IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES (CR 02831)

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

N D

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Transcript of a ruling by Justice J.E. Richard, on a voir dire as to the admissibility of out-of-court statements, at IQALUIT, NORTHWEST TERRITORIES on June 12, 1995

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CHARGE: 271 CCC

COUNSEL:

S. COUPER, Esq. Counsel for the Crown

S. COOPER, Ms., Counsel for the defence

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THE COURT: I will now give my ruling on the admissibility of the child's out-of-court statements, statements which the Crown wishes to present to the jury as part of the Crown's case.

The evidence on the voir dire indicates that this three and a half year old boy, who speaks only Inuktitut, was taken by his mother to his paternal grandmother's home at 9 a.m. on June 24th, 1994, where the child was to be cared for for part of that day while his mother was working. The boy's father E P was there and spent most of the day with the boy. At 3 p.m. the father delivered the boy to the home of the regular babysitter, one O K . The accused N D was staying at Ms. K 's home at that time. Also in the babysitter's home that day were two other young children.

The mother E D picked her son up from the babysitter at 11 p.m. and they went home. The child went to sleep almost immediately and the mother did not notice anything unusual. In the morning when they woke, both mother and child went to the bathroom and while the little boy was on his potty, she heard him say spontaneously, in Inuktitut, "My penis doesn't hurt anymore." She then asked him some questions as follows:

"Q. Was it hurt?

"A. Yes.

"Q. Where?

"A. At O 's.

"Q. Who hurt it?

"A. N ."

The mother then looked in the boy's undershorts and noticed spots of blood. She said the boy at that point in time was not behaving normally, he was yelling at her and would not let her change his underpants. The mother then called the boy's father and when he came to the house and questioned the child, the child said the same thing, that is, that his penis had been hurt by N . The parents then took their son to the hospital where he was examined by Dr. Driscoll. Dr. Driscoll observed three fresh splits or tears in the foreskin tissue at the distal end. It was his opinion that these tears were caused by a forcible retraction of the foreskin tissue over the head of the penis that would have been painful for the boy at the time of retraction.

At the hospital an R.C.M.P. officer, Constable Sampson, questioned the boy with the assistance of the boy's mother, who interpreted the officer's questions and the boy's answers between English and Inuktitut. The boy's answers were to the same effect as earlier, that is, that he had been hurt by N .

Two days later the police arranged for the young boy to be interviewed by a social worker Hannah Kilabuk at the R.C.M.P. detachment. This interview was conducted entirely in Inuktitut language and was video taped. On the voir dire, Ms. Kilabuk, who is bilingual, confirmed the accuracy of Exhibit B, which is a transcript submitted by the Crown and which purports to be a translation into English of the words spoken by Ms. Kilabuk and the child on the video Exhibit A. Ms. Kilabuk did make corrections of two portions of Exhibit B where she says there are errors in translation.

Viewing this video with the assistance of the translated transcript, it appears that the child, not surprisingly, considering his age, is restless, at times unattentive, unfocused and at times does not respond appropriately to the questions asked by Ms. Kilabuk. There are also portions of the interview where Ms. Kilabuk asks questions that are clearly leading; leading the child in his recitation of events.

Of particular significance is the child's initial response when questioned about being sick or being sore in the genital area. When asked why, he responded "At K 's." K is a pet name that the child apparently uses for his paternal grandmother. The boy repeats this answer when asked, and then later

when asked the question "What caused your penis to be sore," he again replies "To K 's." Upon further questioning, the boy says that it was the accused N D who hurt his penis.

The babysitter O K testified on the voir dire. She indicates that during the time that the child was in her home, possibly between 3 p.m. and 5 p.m. that day, she overheard the child speaking with her own four year old daughter while both children were in the bathroom. She overheard the boy I D say that his penis hurt. She did not say or do anything at that time. Presumably the babysitter came forward with this disclosure only after the boy's statements to his mother and others the following day.

The Crown seeks to have these five items of hearsay evidence of statements made by the young boy presented to the jury as evidence in support of the charge that the boy was sexually assaulted by the accused N D .

To reiterate, these five statements are firstly the utterance overheard by the babysitter O K .; secondly, the boy's statement to his mother on the morning of June 25th; three, the boy's statement to his father to the same effect 20 or 30 minutes later; four, the boy's statement to a police officer with interpretation by the mother

earlier -- I'm sorry, later the same morning but again to the same effect as previously stated to his mother and father; and fifthly, the statements made by the child during the course of the interview by the social worker on June 27th, recorded on video tape.

In recent years, trial courts have been directed by the Supreme Court of Canada to receive as admissible evidence at a trial, any hearsay evidence of a young child's statement of a crime committed against the child, provided it is necessary to do so and so long as there is sufficient indicia of reliability in the hearsay to justify depriving the accused person of his right to cross-examine. Thus the threshold test is necessity plus reliability.

Dealing first with necessity, the child was not presented as a possible witness on the voir dire, so I have no firsthand observation or examination on which to decide whether the child is competent to testify pursuant to Section 16 of the Evidence Act. From my observations of the child on the video, Exhibit A, I do have some concern about the ability of that child to communicate evidence. He is still of a very young age and his mother testified that he would not be comfortable or at ease if asked to talk about these things in the presence of strangers. There does not appear to be any serious dispute between counsel as to the criterion of necessity being satisfied here.

Generally speaking, I am satisfied that because of the age of the child and his inability to testify, reception of hearsay evidence of statements made by him is reasonably necessary. Taking each of the statements in isolation, however, I cannot agree that evidence of the third statement, that is the statement to the father, and the fourth statement, that is the statement to the police officer, can be said to be reasonably necessary because those items of hearsay evidence are simply repetitive of the first statement to the mother and are not necessary because they do not add anything new about any fact in issue at this trial. The fifth item of hearsay evidence, the video containing the child's statements made in response to the social worker's questions can be said to be reasonably necessary as it does add pertinent information not contained in the utterance two days earlier to the mother.

Turning to the criterion of reliability, this, of course, is a more difficult question. It is for the Crown to prove on a balance of probabilities that the requirement of reliability has been met. In the context of the new regime on admissibility of hearsay evidence established by the Supreme Court of Canada decision in Khan, reliability is a prerequisite to admissibility because it is the substitute for the accused's usual right to cross-examine the declarant

in our adversarial system.

When determining whether the Crown has met the requirement of reliability, in this case, in my view, it is necessary to consider the last four of the child's out-of-court statements in their totality rather than to assess the reliability of each of those four statements in isolation.

There are many factors that are relevant to the issue of reliability and one of these is the contents of the out-of-court statements of the child. Here the contents of this child's statements indicate that the child is equivocal about one important aspect of the injury to his penis. On the one hand the child says that it was done by the accused N at O 's place. On the other hand, he says it happened at his grandmother's. Such an apparent contradiction or inconsistency, if it were to occur in the direct testimony of a Crown witness testifying against an accused person, would be exposed to a probing cross-examination on behalf of the accused person. Any such cross-examination is not possible here if this proposed evidence is permitted to be heard by the jury.

Statements that are inconsistent can hardly be said to be reliable.

I therefore conclude that the child's out-of-court statements, that is the last four of the

five statements referred to, are not clothed with such a level of reliability as to displace the accused's usual right to cross-examine.

I do not find the same frailty or inherent unreliability in the contents of the utterance overheard by the babysitter on June 24th. Its characteristic of spontaneity, in my view, is a strong indicator of reliability within the Khan principles. That utterance does not, of course, by itself constitute evidence of any criminal assault, but that is another matter more appropriately dealt with at the trial proper.

Although the new regime established in Khan has given a trial court greater flexibility to receive hearsay evidence of children's statements in cases involving alleged abuse of children, in my view the Court should still proceed with caution in that direction and ensure in each case that proper regard is had to the interests of the accused person and the right of the accused to make full answer and defense. This is what I have attempted to do with this ruling, similar to what has been done by the courts of this jurisdiction recently in other cases, notably R. v. N.U. last year in Taloyoak and earlier this year in R. v. Joey Pewatoaluk in Pond Inlet and R. v. David Pissuk in Rankin Inlet.

With particular reference to the video taped

statement, although the primary reason for my ruling on the Khan application today centers on the internal inconsistencies within that statement, I also am of the view, and this is by way of an aside, that the flexibility afforded the Crown by the Khan decision should not be invoked as a means to circumvent the statutory conditions for admissibility of this kind of evidence that is prescribed by parliament in Section 715.1 of the Criminal Code.

So, in summary, then, the last four of the five items of hearsay evidence on which the Crown seeks a ruling are ruled inadmissible, and the other item on which the Crown seeks a ruling, that is the utterance heard by the babysitter on the afternoon of June 24th, is admissible evidence at the option of the Crown.

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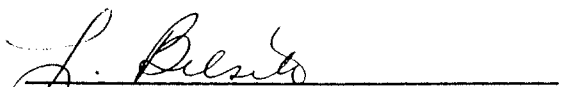
Certified Correct to the best of my skill and ability.



Laurie Belsito, CSR