S.C.C. No. 02792

NOVA SCOTIA COURT OF APPEAL

Matthews, Freeman and Roscoe, JJ.A.
Cite as: R. v. P.V.K., 1993 NSCA 154

BETWEEN:

P. V. K.	)	David R. Thomas
	)	for the appellant
appellant	)	
	)	Kenneth W.F. Fiske, Q.C.
- and -	)	for the respondent
	)	
HER MAJESTY THE QUEEN	)	Appeal Heard:
	)	May 14, 1993
respondent	)	
	)	Judgment Delivered:
	)	June 1, 1993
	)	
	)	
	)	

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal allowed, the conviction set aside and new trial ordered per reasons for judgment of Matthews, J.A.; Freeman and Roscoe, JJ.A. concurring.

MATTHEWS, J.A.:

The appellant was charged that he, between January 4, 1983 and December 31, 1987, did

commit sexual assault upon T.L.K.: s. 271(1)(a) of the **Code**.

After a three day trial in September, 1992, during which witnesses were called on behalf of both the Crown and defence and after addresses by counsel and the trial judge's charge, the jury convicted the appellant. Later the trial judge sentenced the appellant to a term of imprisonment of five years. For particulars respecting the sentencing reference may be had to (1992) 116, N.S.R. (2d) 100.

The appellant now appeals from conviction and seeks leave to appeal from sentence.

The appellant is the father of T.L.K. The Crown alleges that the appellant sexually assaulted his daughter on numerous occasions over approximately 4 1/2 years, beginning in May of 1983 when she was five years old and continuing until she was about 10 years old in 1987. Although sexually assaulted by other men, she testified that the first instance was by the appellant. T.L.K. initially made allegations of sexual assault by the appellant approximately four years prior to trial; then denied them and in 1991 they were again made.

Shortly before trial the appellant, through his counsel, admitted certain facts:

> "THAT T. L. K. was sexually molested by at least four men:
>
> > (1) the man with whom her mother began living after her mother and the accused separated (this molestation was frequent and extended over a long period of time);
> >
> > (2) an uncle on her mother's side of the family (this molestation was sporadic);
> >
> > (3) a friend of T's mother who sometimes boarded with them after her mother's separation from the accused (this occurred a few times);
> >
> > (4) an acquaintance of the family who never lived with them (this occurred a few times)."

Early in the trial it was clear that the credibility of T.L.K. would be the central issue. She asserted that the various acts of sexual assault took place. The appellant denied each of them. He adamantly expressed his innocence. There was some corroborative evidence as to the appellant's denials. Testimony was adduced by the defence as to T.L.K.'s reputation. She was described as a compulsive liar and four witnesses were permitted to testify that each would not believe her under oath. The Crown called one witness in rebuttal who testified respecting T.L.K.'s credibilility and, in particular, spoke favourably as to T.L.K.'s credibility at time of trial. In sum it can be said that T.L.K has, in the past, often lied and that the lying was not confined to statements made to simply one individual. Reading her testimony alone leads one to the inescapable conclusion that she was not at all times a truthful witness.

The appellant, in respect to his appeal from his conviction, alleges that the trial judge erred in law by permitting inadmissible evidence to be adduced and, as well, by failing to instruct the jury to disregard such evidence. He cites six particular instances. He also alleges that the trial judge should have excluded the jury during a discussion respecting certain evidence.

This court has concluded that it is unnecessary to consider each of the issues. In particular I wish to comment on two particular points.

Dr. Rhodri Evans, qualified as a psychiatrist capable of giving evidence in the field of child psychiatry and child sexual abuse, testified on behalf of the Crown. It is of some importance to note that although a significant portion of his testimony concerned the symptoms of sexual assault exhibited by T.L.K., there was evidence in the admissions made by the appellant that she had been sexually assaulted by at least four men. As Dr. Evans admitted in cross-examination:

> "From where I'm sitting, it's very difficult for me to know who has done what."

T.L.K. had, at one time, denied that the sexual assaults took place and later recanted. Dr. Evans testified in part, that even young children can remember incidents of sexual assault, the suppression and disassociation of that memory, the denying of events and the guilt and shame

associated on the victim's part. That led to the following exchange in direct-examination:

> "Q. Do child sexual assault victims sometimes lie about they, what happened to them?
>
> A. Oh yes, yes.
>
> Q. Can you, why do they lie about what happened to them?
>
> A. Ah, can I just clarify that, are you asking whether children sometimes lie about sexual assault taking place?
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> Q. No, I'm asking about whether they, well yes, perhaps if you could direct your mind to that first of all.
>
> A. It's known and there is a growing literature on false accusations of sexual assault and in general terms, the understanding is that children themselves may misrepresent, that they generally misrepresent at the instruction of adults and usually false accusations of sexual assault are seen in cases where there is disputed custody or disputed visitation, those are assaults, although certainly there have been other incidents too, where children have fabricated stories to get individuals into trouble for some reason. Having said that, the literature would suggest that at least ninety percent of disclosure of sexual assault are in fact true disclosures."

No objection was taken at trial respecting this testimony by Dr. Evans, nor did the trial judge intervene. The appellant now takes objection particularly as to the last sentence in the last quoted answer. It is argued that it may have had the effect of bolstering the credibility of T.L.K. and the contrasting adverse affect upon the appellant's denials. The appellant says that Dr. Evans should not have so testified and having done so, the trial judge should have instructed the jury to disregard that testimony. He did not.

Dr. Evans did not name the literature, its date, the source or sources of conclusions or suggestions reached, whether tests or studies had been carried out, and if so, in what manner, their reliability and importantly whether the conclusions or suggestions were accepted by his profession and by him. He made no comment as to the validity of the impugned reference. He merely said what the literature "would suggest". That statement, given in the manner it was, lacked reliability. He was not cross-examined on this part of his testimony.

There was no mention as to how that general statement would relate to T.L.K., nor was any

attempt made to determine from Dr. Evans whether T.L.K. would, in his expert opinion, fit within any of the generalities or in the suggested category of ninety percent true disclosures. No mention was made by counsel or the trial judge in addressing the jury, that the reference to ninety per cent of disclosures being true must also mean that ten percent are false.

Were the impugned comments of Dr. Evans inadmissible or having been said, should the trial judge have warned the jury and informed them that they were to ignore those comments? Helpful comment is found in **R. v. Taylor** (1986), 31 C.C.C. (3d) 1 (Ont. C.A.) There, Dr. Mian, pediatrician, qualified as an expert in child abuse, testified that only about two or three per cent of child complainants in sexual assault cases are lying. The trial judge, in his charge, repeated Dr. Mian's opinion. The accused was convicted. Cory, J., then of the Ontario Court of Appeal, remarked at p. 9:

> "The statement of Dr. Mian that of the individual children who do complain only one to two per cent were lying about the sexual abuse inflicted upon them was inadmissible. This evidence could only serve to bolster the credibility of the complainants and really could serve no other purpose. In the circumstances of this case it was inadmissible. It goes without saying that this statement should not have been mentioned in the charge unless it were to be to instruct the jury that it was inadmissible and should be ignored."

In a similar vein see **R. v. Kostuck** (1986), 29 C.C.C. (3d) 190 (Man. C.A.) and **R. v. J. (F.E.)** (1989), 53 C.C.C. (3d) 64 (Ont. C.A.).

However, the traditional approach to behavioral characteristics has been challenged in **R. v. Lavalle** (1990), 55 C.C.C. (3d) 97 and **R. v. B.(G.)** (1990), 56 C.C.C. (3d) 201 S.C.C.

It may be that, following the concepts enunciated in **Lavalle** and **B.(G.),** properly introduced, an expert may speak to the number of allegations of sexual assaults which are true disclosures. Even so, there remain inherent problems with admitting such evidence. Not only is such testimony opinion evidence and hearsay and thus proper foundation must be laid before they are admissible, they are oath helping and, as mentioned, intended to bolster the credibility of a complainant.

The trial judge, in his charge to the jury, after informing them "of the fundamental principle that protecting the liberty and guarding against the terrible injustice of convicting an innocent person requires a solid foundation for a verdict of guilty whether the complainant and accuser is an adult or a child", pointedly said "it is essentially T's word against her father and her father's word against (T), I think you will wish to proceed carefully and cautiously in your assessment of her accusations." He then said:

> "While corroboration is not essential in law, I suggest that you will look at the evidence to see if there is other evidence which tends to confirm her testimony thereby enhancing the probability that she was telling the truth on material issues."

The jury may well have looked to Dr. Evans' testimony that "the literature would suggest that at least ninety per cent of disclosure of sexual assault are in fact true disclosures" for that corroboration. That is particularly so, because the trial judge after commenting as above noted, commented upon some of the evidence of Dr. Evans.

The impugned testimony may well have persuaded the jury to believe the otherwise questionable testimony of T.L.K. As such it is at the best suspect and at the worst inadmissible. As mentioned, it is hearsay. It may be categorized as opinion evidence. As such it should only be permitted into evidence if it is reliable. McLachlin, J. put it this way in **R. v. Seaboyer** , [1991] 2 S.C.R. 577 at p. 621-2:

> "The rules against hearsay, opinion, and character evidence, as well as the rules of privilege, undeniably limit the right to call evidence. The presence of such rules, it is argued, suggests that rules categorically prohibiting evidence that may be relevant to the defence are not contrary to the principles of fundamental justice nor to our notions of what constitutes a fair trial.
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> This argument rests on the assumption that rules of evidence commonly exclude evidence relevant to the defence, the value of which is not substantially outweighed by its prejudice. A closer examination of the rules, however, casts doubt on this proposition. In fact, the exclusionary rules of evidence are based on the justification that the evidence excluded is likely to do more harm than good to the trial process. Moreover, these rules, as they have developed in recent years, admit of a great deal of flexibility, allowing considerable discretion to the trial judge to admit evidence

> in cases where the value of the evidence outweighs its potential prejudice.
>
> Consider the hearsay rule. At one time it was seen as an absolute prohibition subject to a number of limited, rigidly defined exceptions. In this respect, it resembled s. 276 of the **Criminal Code**. But in more recent times, this inflexible approach has been replaced by an approach which allows more discretion to the trial judge. Thus this Court in **Ares v. Venner**, [1970] S.C.R. 608, held that old categories are no longer exclusive and that hearsay evidence which does not fall within one of the traditional exceptions may be received if it is (a) necessary, and (b) reliable. This approach was recently affirmed by this Court in **R. v. Khan**, [1990] 2 S.C.R. 531. The reason for the change was simple. The judges perceived that the rules of evidence were unfairly restricting the right to bring relevant and helpful evidence before the court, thereby undermining the ability of the court to find the truth and do justice. So the courts broadened the rule to conform to their sense of justice by permitting judges convinced of the reliability and trustworthiness of the evidence to admit it despite its failure to conform to the traditional exceptions to the hearsay rule.
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> ...
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> The law relating to opinion evidence similarly stops far short of absolute exclusion. The opinion evidence rule is less a rule of exclusion that a means of setting certain conditions for the reception of evidence which might otherwise be unreliable - evidence which, moreover, is usually collateral to the issues of fact involved in the case and which may arguably infringe on the role of the trier of fact or drawing inferences from the facts as found. Provided the witness can be shown to be qualified to give the opinion and provided the opinion is relevant and does not trench unduly on the judge's or jury's ultimate task, it may be received. Again, in practice considerable discretion rests with the trial judge in weighing the proper considerations in the particular case."

These difficulties, in my view, were exacerbated by the treatment of Dr. Evans' testimony by the trial judge in his charge to the jury. The trial judge referred to that testimony at some length, commenting in part:

> "Sometimes child victims lie, according to Dr. Evans. Sometimes that's the result of pressure and sometimes that pressure comes from adults. Sometimes children lie because of break-ups in their family or that they're trying to get adults into trouble. Dr. Evans said that the literature persuades him that 90 per cent of accusations are true and he said that it is well known that the majority of children never disclose episodes in their history of sexual abuse and that they will deny it if asked. He said yes, fifteen year olds are able to recall what happened to them when they were youngsters."

Not only were those remarks helpful to the Crown, unfortunately, they were not an accurate representation of Dr. Evans' testimony. Dr. Evans did not say that "the literature persuades him that ninety per cent of the accusations are true". He merely said "the literature would suggest...". Dr. Evans did not offer any personal opinion on this point which may have been crucial to the jury's conclusion respecting the credibility of T.L.K. Having suggested to the jury that they should look to other evidence to corroborate T.L.K.'s accusations, the jury may well have taken the misquotation by the trial judge as that persuasive, corroborative testimony.

The second point to which I wish to refer concerns the testimony of S.B.J.. As previously mentioned, the defence had put the credibility of T.L.K. in issue. Not only was it demonstrated during her cross-examination that she was not at all times truthful, other witnesses not only castigated her credibility but said that they would not believe her on her oath. The alleged sexual assaults were not witnessed. With T.L.K.'s assertions and the appellant's denial of the assaults the attack on T.L.K.'s credibility was central to the defence.

Mrs. J. was at time of trial T.L.K.'s foster mother. She was called by the Crown in rebuttal. She testified that at the time T.L.K. first became her foster child in 1988, T.L.K.'s reputation for honesty in the community was not good: "people didn't believe a lot of what she said at that time". She further said that if, at that time, she had been asked if she would believe T.L.K. on her oath in court, she would have responded: "probably not". She added however that T.L.K.'s reputation for honesty in the community is now "good" and that she definitely would now believe her under oath. She was not cross-examined.

Prior to giving those portions of her testimony this exchange took place in direct-examination:

> "Q. And do you -- are employed other than as T's foster mother?
>
> A. Yes, I am. I work at [...]."

There was no explanation as to the meaning "[...]". None was asked. The Crown did not attempt to qualify Mrs. J. as an expert capable of giving an opinion evidence. The statements which

I have earlier attributed to her were given only in her capacity as a lay witness. However, the trial judge, in his charge to the jury said this:

> "The last witness was called in rebuttal by the Crown, Ms. J., and you'll certainly remember her evidence. She is the foster mother and a [...]and she is the person in whose care T. K. has been living for the past couple of years and Mrs. J. has two other children with her husband and also another foster child, and she says that she has grown to know T's friends and her teachers and her present associates and she said that back in 1988 she would not have trusted T K.'s trustworthiness. She would not have believed her upon her oath. She had a bad reputation in the community for truth telling and you'll want to contrast that evidence with what she says today, what she said rather, yesterday, on the stand that as far as she is concerned, having come to know not only T. but come to know through her associates and associations, her reputation in the community is different today and that she would believe her on her oath. And so you'll want to contrast carefully the evidence of a caring foster mother, Mrs. J., who says, yes, I would believe T.K. upon her oath today, and that's the important thing. It's the truthfulness today, or yesterday when she gave her evidence and the day before that you're looking at. That's the critical time. But you're able to look past that at these various other pieces of testimony from other witnesses which talk about earlier reputations because those may be features that you can take into account in assessing her present day trustworthiness." (Emphasis added)

The trial judge then informed the jury that they would want to contrast the testimony of Mrs. J. with, in particular, one of the defence witnesses and the appellant, as to whether T.L.K. had been "a victim, repeatedly, of sexual assaults".

Unfortunately, the trial judge raised the status of this witness from one who stated her occupation, without definition as to its meaning, to that of "a [...]". Arguably the effect on the jury was to raise this witnesses' credibility above those who are called by the defence. By reason of the trial judge raising Mrs. J.'s position to that "a [...]t", she may well have been, in the minds of the jurors an expert and thus a person to whom they should show greater respect than a lay witness, particularly concerning the crucial issue: the credibility of the accusations of T.L.K.

The use of expert evidence is warranted when the subject matter in issue is beyond the knowledge of lay people. The witness must have the skill, knowledge or experience with respect to that subject matter such that the opinion given will aid the trier of fact. See among many others,

McCormick on Evidence, 4th ed. pp. 54-5.

The purpose of expert evidence was described in this fashion by Dickson, J. in **R. v. Abbey** (1982), 58 C.C.C. (2d) 394 (S.C.C.) at p. 409:

> "With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the exert is unnecessary'."

In **R. v. Beland and Phillips** (1988), 36 C.C.C. (3d) 481 (S.C.C.), McIntyre, J. cited with approval the above quotation from **Abbey** and continued at p. 493-4:

> "It was said in **Davie v. Magistrates of City of Edinburgh**, [1953] S.C. 34 at p. 40, by Lord Cooper:
>
> > 'Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.'
>
> The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from, proved facts in a field in which the exert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. Where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received."

With respect, there was an obligation upon the trial judge to properly instruct the jury as to the use that could or should be made of that evidence which was highly prejudicial to the accused. Clearer directions were essential.

In my opinion the curative provisions of s. 686(1)(b)(iii) of the **Code** should not be applied. In order to reach their verdict of guilty the jury must have believed in whole or in the essential part the testimony of the complainant that she was sexually assaulted by the appellant.

In my opinion, the evidence is not such that the jury would have inevitably convicted the appellant if the trial judge had instructed the jury as to the proper use they could make of Dr. Evans' testimony and if he had not misconstrued the doctor's testimony and that of Ms. J.. We cannot speculate as to the basis upon which the jury rendered its verdict and in particular, where so much depended upon the acceptance or rejection of the complainant's testimony.

The credibility of the complainant's testimony was put to the test. There was testimony which found it wanting. The jury had to decide whether they believed her in respect to her damning testimony at trial, under oath. Was T.L.K. telling the truth when she testified that the appellant sexually assaulted her on several occasions? The points in error to which I have referred may well have been sufficient for the jury to conclude that, although T.L.K. may have lied in the past, they should believe her now. There can be no doubt, the jury's verdict depended upon the acceptance or rejection of T.L.K.'s testimony. When the trial judge misconstrued the testimony of Dr. Evans and gave Mrs. J. an inaccurate status, in a matter so vital to the issue before the jury, it cannot be said that the jury may not have been affected thereby or that no substantial wrong or miscarriage has occurred.

Sexual abuse of a child is a crime demanding condemnation in the strongest language. In particular, this is so when the perpetrator is in a position of trust and especially when the offence concerns a father violating his young daughter. The crime is not easy to detect for it invariably occurs in private. Thus, a trial usually comes down to the word of the child against that of the adult. The understandable urge is to prosecute perpetrators of these dastardly crimes. In doing so, however, there is a primary principle: an accused must not be found guilty until it has been determined that he or she is guilty beyond a reasonable doubt. As repulsive as the crime undeniably is, it is worse that an innocent person should be found guilty of it. That is a concept which transcends all else.

In my opinion the cumulative effect of the two points to which I have referred is such that the verdict cannot be permitted to stand. I would allow the appeal, set aside the conviction and order a new trial.

In the circumstances, it is not necessary to consider the appeal against sentence.

J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.