

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

M.M.R.

Restriction on Publication

Pursuant to s.486.4 of the *Criminal Code*, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Pursuant to s. 648 of the *Criminal Code*, the proceedings referred to in this Ruling are subject to a publication ban until such time as the jury has retired to consider its verdict.

The name of the accused and certain other individuals have been initialized in furtherance of these two restrictions on publication.

RULING on APPLICATION UNDER s. 715.1 of the *CRIMINAL CODE*

[1] MR is charged with sexual interference and sexual assault, under ss. 151 and 271 of the *Criminal Code*.

[2] The alleged events took place in Whatì in the Northwest Territories on January 22, 2019. The complainant is under 18. On January 23, 2019 she gave a video recorded statement at the Whatì detachment to Constable Benjamin Williams.

[3] The Crown applies to have the statement admitted as the complainant's evidence in chief under s. 715.1 of the *Criminal Code*, RSC 1985, c C-46, which provides:

715.1 (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.

[4] The purpose of s. 715.1 was examined and explained in detail in *R v L (DO)* [1993] 4 SCR 419. It is intended to create a less stressful and traumatic environment for child and adolescent complainants and to assist the courts in the search for the truth. At the same time, it preserves judicial discretion to edit the statement or refuse its admission entirely where the prejudicial effects for the accused outweigh probative value. This discretionary power should not be used to determine questions of weight. *R v F(CC)* [1997] 3 SCR 1183 at 1207.

[5] In her minority opinion in *R v L (DO)* at 463, L'Heureux-Dubé, J. identified a number of factors to be taken into account by a judge in determining whether to exercise discretion to exclude the statement. The relevant considerations here are the form of questions used by the interviewer; the presence or absence of inadmissible evidence; and the ability to eliminate inappropriate material through editing the video recording.

[6] MR takes no issue with the age and time requirements, and both Crown and defence counsel agree that this would be a "ruling in principle", to be confirmed if the complainant adopts the statement at trial.

[7] MR objects to the statement's admission on the basis of a number of deficiencies which he argues would interfere with the proper administration of justice. In particular, there are a number of leading questions on the central issue during the interview; there was a leading statement put to the complainant while she was being driven to the health centre; relatedly, the "act complained of" was described in response to the leading questions; and the officer conducting the interview referred to another person with the same surname.

[8] For reasons that follow, the statement will not be admitted in whole or in part.

[9] Constable Williams gave evidence about the investigation, including what happened in the police truck and the circumstances surrounding the statement itself. I will not summarize all of his evidence, but I will refer to those parts of it necessary to deal with the legal issues MR raised.

[10] The statement made to the complainant in the police truck arose in the context of a request to have her confirm basic details about the alleged events and to obtain her permission to take her to the health centre for a medical examination. The conversation was not audio recorded. I conclude from Constable Williams' evidence that the statement itself consisted of him telling her that they (ie. Constable Williams and the other officer) had heard she had sex with MR. I would not exclude the video recorded statement on this basis. It is a matter of common sense that the police would need to confirm with the complainant what they were investigating and why they wanted to take her to the health centre to undergo an examination. It would not have been realistic for the police to hold back key information such as the name of the accused or the nature of his alleged actions.

[11] The fact that Constable Williams referred to another person with the same last name at various points in the interview is not fatal and, again, I would not exclude the statement on this basis. These are clearly slips on his part, which both he and the complainant corrected. It is obvious that the complainant knew they were discussing what happened between her and the accused, not the other individual. In any event, it would be a simple task to edit the statement to remove the references to the other person without making the statement misleading or changing it in any significant way.

[12] The leading questions posed to the complainant during the interview, particularly at the beginning of the interview, are a different matter altogether. In my view, they create an insurmountable obstacle to admitting the statement.

[13] Most commonly, leading questions are those which suggest the answer. They may also take the form of a question which assumes a fact that is in dispute: *The Law of Evidence in Canada*/Alan W. Bryant, Sidney N. Lederman, Michelle K. Fuerst, 4th ed (LexisNexis Canada Inc.) at paras 16.54-16.55. That is the case with the majority of the leading questions posed to the complainant: they assume that the complainant and MR had sex *before* that fact has been established by the complainant's evidence.

[14] In *The Law of Evidence in Canada, supra*, at para 16.53, the authors summarize the most commonly cited reasons for the existence of the evidentiary rule prohibiting a party from asking its own witness leading questions. These are: (1) the

bias of the witness in favour of the examiner; (2) the advantage the examiner has over his or her adversary in knowing what the witness' evidence is, creating a danger that the question will bring out only what is helpful to that party, rather than a balanced version; and (3) the propensity of a witness to assent readily to suggestions made by the examiner.

[15] All of these interfere with the Court's truth seeking function and, in the case of evidence tendered against an accused, they compromise trial fairness.

[16] The interview begins with Constable Williams briefly reviewing what happened earlier that day. This is followed by two leading questions, going to the central allegation, at page 4, lines 97 to 103¹:

Q. [. . .] the main question I wanted to know about from you though is, when did this happen? When did you and . . . [MR] . . .

A. (Non Verbal Response)

Q. Okay. When did you and [MR] have sex?

A. Yesterday

[17] This exchange is followed by a series of questions and answers about how MR came to be in the complainant's house and how they wound up in the washroom there. The acts complained of are not described. She is then asked, at page 18, starting at line 464, what happened in the washroom. The complainant pauses and then the following exchange occurs:

Q. I'm assuming in the washroom from what you said before is where you guys had sex.

A. Yeah

[. . .]

Q. No, okay. When you said before, and again I'm just gonna ask you – did you and him have sex in the bathroom, in the washroom?

A. Yeah

¹ For convenience, I have taken these excerpts from the transcript. Its accuracy is not in issue.

[18] Again, the complainant has not stated she had sex with the accused by this point in the interview. Rather, she has affirmed the information put to her in the form of leading questions.

[19] Starting at page 19, line 498, the complainant is asked to describe what “sex” means to her. She describes vaginal and anal intercourse and then, starting at page 25, line 673, there is another exchange:

Q. [. . .] I asked you before if you and [MR] had sex. Now you just described to me what sex is to you. Did that happen between you and [MR]?

A. Yeah

[20] The problem with the first question above, “. . . I asked you before if you and [MR] had sex”, is the same. The Complainant was not previously asked *if* she and MR had sex. She was asked *when* they had sex. The next question, “Now you just described to me what sex is to you. Did that happen between you and [MR]?” and the response could be admissible; however, they are premised on facts assumed by the earlier leading questions.

[21] Beginning at page 26, Constable Williams tries again to have the complainant describe what happened using open ended questions. Subsequently, the following exchange occurs, starting at page 27, line 714:

Q. Okay. So, we know that at some point you and him went in the washroom and had sex. You said you – did you have ah anal sex?

A. (Non-verbal response)

Q. Okay. Did you have vaginal sex?

A. (Non-verbal response)

[. . .]

Q. Like did you – did – did he and you start having sex right away in the washroom or not right away?

A. Not right away.

[. . .]

Q. From the time you shut the door, to the time you begin to have sex – what’s going on?

A. (Non-verbal response)

[22] Not all of these questions are leading, but they are prefaced with a statement, specifically, “So, we know that at some point you and him went in the washroom and had sex”. This stems from the leading question at the outset (“When did you and [MR] have sex?”) which, as noted, assumes sexual activity occurred.

[23] Constable Williams continues to try to have the complainant describe the events in her own words. He has some success eliciting some information about the events this way. Among other things, she is asked, at page 31, starting at line 835, what she means by the word “aggressive”. She replies that [MR] was “forcing her”.

[24] Throughout the balance of the statement there are a number of additional questions put to the complainant about the sexual activity and the events surrounding it. Again, however, all of them build on the *assumption*, found in the question at page 4 (ie. “When did you and [MR] have sex?”) that there was sexual activity between the complainant and MR. Yet, nowhere in the statement does the complainant say in her own words, through an open-ended question that she and MR engaged in sex. In my view, this makes most of of the evidence about the sexual activity in the statement unreliable and unfair to MR.

[25] Constable Williams is not be faulted for his methods. His primary responsibility was to investigate a serious allegation of sexual assault against the complainant. As part of that, he had to ask questions of an adolescent girl who very obviously has a shy, quiet demeanor. She was being asked to provide details of events which, by anyone’s standards, are deeply personal. She was not forthcoming with information. Constable Williams did what he could to encourage the complainant to describe what happened.

[26] I have considered carefully whether the video statement can be admitted in an edited format and I conclude it is not possible. The inadmissible questions and answers permeate the entire statement, particularly the key portions where the complainant describes the events that form the basis of the charges. Further, removing the offending information would leave only bits and pieces of information, without sufficient context.

[27] Another concern is the manner in which the complainant responds to many of the questions. Frequently, her responses are non-verbal and it is not entirely clear whether she is asserting an answer or merely “going along” with what Constable Williams is saying to her. Ordinarily, this would be a matter of weight. Combined with the overall effect of the leading questions, however, this is a factor which supports excluding the video statement.

[28] Finally, I have considered the fact that the complainant is an adolescent and that this interview seemed very difficult for her. She appears shy and quiet and, at times, embarrassed, despite Constable Williams' efforts to make her comfortable. As noted, she was asked to speak about deeply personal and private things during her interview. It would be ideal if the requirement for her to do that again could be minimized. Unfortunately, this just would not be fair to the accused. I note, however, that s. 715.1 is but one of a number of provisions in the *Criminal Code* designed to assist the Court in obtaining evidence from young complainants in sexual assault cases. It is open to the Crown to apply for an order for the complainant to testify by closed circuit television or with a screen, with or without the presence of a support person, to facilitate testimony.

[29] Accordingly, the Crown's application to use the complainant's video statement as her evidence in chief is dismissed.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
25th day of November, 2020

Counsel for the Crown:

Angie Paquin

Counsel for MR:

Kate Oja

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Respondent

-and-

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**RULING on APPLICATION UNDER s. 715.1 of
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By

THE HONOURABLE JUSTICE K. M. SHANER
