we will adjourn to await the jury's arrival and then we will open court with the jury, poll the jury, and I will call upon you, then, Mr. Rose, to just repeat what you have said, that you will not be calling any evidence on behalf of the Crown, and then I will direct the jury to find Mr. P not guilty. And, in fact, the new procedure that I intend to follow is that I will simply enter the verdict rather than go through the age old exercise of sending them to the jury room for that purpose.

MR. ROSE: Yes, sir.

THE COURT: So we'll adjourn, then, until 9:00, unless there's anything further from counsel at this point.

MR. BLAIS: No, thank you, My Lord.

(ADJOURNMENT)

I, Cheryl Mendryk, C.S.R.(A), hereby certify that I attended the above Proceedings and took faithful and accurate shorthand notes and the foregoing is a true and accurate transcript of my shorthand notes to the best of my skill and ability.

Dated at the City of Calgary, Province of Alberta, this 18th day of February, A.D. 1995.

Cheryl Mendryk

Cheryl Mendryk, Ms.
Court Reporter.