REGINA v. KOSTUCK

29 C.C.C. (3d) 190

Manitoba Court of Appeal
Hall, O'Sullivan and Philp JJ.A.

JULY 11, 1986

Evidence — Opinion evidence — Psychiatrist and psychologist — Accused charged with indecent assault and gross indecency relating to sexual abuse of child — Child psychologist called as expert in child abuse — Psychologist testifying that children very rarely lie about sexual abuse — Trial judge erred in accepting such evidence as corroborative of complainant's evidence — Expert witness not entitled to testify that witness including complainant likely telling the truth — Appeal by accused from conviction allowed.

APPEAL by the accused from his conviction on charges of indecent assault and gross indecency.

M. L. Skremetka, for accused, appellant.

D. R. Melnyk, for the Crown, respondent.

The judgment of the court was delivered by

HALL J.A.

HALL J.A.:—The issue is whether the learned trial judge, in convicting the accused of counts of indecent assault and gross indecency, erred in finding that the evidence of the complainant was credible, by relying in part upon the evidence of a psychologist that, when a child discloses sexual abuse, she or he is usually telling the truth.

In his reasons, the learned trial judge stated in part:

I also had the benefit of hearing Dr. Laura Mills who, as ex. 1 demonstrated, is a very qualified expert in the field of child abuse in general and specifically, from what I gather from her evidence, sexual child abuse. She has seen, I think she said, 100 to 200 cases of that. ***[page191]***

Again, the court can take parts of her testimony to see if it makes sense with the rest of what we have heard. I was struck by her evidence as to the fact that the vast majority of disclosures of children are truthful; the fact that children take upon themselves certain responsibilities in those situations, which are certainly not theirs but they take them; and also the lack of self- esteem a child may have and how it is played out. And if I take that evidence of Dr. Mills' and I apply it to

the evidence that I heard from Paula's mother as well as from Paula, I can look at that as being corroboration of the complaints made by the child. I find that Paula's evidence is credible, and I accept her evidence as opposed to the accused.

A reasonable interpretation of these remarks is that he relied upon the evidence of the psychologist that in the vast majority of disclosures by children of sexual abuse, they are usually telling the truth.

When objection was taken generally to the evidence of the psychologist he said:

THE COURT: The decision that I am going to make as to whether or not the accused is guilty of the charges which he has been accused of will, to a very great degree, be based on the credibility of the complainant. That is an issue that I and 1 alone am going to decide. That is not the issue which I expect Dr. Mills is going to testify to. And if she did and you objected, you would be quite correct in your objection, Mr. Skremetka. I view the evidence that Dr. Mills might give would be more in the line that Ms. LeMere has referred to and that I would think that it would be some use to the court in assessing the factual situation which I am facing. I am going to hear what Dr. Mills has to say. She appears to me to be eminently qualified in the field, and I have no hesitancy in saying that if the court can receive some advice in a case of this nature, not as to the issues that have to be decided, that this court is going to accept that advice, or not necessarily accept it, but it is going to hear it; and on that basis, I deny your motion.

In the course of her testimony, the following question and answer appears:

Q. Are you able to tell this Court some of the symptoms that a sexually abused child exhibits?

A. Okay. There's a number of symptoms that -- or behavioural symptoms or psychological symptoms that these children show, and not all children will show the full range of symptoms, but these are the things that are typically seen. The primary symptom or behaviour that indicates to people that the child has likely been sexually abused is a disclosure of sexual abuse. Children very, very rarely lie about sexual abuse. It's typically something that's beyond their knowledge to make up, and it's information that's not readily available to children, so that -- so disclosure is certainly a primary indication of sexual abuse. Other symptoms that suggest sexual abuse, but certainly indicate emotional disturbance of some sort, are things like bedwetting, or wetting during the day, nervous disorders, nightmares or night terrors, doing poorly at school, a great deal of emotional ability -- in other words, children who, you know, with the drop of a hat will be very upset for no apparent reason -- children who are very withdrawn and who appear depressed, children who are sexual acting out in younger children -- that might include ***[page192]*** masturbation, you know, open masturbation in front of other people or attempting to interfere with other children's genital areas. In older children it might include premature interest in sexual relations -- of course that would be the sexual acting out part.

You know, as I said, a lot of these symptoms are signs of being very emotionally upset and it could have other bases, but we see those kinds of things in sexually abused children.

Without accepting that disclosure, usually truthful, is a symptom of a sexually abused child, the learned trial judge erred in accepting such evidence as corroborative, supportive or otherwise acceptable in finding that the complainant's evidence was credible.

It has long been part of the law for which no authority need be cited that a witness, expert or otherwise, may not testify that an accused or any other witness, including a complainant, is likely telling the truth. That is not saying that a witness may not depose facts or give opinions (if qualified) that would be helpful in the difficult task of finding the truth.

While concern about sexual abuse is commendable and should be encouraged, it should not be at the expense of the standards of proof designed to protect the innocent from allegations which in many cases are very difficult to prove.

It is unnecessary to consider the other grounds of appeal. The appropriate course to follow would be to set aside the conviction on the two counts and enter a verdict of acquittal rather than order a new trial and it is so ordered.

Appeal allowed; acquittal entered. ***[page193]***