

Regina v. Kilabuk

60 C.C.C. (3d) 413

**Northwest Territories Supreme Court
de Weerd J.**

OCTOBER 11, 1990

Charter of Rights — Right to fair trial — Use of videotape evidence — Criminal Code providing that on trial of charges of certain sexual offences videotape in which complainant describes acts complained of admissible if complainant adopts contents of videotape while testifying — Complainant must be under 18 years of age at time of offence — Provision not infringing principles of fundamental justice or right to fair trial — Trial judge having discretion to exclude evidence where probative value outweighed by risk of undue prejudice to accused — Cr. Code, s. 715.1 — Canadian Charter of Rights and Freedoms, ss. 7, 11(d).

Charter of Rights — Fundamental justice — Videotape evidence — Criminal Code providing that on trial of charges of certain sexual offences videotape in which complainant describes acts complained of admissible if complainant adopts contents of videotape while testifying — Complainant must be under 18 years of age at time of offence — Provision not infringing principles of fundamental justice or right to fair trial — Trial judge having discretion to exclude evidence where probative value outweighed by risk of undue prejudice to accused — Cr. Code, s. 715.1-- Canadian Charter of Rights and Freedoms, ss. 7, 11(d).

Section 715.1 of the Criminal Code, which permits a videotape made within a reasonable time after the alleged offence in which the complainant describes the acts complained of, to be admitted in evidence in proceedings relating to certain sexual offences where the complainant was under the age of 18 years at the time of the offence, if the complainant adopts the contents of the videotape while testifying, does not infringe an accused's rights as guaranteed under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms. The special problems faced with very young witnesses particularly when giving an account of traumatic [page414] events in their lives, make use of videotape necessary if their evidence is to be heard at all in many cases. Provided that proper safeguards are observed and no undue prejudice to the accused can be shown, the probative value of such evidence, depending on all the circumstances, may so far outweigh the risk of undue prejudice to the accused that the evidence may be ruled admissible. The principles of fundamental justice are not infringed by the introduction of videotape evidence in a criminal trial. Further, while the videotape itself is not made at a public hearing, it is introduced at a fair and public hearing within the meaning of s. 11(d) of the Charter. Section 715.1 does not deprive the trial judge of the power to exclude a videotape from evidence at trial even if the conditions of that section are met. Nor will the videotape be sent into the jury room as one of the exhibits at trial. While there are obvious and serious practical problems in giving effect to s. 715.1 so that

the trial judge must weigh very carefully all the circumstances when deciding to admit a videotape in evidence on a criminal trial, the risk that those problems will arise does not affect the constitutionality of the provision.

R. v. Thompson (1989), 68 C.R. (3d) 328, 39 C.R.R. 1, 97 A.R. 157; R. v. Christensen (1989), 8 W.C.B. (2d) 13 not folld;

R. v. Potvin (1989), 47 C.C.C. (3d) 289, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193, 42 C.R.R. 44, 93 N.R. 42, 21 Q.A.C. 258, 7 W.C.B. (2d) 41 consd;

Cases referred to:

R. v. B.(K.) (1990), 76 Alta. L.R. (2d) 129, 10 W.C.B. (2d) 516; R. v. D.O.L., November 15, 1989 (unreported); Re T (J.A.); C.A.S. of Niagara Region v. T. (B.I.) (1987), W.D.F.L. 1120

Statutes referred to:

Canadian Charter of Rights and Freedoms, ss. 7, 11 Constitution Act, 1982, s. 52 Criminal Code, ss. 159 [rep. & sub. R.S.C. 1985, c. 19 (3rd Supp.), s. 3]; 271 [am. idem, s. 10]; 486 (2.1) [enacted idem, s. 14(1)]

Ruling on an application by the accused to have s. 715.1 of the Criminal Code declared to be unconstitutional.

D. Brice-Bennett, for accused.

P. Rousseau, for the Crown.

de Weerd J.: At issue on this motion made by counsel for the accused, in the absence of the jury during a trial of the accused on charges under ss. 159 and 271 of the Criminal Code, is the constitutional validity of s. 715.1 of the Code, which states: 715. 1 In any proceeding relating to an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273, in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape. I ruled against the motion after having heard the submissions of counsel thereon, reserving my reasons for so doing until an

opportunity arose to reduce them to writing. The following are those reasons.

In support of the motion, counsel for the accused cited s. 7 and s. 11 of the Canadian Charter of Rights and Freedoms, of which the English version is: 7. Everyone has the right to life, liberty

and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and impartial tribunal. It is the submission of counsel for the accused that s. 715.1 of the Criminal Code is inconsistent with these provisions of the Charter and is therefore not constitutionally valid or operable in law by virtue of s. 52 of the Constitution Act, 1982: 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) the Canada Act 1982, including this Act; Briefly summarized, it is the contention of counsel for the accused that s. 715.1 of the Code is not "in accordance with the principles of fundamental justice" contemplated by s. 7 of the Charter and that the procedures authorized by s. 715.1 of the Code are inconsistent with "a fair and public hearing" pursuant to s. 11(d) of the Charter. In support of this, counsel has cited *R. v. Thompson* (1989), 68 C.R. (3d) 328, 39 C.R.R. 1, 97 A.R. 157 (Q.B.), and *R. v. Christensen*, unreported, June 14, 1989 (Ont. Dist. Ct.) [summarized 8 W.C.B. (2d) 13]. I have also read the discussion on s. 715.1 of the Code in *McWilliams, Canadian Criminal Evidence* (3d ed.), at pp. 34-14 to 34-16, the content of which is generally reflected in the reasons for judgment in *Thompson*, followed in *Christensen*.

For the contrary view, Crown counsel cited the cases of *R. v. B. (K.)* unreported, June 28, 1990 (Q.B.) [since reported 76 Alta. L.R. (2d) 129, 10 W.C.B. (2d) 516] and *R. v. D.O.L.*, unreported, November 15, 1989 (Man.Q.B.). As already mentioned, I am persuaded that this contrary view is the correct one. In reaching that view I have had the advantage of reading the conflicting commentaries which appear at 68 C.R. (3d) 331, by Naeem Rauf, Esq. and at 68 C.R. (3d) 335 by Professor Nicholas Bala.

It is now well established that the principles of fundamental justice need not be infringed by the introduction of videotape evidence in a criminal trial. For example, such evidence has been received to reveal what occurred when an alleged confession was made to a police officer and numerous other instances can be cited. The special problems faced with very young witnesses, particularly where giving an account of traumatic events in their lives, make use of videotape necessary if their evidence is to be heard at all in many cases. Provided the proper safeguards are observed and no undue prejudice to the accused can be shown, the probative value of such evidence, depending on all the circumstances, may so far outweigh the risk of undue prejudice to the accused that the evidence may be ruled admissible.

While it is true that the videotape is made under conditions which cannot be regarded as a "public hearing" in itself, the introduction of the evidence contained on the videotape will be at "a fair and public hearing" provided that the proper safeguards are observed as already mentioned. The ultimate test will be whether or not the probative value of the evidence, in all

the circumstances, outweighs the risk of undue prejudice to the accused. If it does, there seems to me to be no proper basis for its exclusion.

I do not read s. 715.1 as depriving the trial judge of power to exclude such a videotape from the evidence at trial once the conditions of that section have been met. Nor do I find that there is anything requiring the videotape to be sent into the jury room as one of the exhibits at trial when the jury retires to consider its verdict, any more than portions of a transcript of the evidence-in-chief without, at the very least, corresponding portions of a transcript of the cross-examination.

The language of s. 715.1 is clear enough in saying that the videotape "is admissible" (or, in the French version, "est admissible") so as to empower the court to receive it in evidence subject always to other relevant considerations governing admissibility not displaced by s. 715.1. There is nothing in the section requiring that such a videotape "shall be admitted" or (or "doit être admis"). The somewhat analogous provisions of what is now s. 715 of the Code were so interpreted, being held constitutionally valid and applicable, in *R. v. Potvin* (1989), 47 C.C.C.(3d) 289, [1989] 1 S.C.R. 525, 93 N.R. 42 (S.C.C.), a decision delivered only after that in *Thompson*.

As I mentioned during argument, care will have to be taken to distinguish between the rules of evidence applicable in criminal cases and the greatly relaxed rules applicable in child protection proceedings. Cases of the latter sort, such as *Re T. (J.A.)*; C.A.S. of

Niagara Region v. T.(B.I.) (1987), W.D.F.L. 1120 (Ont. Prov. Ct.), are not a safe guide to the admissibility of videotapes in evidence under s. 715.1 of the Criminal Code. But, by the same token, since they are inapplicable in criminal cases, it is not a sustainable objection to the constitutionality of s. 715.1 that those more relaxed rules would open the floodgates to videotape material replete with otherwise objectionable hearsay, grossly leading questions or suggestions on material issues of fact, etc. And the greatest care will obviously have to be taken in preparing a videotape for use under s. 715.1 so as to avoid imputations of coaching the witness through off-camera cues and so forth.

As to the possibility that a witness who has been videotaped will "freeze" and not answer questions under cross-examination, is of course, always a possibility given that the cross-examination would be conducted after a period of at least some weeks or months following the taking of the videotape, probably in a different setting (even if not in a court-room but, instead, pursuant to s. 486(2.1) of the Criminal Code) and in the presence of persons other than those present during the videotape. The videotape may have been recorded, as in this case, more than a year before it is tendered in evidence so that a significant delay will have occurred before any cross-examination can be conducted.

There are therefore obvious and serious practical problems in giving effect to s. 715.1 of the Criminal Code, indicating that trial judges will weigh very carefully all the circumstances when deciding to admit a videotape in evidence on a criminal trial under that section. But I do not see the risk that those problems will arise as affecting the constitutionality of s. 715.1. If such problems appear likely to arise in a given case, the safest course would be to exclude the videotape from the evidence at trial. If the videotape is admitted and these problems occur,

though they were deemed unlikely to arise, it may be that an appropriate response would be to declare a mistrial.

There will no doubt be enough cases in which videotape evidence can be properly admitted under s. 715.1 of the Criminal Code, such as R. v. B.(K.), that the authorities concerned will take steps to ensure that such evidence is presented in a form and under conditions which will, whenever possible, meet the exacting standards required by the rules of evidence in a criminal trial. Ruling accordingly.