NOVA SCOTIA COURT OF APPEAL

Citation: R. v. D.M., 2007 NSCA 80

Date: 20070706
Docket: CAC 272006
and CAC 278885
Registry: Halifax

Between:

DM

Appellant

v.

Her Majesty the Queen

Respondent

and

Her Majesty the Queen

Appellant

v.

DM

Respondent

Restriction on publication: **Pursuant to s. 486.4 of the *Criminal Code of Canada*.**

Judges: Bateman, Saunders and Fichaud, JJ.A..

Appeal Heard: June 1, 2007, in Halifax, Nova Scotia

Held: **Appeal allowed; convictions set aside and a new trial ordered per reasons for judgment of Fichaud, J.A.; Bateman and Saunders, JJ.A. concurring.**

Counsel: Robert Gregan and Roger Burrill, for the appellant on conviction/respondent on sentence
Daniel A. MacRury, Q.C. for the respondent on conviction/ appellant on sentence

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

Reasons for judgment:

[1] DM was convicted of sexual touching and inciting touching for a sexual purpose. The victim, his niece, was under five years old at the time. The day after the event the child gave a video taped statement in the presence of a social worker and an RCMP officer. The Crown did not attempt to admit the video as evidence. The Crown's only evidence was the hearsay of the child's parents, who testified that their daughter had reported the event to them. On the *voir dire* the Crown submitted that the child's video was legally inadmissible and, as there was no other evidence, the parents' hearsay was "necessary". The trial judge agreed with the Crown's submission and admitted the parents' hearsay under the principled exception to the hearsay rule. The issue is whether the trial judge erred by premising her ruling on the conclusion that the child's video was inadmissible under the rules of evidence.

Background

[2] DM was 47 years old at the trial date. He lived with his mother VM. MM is DM's niece. She was four years and ten months old in January 2005. Her father PM is DM's brother. MM lives with her father and her mother KA within walking distance of the home shared by DM and VM.

[3] VM and DM often would look after MM when the child's parents were away. On the evening of January 6, 2005, MM's parents were out of town. They left MM in DM's care. Shortly before 1 a.m. on the morning of January 7, MM's parents returned and picked up their daughter. According to the parents' testimony, MM said that DM had touched her sexually.

[4] The parents immediately took MM to the RCMP office, and the child was then taken to the Regional Health Care Facility for examination. There was no physical evidence of sexual abuse.

[5] On January 7, MM was taken to the office of Family and Children's Services. In the presence of a social worker and an RCMP corporal, MM gave a video taped statement. MM's parents were not in the room at the time. Her mother KA was outside in the hall, and watched only the last few minutes of this statement on a monitor. KA was asked about the video. She testified:

Q. Okay. So you don't know right now whether or not this tape is . . . accurately reflects what MM told you that night or not.

A. I know the part that I saw was accurate because of what she told me.

Q. Okay.

A. The part where I was in the room and I watched her through the TV . . .

Q. Yes.

A. . . . was accurate. What she told Kim was accurate . . .

Q. Okay. And what's . . .

A. . . . that . . .

Q. I'm sorry, go ahead.

A. That was the part where she had said that DM had put her pee-pee in his mouth.

Q. Okay. And that was accurate as far as you . . .

A. Yes.

[6] At the trial, the Crown did not offer the video statement in evidence through any witness. The trial judge conducted a *voir dire* to determine the admissibility of the parents' hearsay under the principled exception to the hearsay rule. MM testified at the *voir dire* but would not speak to the sexual touching. The Crown did not play the video statement for MM, or attempt to have MM adopt the statement under s. 715.1 of the *Criminal Code*. The Crown relied entirely on the hearsay of PM and KA, who testified what MM had reported to them on January 7, 2005.

[7] The trial judge, Provincial Court Judge Beaton, concluded that the parents' hearsay was both necessary and reliable under the principled exception, and admitted their evidence. Later I will review the trial judge's reasons for the *voir dire* ruling, and her comments about the absence of the child's video evidence.

[8] After the trial, the trial judge convicted DM of sexually touching a child and inciting a child to touch him sexually, contrary to ss. 151(a) and 152 of the *Criminal Code*. She imposed a conditional sentence of two years less a day plus 24 months probation and DNA and SOIRA orders.

[9] DM appeals his convictions. The Crown cross-appeals the sentence.

Issues

[10] DM says that the trial judge (1) erred in law by her statement that the video would be inadmissible under the rules of evidence and this affected her conclusion on the admission of the parents' hearsay. DM also says that the trial judge erred by (2) curtailing the defence examination of defence witnesses and (3) improperly applying principles of reasonable doubt.

[11] In my view, there should be a new trial on the first ground. So it is unnecessary to discuss the issues of testimonial curtailment and reasonable doubt or the Crown's cross-appeal on sentence.

The Trial Judge's Reasons

[12] In her decision after the *voir dire*, the trial judge began her analysis of the principled exception as follows, referring to *R. v. Khan*, [1990] 2 S.C.R. 531:

> There are many ways in which that evidence is sought to be adduced. And, of course, the Best Evidence Rule applies in relation to each and every case conducted by the Crown. The burden is on the Crown and the Best Evidence Rule always applies.
>
> . . .
>
> And I am referring now to Paragraph 23 of the *Khan* decision wherein Justice McLachlin, as she then was, noted, and I quote as follows:
>
> > Lord Pearce's four tests may be resumed in two general requirements: necessity and reliability. The child's statement to the mother in this case meets both these general requirements as well as the more specific tests. Necessity was present, other evidence of the event, as the trial judge

> found, being inadmissible. The situation was one where, to borrow Lord Pearce's phrase, it was difficult to obtain other evidence. The evidence also bore strong *indicia* of reliability. T. was disinterested, in the sense that her declaration was not made in favour of her interest. She made the declaration before any suggestion of litigation. And beyond doubt she possessed peculiar means of knowledge of the event of which she told her mother. Moreover, the evidence of a child of tender years on such matters may bear its own special stamp of reliability.

[13] The trial judge concluded that the parents' hearsay was necessary, for these reasons:

> So the Court has to consider whether the evidence the Crown is attempting to introduce bears that threshold stamp of necessity and reliability. Is the evidence reasonably necessary and is it reliable?
>
> Well, I had the opportunity to observe young [MM] this afternoon. It was more than obvious to anyone who might sit here and watch and listen or to anyone who might, in my view, have the occasion to read a transcript of these proceedings, that there were places, to put it in the street vernacular of young people, "there were places [MM] just wasn't going to go". There were questions put to her that she just was not going to touch.
>
> And I am entirely satisfied, based on what I have seen this afternoon in terms of [MM's] capacity to communicate but her unwillingness or reluctance to communicate on certain issues that, indeed, the evidence is reasonably necessary. How else is it that the Crown is going to introduce evidence unless it is hearsay evidence of other people at this point?

[14] In her assessment of necessity, the trial judge discounted MM's video statement, saying:

> The Defence urges that there is other evidence available. Well, Counsel, of course, would know far better than I. I am the blank page in this process. I know not what is out there until it is before me and until it is properly before me. **And as Defence counsel has alluded to the existence of a videotape, Crown has quite correctly pointed out that there is a process.**
>
> If the Crown is going to seek to rely on an out-of-court statement made by the complainant, **the complainant is going to have to take part in adopting that statement, a videotaped statement, or document before it can come**

before the Court according to the appropriate and proper application of the principles of evidence.

That is not where we are at this point. We may be at that stage at some point in the process. Again, I, quite frankly, would be the last one to know if we are going to go there. And if the Crown is not going to go there, I expect they are not because the young lady today could not, on cross-examination, I emphasize could not, adopt that she had even been to a location and talked to anyone much less made a videotape with them. [emphasis added]

[15] The trial judge's statement "the Crown has quite correctly pointed out that there is a process", apparently refers to Crown counsel's transcribed submissions to the trial judge:

Submissions by Mr. Baxter (*voir dire*) . . .

So I suggest to you that it's necessary to admit the evidence because we obviously don't have any other evidence. She can't testify to it and she is only five years old at this point and a bit and may not honestly remember it or may just find it too unpleasant to talk about or a combination of the same ... of the two things.

. . .

As to the videotape, I'm not sure what my friend is getting at there, but under 715.1, the existence of a videotape is only one step. The complainant or witness, while testifying, has to adopt the contents of the videotape and, clearly, she, that is [MM], did not even recall making the videotape. That was addressed, I guess, more in cross-examination than in direct.

But in my friend's questions, he could not ... she could not remember Kim Wood, could not remember the room, could not remember anything about it, so the only way that videotape can come in is if the complainant or witness, because, in some cases, a witness under 18 can be ... their evidence on videotape can be admitted, they have to adopt the contents of it.

. . .

Reply by Mr. Baxter (*voir dire*) . . .

And you can't just put it in by consent as part of the Crown's case. The requirement is clear in the *Criminal Code* as to how it gets in.

[16] The trial judge's conclusion that "the complainant is going to have to take part in adopting that statement, a videotaped statement, or document before it can come before the court according to the appropriate and proper application of the principles of evidence" refers to s. 715.1(1) of the *Criminal Code*:

> 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. [Emphasis added.]

[17] On the *voir dire*, the Crown did not ask MM about the video or show her the video. On cross examination by the defence, MM did not recall the videotaped statement:

> **Q.** Okay. And what about a policeman, there was a policeman. Do you remember talking to any policeman?
>
> **A.** No.
>
> **Q.** No? Okay. Do you remember being in a room that had a big piece of glass in it, it was like shiny glass?
>
> **A.** No.
>
> **Q.** No?
>
> **A.** I don't think I ever seen it, I don't think.
>
> **Q.** You didn't ? Okay. So you don't remember talking to a girl with hair the colour of yours and letting her know about your dog Boots?
>
> **A.** No,
>
> . . .

> **Q.** Black. Okay. And you don't remember talking . . . do you remember talking to a girl named Kim and letting . . . telling her about Sam?
>
> **A.** No.

MM declined to answer questions about the sexual activity. The trial judge said "There were places [MM] just wasn't going to go", and apparently agreed with the Crown that MM would not adopt the video statement under s. 715.1.

[18] In short, the Crown's submission was "it's necessary to admit the parents' evidence because we obviously don't have any other evidence", given that MM would not adopt the video under s. 715.1. The trial judge accepted the Crown's submission as her premise. According to the trial judge, the Crown had no legal avenue to admit MM's video statement, by s. 715.1 or otherwise, and the parents' hearsay was necessary to fill the vacuum.

Standard of Review

[19] On appeal from a decision whether to admit out of court statements under the principled exception to the hearsay rule, the court of appeal accepts the trial judge's findings of fact absent manifest error, but applies correctness to issues of legal principle. *R. v. P.S.B.*, 2004 NSCA 25 at ¶ 36-37; *R. v. Scott*, 2004 NSCA 141 at ¶ 77, and authorities cited. The question here is whether the trial judge erred by basing her ruling on the assumption that MM's video recording was inadmissible under the rules of evidence. That is an issue of law to which I will apply the correctness standard.

The Error of Law - Admissibility of Video Under Principled Exception

[20] Even if the video recording is not adopted under s. 715.1(1), the Crown may still offer it under the principled exception to the hearsay rule. In *R. v. Burk* (1999), 139 C.C.C. (3d) 266 (O.C.A.), Justice Finlayson said:

> 11 The trial judge's concern about the admissibility of the videotape is understandable given the fact that the conditions in s. 715.1 of the *Code* were not included. However, the videotaped statements in this case, as out-of-court statements offered for their truth, are hearsay. *R. v. F.* (C.C.) (1997), 120 C.C.C. (3d) 225 (S.C.C.). The trial judge was correct that s.715.1 of the Code provides a

> statutory exception to the admissibility of this particular type of hearsay evidence, but there is also a case law exception which provides for the admissibility of hearsay evidence if it is necessary and reliable. The Supreme Court of Canada in *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257, applied the principled approach of the *Khan* decision to the admission of videotaped hearsay evidence. In the context of dealing with prior inconsistent statements, the Court held in *K.G.B.* that the fact that a prior out-of-court statement was videotaped was an important factor in establishing the reliability criteria for the admission of hearsay evidence. Lamer C.J., speaking for the Court, said at p. 293:
>
> > In addition to an oath or solemn affirmation and warning, then, a complete videotape record of the type described above, or one which duplicates the experience of observing a witness in the court-room to the same extent, is another of the other important *indicium* of reliability which will satisfy the principled basis for the admission of hearsay evidence.
>
> 12 Accordingly, the trial judge was in error in not admitting the videotape itself as an exhibit and treating it as another exception to the hearsay rule. However, the failure to do so caused no prejudice to the Crown in this particular case.

To the same effect: *McWilliams' Canadian Criminal Evidence*, Fourth Edition, vol. 1 (Canada Law Book), ¶ 7: 120.30.20; *R. v. M (M.A.)* (2001), 1 C.C.C. (3d) 22, (B.C.C.A.), at ¶ 5; *R. v. F.(W.J.)*, [1999] 3 S.C.R. 569 at ¶ 22-23, 41, 52, per McLachlin, J. for the majority.

[21] The trial judge erred in law by saying that "[MM] is going to have to take part in adopting that statement, a videotaped statement, or document before it can come before the court according to the appropriate and proper application of the principles of evidence." The trial judge disregarded the second avenue — assessment of the video's necessity and reliability and possible admission under the principled exception. From the Crown's position stated at trial it appears that, had the trial judge's decision mentioned this option, the Crown would have offered the video and the trial judge could then have assessed the video's necessity and reliability.

[22] The Crown's factum summarized its position on the admissibility of the video recording:

> 8. The entire thrust of the Appellant's argument with respect to the admission of the out-of-Court statements made to the parents by [MM] is that the necessity threshold was not met because the Crown did not introduce a second videotape

> statement made to social workers pursuant to s.715.1 of the *Code*. With respect this argument has no merit for two reasons:
>
> > (1) In a voir dire dealing with the admissibility of statements made to the parents the Crown cannot introduce a subsequent videotape because it would violate the rule against prior consistent statements.
> >
> > (2) The complainant [MM] did not adopt this videotape.

[23] The Crown's second submission repeats the view expressed in the Crown's transcribed submission to the trial judge (above ¶ 15). I have dealt with that issue. The Crown could have attempted to admit the video under the principled exception.

[24] The Crown's first submission would mean that, under the principled exception, a court could not admit a series of out-of-court statements from the same declarant. The Crown cites only one authority, *R. v. Keeler* (1977), 36 C.C.C. (2d) 8 (A.C.A.) at pp. 10-11, for the general rule that a witness may not give evidence of a prior consistent statement:

> [9] The general rule excluding such evidence as set out in *Cross on Evidence*, 4th ed., at p. 207 is:
>
> > > The general rule at common law is that a witness may not be asked in-chief whether he has formerly made a statement consistent with his present testimony. He cannot narrate such statement if it was oral or refer to it if it was in writing (save for the purpose of refreshing his memory), and other witnesses may not be called to prove it. Not only does the rule prohibit the reception of the statement as a hearsay statement, but it also prohibits proof of the previous oral or written statements of the witness as evidence of his consistency. Thus, in R. v. Roberts, the accused was charged with murdering a girl by shooting her as she was letting him into her house. The defence was that the gun went off accidentally while the accused was trying to make up a quarrel with the girl. Two days later the accused told his father that the defence would be accident. The trial judge would not allow the accused to prove this conversation, and the Court of Criminal Appeal held that the judge had been right.

> There are at least three exceptions to this exclusionary rule which are universally accepted in criminal cases: see article by R. N. Gooderson "Previous Consistent Statements" Cam. Law. Jo. 64 at p. 65 (1968):
>
> > 1. Statements admitted as part of the res gestae – as the statement to the police officer was made 5 hours after the alleged offence it is apparent that the evidence could not be given under this exception;
> >
> > 2. Statements to rebut a suggestion that the evidence given in court was recently fabricated – it was on this ground that defence counsel attempted to justify the admission of the evidence, and I shall deal with this ground later in this judgment.
> >
> > 3. Complaints by victims in certain types of cases – it was by analogy to this exception that Mr. Justice Kirby allowed the evidence to be given, and I shall deal with this later.

[25] In my view the rule governing prior consistent statements does not apply to this situation. We are not discussing a witness who tries to bootstrap her credibility with an oath-helping prior consistent statement. MM would not even testify on this issue. That is the reason for the Crown's submission of "necessity" to admit hearsay.

[26] Because a full record of the hearsay statements may assist the analysis of necessity and reliability, the trial judge may consider and then admit a series of statements by the complainant under the principled exception to the hearsay rule. *R. v. F (W.J.)*, [1999] 3 S.C.R. 569, at ¶ 22-23, 41, 52; *R. v. Rockey*, [1996] 3 S.C.R. 829, at ¶ 6, 20, 33-34; *R. v. Dubois* (1997), 118 C.C.C. (3d) 544 (Q.C.A.) at pp. 557-561 leave to appeal denied, [1998] 1 S.C.R. viii; *R. v. Meaney* (1996), 111 C.C.C.(3d) 55 (N.C.A.), leave to appeal denied (1997), 112 C.C.C. (3d) vii (S.C.C.); *R. v. LaBrecque*, [1997] 3 S.C.R. 1001, adopting the reasoning of the Quebec Court of Appeal (1996) 112 C.C.C. (3d) 472 at p. 480; *R. v. Scott*, 2004 NSCA 141, at ¶ 105-7 leave to appeal denied, [2005] 2 S.C.R. x, and authorities there cited. In *R. v. D (G.N.)* (1993), 81 C.C.C. (3d) 65 at p. 78 (O.C.A.), leave to appeal denied [1993] 2 S.C.R. vii, Justice Weiler summarized what I accept as the law:

> In order to obtain a full and complete account of what is alleged to have happened to a very young child, the reception into evidence of several conversations the child had with adults may be reasonably necessary. Where a

> statement by the child to an adult contains material particulars, or provides important context in which the alleged acts took place, some repetition may be essential. Where a hearsay statement adds nothing which is relevant for consideration by a trier of fact, it will not satisfy the criterion of reasonable necessity and will not be admissible.

To the same effect *McWilliams' Canadian Criminal Evidence* (Fourth Edition), ¶ 7:50.20.120.

[27] The Crown cites nothing to distinguish these authorities.

[28] A shift from rigidity to flexibility underscores the development of the principled exception. In *R. v. B.(K.G.)*, [1993] 1 S.C.R. 742 and in *R. v. U.(F.J.)*, [1995] 3 S.C.R. 764 at ¶ 28-45 Chief Justice Lamer explained how the traditional rule respecting admission of prior inconsistent statements now adapts to the modern approach governed by necessity and reliability.

[29] In *R. v. Khelawon*, [2006] 2 S.C.R. 787, the Court expanded the reliability analysis under the principled exception. Justice Charron for the Court said:

> 4 As I will explain, I have concluded that the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

See also ¶ 50-55, 94-100. The "supporting or contradictory evidence" would, in appropriate cases, include the declarant's other statements.

[30] In *Khelawon*, Justice Charron, at ¶ 47-49, cited the overarching principle of trial fairness that governs the principled exception to the hearsay rule. She said:

> 49 The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay

> form. The criterion of reliability is about ensuring the integrity of the trial process.

[31] To assess necessity and reliability fairly, it is sometimes essential that the trial judge have a full record of the declarant's available out-of-court statements. This is particularly so where those statements were contemporaneous with the event, or where a series of statements might show changes to the related narrative. It is for the trial judge on the *voir dire* to determine whether the record of hearsay statements should include MM's video recording. She should determine the matter unencumbered by the mistaken view that the Crown is legally disabled from tendering the video outside s. 715.1.

[32] In *R. v. Couture*, 2007 SCC 28 Justice Charron for the majority said:

> 79. The criterion of necessity is intended to ensure that the evidence presented to the court be in the best available form, usually by calling the maker of the statement as a witness.

Justice Charron (¶ 84, 88) reiterated the *Khelawon* approach to reliability.

[33] MM made her video recording the day after the event. A contemporaneous video recording of the complainant has been described as "probably the best recollection of the event that will be of inestimable assistance in ascertaining the truth" - *R. v. C.C.F.*, [1997] 3 S.C.R. 1183, at ¶ 21, per Cory, J., and see also ¶ 41-44. Whether or not MM would adopt it in court, it is clear from KA's testimony (above ¶ 5) that MM did make a video recorded statement. Even if it is inadmissible under s. 715.1(1), the video recording may be admitted at common law through the testimony of the witnessing social worker or RCMP officer, if the trial judge concludes it is necessary and reliable. If admitted, the video may be of significant assistance to the trial judge's search for the truth. The video is the only potentially observable statement by a witness with personal knowledge, MM. The parents' evidence, on the other hand, was second hand from the child, their testimony was long after the event, and in some respects their separate testimony inconsistently related what MM had said in their joint presence. Juxtaposing the passages from *D.(G.N.)*, *Khelawon* and *Couture* quoted earlier, the possible significance of MM's video is evident.

[34] Nothing in my reasons pre-empts the trial judge's discretion on a new trial to consider the necessity or reliability of any of MM's statements, including the video

recording. But I reject the Crown's submission that the rule against prior consistent statements bars the trial judge on a *voir dire* from considering the admissibility of MM's video statement along with her statements to her parents. The video statement is admissible if the trial judge is satisfied of its necessity and reliability. The trial judge has the discretion to decide whether each hearsay item, the video or the statements to each parent, is necessary and reliable. The Crown's offer of hearsay under the principled exception invites the trial judge to assess necessity and reliability under the encompassing principles of trial fairness discussed in *Khelawon*. In the interest of trial fairness, the trial judge has the discretion to decide that one hearsay item alone may potentially mislead, or does not "ensure that the evidence to the court be in the best available form" under *Couture*, and should be admitted only if accompanied by the other hearsay statements.

Section 686(1)(b)(iii)of the Code

[35] The error in law does not end the matter. The appeal court must trace the error's effect on the verdict. The Crown says that there was no substantial wrong or miscarriage of justice under s. 686(1)(b)(iii). The Crown has the onus to show that, without the legal error, the verdict would have been the same. *Rockey*, per Sopinka, J. at ¶ 2-7. *R. v. Robinson* (2004), 189 C.C.C. (3d) 152 (O.C.A.), at 166-7 per Doherty, J.A.

[36] The Crown has not satisfied its onus.

[37] At the oral argument of the appeal, counsel for the Crown mentioned prosecutorial discretion as a basis to withhold the video. That was the first occasion on the record of this proceeding that the Crown cited prosecutorial discretion respecting MM's video. Neither at trial nor in its appeal factum did the Crown raise that issue. The Crown's trial counsel told the trial judge "it's necessary to admit the [parents'] evidence because we obviously don't have any other evidence", the video being inadmissible because "the only way that video can come in is ... they have to adopt the contents of it" which MM would not do (above ¶ 15). The Crown's appeal factum, quoted above (¶ 22), again says only that the video would be inadmissible under the rules of evidence. Then, after DM's counsel had completed his submission at the appeal hearing, the Crown introduced prosecutorial discretion.

[38] At the new trial, the issue of MM's adoption of the video statement will resurface. My decision assumes that the Crown, consistent with its position at trial,

would offer the video statement under s. 715.1 if MM adopts it. I assume further that, given my reasons, the Crown would offer it under the principled exception if MM does not adopt it. I do not comment on the Crown's belated assertion of prosecutorial discretion. If, at a new trial, the Crown does not offer the video because of prosecutorial discretion, the parties will have the opportunity to make submissions to the trial judge respecting the implications, if any, on the Crown's onus to prove necessity and reliability of the parents' hearsay.

[39] Nobody showed MM the video at the trial. Had she seen it, she may have recognized herself with jogged cognition of the statement. That might suffice under s. 715.1 even though she had no current memory of the event involving DM: *CCF* at ¶ 30-44. The trial judge said "I am the blank page in this process." (above ¶ 14) That is because the trial judge did not have the opportunity to assess fully whether MM would adopt the video.

[40] At a new trial, unless it is thought that showing the video would traumatize MM, the attempted adoption process may be more productive if the Crown shows MM the video at a *voir dire*. In *F(W.J.)* ¶ 22, and in *CCF* ¶ 5 Justices McLachlin and Cory respectively noted that the child was shown the video before being asked about adoption. After MM sees the video, the trial judge can determine whether MM recognizes herself and whether that jogs her to adopt her video statement, within the meaning of adoption discussed in *CCF* ¶ 30-44.

[41] My decision makes it clear that the Crown also had a second avenue - the common law principled exception. The trial judge admitted, as necessary and reliable, the parents' year old recollections of what MM told them. It would be odd that the day old videotaped statement of MM herself would be less necessary or reliable. By saying this, I do not fetter the trial judge's discretion to consider these issues at a *voir dire* in a new trial. I am responding only to the suggestion that the saving provision should apply because, without the error of law, the result would have been the same.

[42] If MM's video statement is admitted, clearly the Crown cannot show that the result inevitably would have been convictions. The video statement is not in evidence on this appeal. I do not know what MM said, so I cannot conclude that a trier of fact, having viewed that statement, would necessarily convict.

[43] This is not a proper case for the saving effect of s. 686(1)(b)(iii).

Conclusion

[44] I would allow the appeal and set aside the convictions.

[45] In *R. v. F.(W.J.)*, Justice McLachlin disposed of the appeal as follows:

> [52] It follows that a new trial must be held. If on the retrial L.A. proves unable to communicate, it will be open to the trial judge to find that admission of her out-of-court statements is necessary on the principles set out in *Khan*, *supra*. I would allow the appeal and direct a new trial.

[46] Similarly, I would direct a new trial. If, on the new trial (1) MM's reluctance to communicate satisfies the trial judge that there has been no "adoption" of her statement under s. 715.1, and (2) the trial judge is satisfied that the admission of any or all of MM's out-of-court statements, including her video statement, are necessary and reliable (within the expanded test of *Khelawon*) then it will be open to the trial judge to admit those statements.

Fichaud, J.A.

Concurred in:

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