Regina v. F.E.J.

53 C.C.C. (3d) 64

Ontario Court of Appeal
Morden, Tarnopolsky and Galligan JJ.A.

NOVEMBER 24, 1989

Evidence — Opinion evidence — Psychiatrist and psychologist — Sexual assault of child — Accused charged with sexual assault of daughter — Prior to trial daughter writing letter to Children's Aid worker and indicating that she ***[page65]***

had lied about her father — At trial child testifying that letter was untrue - - Evidence of psychologist and social worker that such letter typical of recantations commonly seen among children who have been sexually abused admissible — Further opinion by psychologist that he had never found a case in which child was being truthful and recanting inadmissible — Accused tried by judge alone — Apparent that trial judge did not use inadmissible portion of evidence — Appeal by accused from conviction for sexual assault dismissed.

The accused was charged with the sexual assault of his daughter. It was the evidence of the child who was 16 years of age at the time of the trial, that her father had engaged in the sexual misconduct with her from the time she was seven years of age until she was 14 or 15 years of age. Shortly before the preliminary hearing the child wrote a letter to the Children's Aid Society worker to whom she had reported her father's misconduct in which she said "I am sorry but I lied about my dad." She went on to set out her reasons for doing so. When she was cross-examined at trial about the letter the child said that it was a lie and that she had written it to help her deal in her own mind with what had occurred. Over objection by defence counsel the Crown then called a psychologist who had particular experience with sexual abuse of children. He had never interviewed the complainant in this case but testified that the letter she had written was fairly typical of the recantations commonly seen among children who have been sexually abused, when they realize the problems that the revelations have caused. He further testified that in his experience he had never found a case in which a child was being truthful when she recanted. The Children's Aid Society worker was also permitted to testify that the letter was part of the scenario seen with a lot of abused children.

On appeal by the accused from his conviction for sexual assault, held, the appeal should be dismissed.

Evidence, including expert evidence, is generally inadmissible if adduced solely for the purpose of bolstering a witness's credibility. Such evidence is withinthe exclusionary rule against oath-helping. On the other hand expert evidence has been admitted to show that certain psychological

and physical conditions are consistent with sexual abuse. This latter evidence is, however, admissible not simply to bolster the credibility of the principal Crown witness but rather is adduced as tending to show a condition consistent with sexual abuse and therefore as being capable of supporting the witness's testimony. It remains for the court to decide as a question of fact whether the psychological or physical condition as interpreted by the expert does, in fact, support the testimony of the child witness. Accordingly, properly qualified expert opinion evidence about the general behavioural and psychological characteristics of child victims of sexual abuse is admissible for certain purposes. In order to assist a trier of fact in deciding whether in a particular case a recantation by a child of her allegations of sexual abuse should lead to a doubt about the witness's credibility, expert evidence about the general behaviour patterns of children in similar circumstances would be helpful and should be admitted. Such evidence falls within the general rule that expert opinions are admissible in order to assist the trier of fact with the significance of proved facts in an area where the expert has special knowledge outside the knowledge of the trier of fact. It is probably not generally known that children who have been sexually abused and have reported it commonly recant their allegations. In order for the trial judge to decide whether this child's testimony should have been disbelieved because of the letter she had written to the Children's Aid worker, the judge was entitled to know that recantations are common. On the other hand, the admission ***[page66]*** of this evidence calls for the greatest care on the part of the trial judge in the use to be made of such evidence. While the psychologist's testimony about general behaviour patterns of children involved in sexual-abuse cases was admissible his further testimony that he had never seen a case where the recantation was truthful was inadmissible. On the other hand, it was clear from the trial judge's reasons that he had not used inadmissible evidence to bolster the credibility of the child and the admission of that opinion occasioned no prejudice to the accused. The evidence of the Children's Aid Society social worker was, as well, admissible on the same basis as the evidence of the psychologist.

R. v. Beland and Phillips (1987), 36 C.C.C. (3d) 481, 43 D.L.R. (4th) 641, [1987] 2 S.C.R. 398, 60 C.R. (3d) 1, 79 N.R. 263; R. v. B(G.) (1988), 65 Sask. R. 134, 4 W.C.B. (2d) 280; R. v. Beliveau (1986), 30 C.C.C. (3d) 193; U.S. v. Azure, 801 F. 2d 336 (1986), consd

Other cases referred to

R. v. Kyselka (1962), 133 C.C.C. 103, 37 C.R. 391, [1962] O.W.N. 160; R. v. Taylor (1986), 31 C.C.C. (3d) 1, 57 O.R. (2d) 737, 55 C.R. (3d) 321, 1 W.C.B. (2d) 137; R. v. Kostuck (1986), 29 C.C.C. (3d) 190, 43 Man. R. (2d) 84; R. v. Burkart, [1965] 3 C.C.C. 210, 45 C.R. 383, 50 W.W.R. 515; R. v. Millar (1989), 49 C.C.C. (3d) 193, 71 C.R. (3d) 78, 33 O.A.C. 165, 8 W.C.B. (2d) 441; Commonwealth v. Baldwin, 502 A. 2d 253 (1985)

Sentence — Sexual offences — Sexual assault of daughter by father over period of many years — Child testifying that accused committed numerous sexual acts including sexual intercourse — Crown appeal from sentence of 18 months' imprisonment dismissed.

APPEAL by the accused from his conviction for sexual assault; APPEAL by the Crown from the sentence imposed.

B.H. Greenspan, for accused, appellant.

S.G. Ficek, for the Crown, respondent.

The judgment of the court was delivered by

GALLIGAN J.A.

GALLIGAN J.A.:— This appeal raises the difficult issue of how far a court may go in admitting evidence to explain why a prior inconsistent statement should not be viewed as impeaching the credibility of a youthful witness's testimony.

After trial by a judge alone, the appellant was convicted of having committed sexual offences against his daughter, M.E. He was sentenced to a term of 18 months' imprisonment. The evidence was that sexual misconduct began when M.E. was about seven years of age and continued until she was about 14 or 15. The appellant appeals against the conviction. The Crown seeks leave to appeal the sentence.

At the time of the trial M.E. was 16 years of age and a student in Grade 10. She testified that over many years her father committed numerous sexual acts with her, including sexual intercourse. The appellant testified that M.E. was his favourite child ***[page67]*** and that they were very close, but he denied that anything "like that ever happened". The trial judge correctly said that the case came down "to a straight issue of credibility" and resolved it against the appellant. He accepted M.E.'s testimony and found the appellant guilty.

Shortly before the preliminary hearing, M.E. wrote a letter to the Childrens' Aid Society worker to whom she had reported her father's misconduct. She was 15 at the time. The letter began by saying: "I am sorry but I lied about my dad." She went on to set out her reasons for doing so. In essence she stated that she had said the horrible things about her father in the hope that they would bring her mother back and that the family would be together again.

When she was cross-examined about the letter she said that it was a lie and that she had written it to help her deal, in her own mind, with the terrible events of her life. She said that by looking at the letter she could make herself think that none of it had ever happened and then it would go out of her mind. She maintained, however, that the evidence which she gave at trial was true.

The Crown called a well-qualified psychologist who had particular experience with sexual abuse of children. The admissibility and use of that testimony is the subject of the first ground of appeal. His evidence was admitted over the objection of defence counsel. He had never interviewed M.E. , but had read her letter. The essence of his testimony was that the letter was fairly typical of the recantations commonly seen among children who have been sexually abused

when they realize the problems that their revelations have caused. He said that this letter would be a typical one in a textbook on child sexual abuse. Further, he said that in his experience he had not found one case in which a child was being truthful when recanting.

Before turning to discuss the admissibility of this evidence there are some general comments that I would like to make. Sexual abuse of children is a despicable crime. It is not easy to detect and, because it invariably happens in private, it can be difficult to prove. Usually it comes down to the word of a child against that of an adult. It is easy, therefore, to be sympathetic with the efforts of those who try to discover these crimes and prosecute their perpetrators.

While there is no scale upon which conflicting evils can be weighed, it should be remembered that revolting as child sexual abuse is, it would be horrible for an innocent person to be convicted of it. For thatreason I think the courts must be vigilant ***[page68]*** to ensure that the zeal to punish child sexual abusers does not erode the rules which the courts have developed over the centuries to prevent the conviction of the innocent.

Frequently the most difficult task of a judge or jury is to decide upon the credibility of witnesses. One of the most important indices that a witness may not be reliable is found where the witness's testimony, on a material issue about which an honest witness is unlikely to be mistaken, is contradicted by what he or she said on a previous occasion. The reason why the trier of fact should view the evidence of such a witness with caution is that it is difficult to know whether the witness was being truthful in the witness-box or on the prior occasion. A court may act upon the testimony of such a witness if it is satisfied beyond reasonable doubt that the testimony is true, but it should be cautious before doing so. Any explanation which is given for the contradiction or any circumstances which may help to explain it must be carefully weighed, but a contradiction on a material matter is something that generally tends to impeach the credibility of a witness.

In this case M.E. said in her letter that her allegations of sexual abuse against her father were lies. It is hard to think of a more material contradiction of her testimony. She was entitled to give an explanation about why she wrote the letter and the judge was required to weigh it. The issue is whether it was permissible for the Crown to call an expert witness to testify that this letter was typical of untruthful recantations of children who were victims of sexual abuse.

Counsel said that they had been unable to find any appellate decisions directly on point in Canada. It appears, however, that it is not unusual for this type of evidence to be introduced in the trial courts of this province. Mr. Greenspan argued that the evidence was inadmissible because its purpose was to bolster or enhance the testimonial trustworthiness of M.E. Ms. Ficek contended that the testimony of the psychologist related to "the syndrome of recantation" and was relevant and admissible to explain the significance of the witness's recantation.

There are two lines of authority, which can often co-exist but which in this case seem to come into conflict. The first line of authority is that, generally speaking, expert evidence is not admissible to support the credibility of a witness. The other is that expert evidence is admissible to show that in cases of child abuse certain common psychological and physical conditions occur. I propose to make some brief reference to each of these two lines of authority.

[page69] Evidence adduced solely for the purpose of bolstering a witness's credibility is inadmissible. This exclusionary rule has been called the rule against oath-helping. The existence and importance of the rule was emphasized by McIntyre J. speaking for four of the five judges who formed the majority of the Supreme Court of Canada in R. v. Beland and Phillips (1987), 36 C.C.C. (3d) 481 at pp. 486-9, 43 D.L.R. (4th) 641, [1987] 2 S.C.R. 398. Wilson J.'s dissenting judgment on behalf of the minority discloses that she recognized the existence of the rule. Some examples of the rule's application may be seen in the following cases: R. v. Kyselka (1962), 133 C.C.C. 103, 37 C.R. 391, [1962] O.W.N. 160 (C.A.); R. v. Taylor (1986), 31 C.C.C. (3d) 1 at pp. 5-6, 57 O.R. (2d) 737, 55 C.R. (3d) 321 (C.A.); R. v. Kostuck (1986), 29 C.C.C. (3d) 190, 43 Man. R. (2d) 84 (C.A.), and R. v. Burkart, [1965] 3 C.C.C. 210, 45 C.R. 383, 50 W.W.R. 515 (Sask. C.A.).

The second line of authority is of relatively recent origin and its rationale is explained in the reasons for judgment given by Wakeling J.A., speaking for himself, in R. v. B.(G.) (1988), 65 Sask. R. 134 at p. 148, 4 W.C.B. (2d) 280 (C.A.):

I do not need to resort to statistics to establish that there are many more cases now coming to trial involving sexual abuse of children and requiring a very difficult evaluation of youthful testimony. Under these circumstances, it is understandable that the courts should seek as much assistance as possible from those who can be qualified as experts. They can shed some additional light on evidence that would otherwise be of negligible value, so as to assist the judge in reaching a determination of what facts have been adequately corroborated or otherwise established.

In R. v. Beliveau (1986), 30 C.C.C. (3d) 193, the British Columbia Court of Appeal ruled that an expert in child abuse could express an opinion that certain behaviour, demeanour and other factors were consistent with the child having been sexually abused. However, it was made clear that opinion evidencecould not be given about the truthfulness of the witness. One of the judges who delivered reasons, Craig J.A., held at p. 203 that counsel for the Crown could not ask Crown witnesses whether they considered the child to be a truthful person. The other judge who delivered reasons, Macfarlane J.A., pointed out at p. 207 that the evidence of the expert was not admissible "to establish that the child was a truthful witness".

In R. v. Millar (1989), 49 C.C.C. (3d) 193, 71 C.R. (3d) 78, 33 O.A.C. 165, this court held that in a physical child-abuse case the opinions of qualified experts were admissible on the issue of whether certain injuries were caused accidentally or intentionally. ***[page70]*** The opinions were held to be admissible even though they were on the very issue which the trier of fact (in that case the jury) had to decide. The basis upon which the opinions were held to be admissible was that the jury could receive "useful assistance from the witnesses who have extensive knowledge and experience in the detection of cases of child abuse" and that the expert witnesses had "special knowledge and experience going beyond that of the trier of fact" (p. 218). Morden J.A. who gave the judgment of the court then observed at pp. 218-9:

On the admissibility and use of expert opinion evidence on the characteristics of sexually abused children, reference may be made to R. v. Taylor (1986), 31 C.C.C. (3d) 1, 57 O.R. (2d) 737, 55

C.R. (3d) 321 (Ont.C.A.); R. v. Beliveau (1986), 30 C.C.C. (3d) 193 at p. 207 (B.C.C.A.), and R. v. B.(G.) (1988), 65 Sask. R. 134 at pp. 147-9 (Sask.C.A. -- Wakeling J.A. speaking for himself).

It is not necessary in this case to attempt to list all of the purposes for which that kind of evidence is admissible. It seems from R. v. Beliveau, supra, and from the views expressed by Wakeling J.A. in R. v. B.(G.), supra, that it can be used to show that certain psychological and physical conditions could be consistent with sexual abuse. If those conditions were proved to exist in a case, they could tend to support the child's evidence that there had been sexual abuse. It is clear, however, from the judgment of this court in R. v. Taylor, supra, from the judgment of the British Columbia Court of Appeal in R. v. Beliveau, supra, and from the judgment of the Manitoba Court of Appeal in R. v. Kostuck, supra, that the opinion of experts, even in a child-abuse case, is not admissible simply to bolster the credibility of the principle Crown witness.

The distinction between those two circumstances may not always be easy to make. At first blush it may appear that there is not much of a difference between admitting expert opinion evidence to bolster credibility and admitting it to show that certain psychological and physical conditions are consistent with sexual abuse and thus capable of supporting the testimony of the child witness. The difference is that in the first case the witness gives his or her expert opinion about truthfulness. In the second, the evidence is only admitted as tending to show a condition consistent with sexual abuse and, therefore, as being capable of supporting the witness's testimony. It remains for the court to decide as a question of fact whether the psychological or physical conditions, as interpreted by the expert, do in fact support the testimony of the child witness. The distinction is crucial and must always be borne in mind.

[page71] American courts have had to deal with this issue. In U.S. v. Azure, 801 F. 2d 336 (1986), the United States Court of Appeals (8th Cir.), reviewed a trial in which a paediatrician who was an expert in child abuse gave his opinion about the truth of the evidence of a child who had testified that she had been abused. That court held that the paediatrician's evidence was inadmissible but did say that some general evidence about the conduct of victims of sexual abuse might have aided the jury in its difficult task of assessing credibility.

In Commonwealth v. Baldwin, 502 A. 2d 253 (1985), the Pennsylvania Superior Court had to consider a case that bore some similarities to this one. The prosecution called as a witness a social worker who was well qualified in sexual-abuse cases. He testified in general terms about the dynamics of intra- family sexual abuse and the behaviour pattern of its victims. He specifically did not express any opinion about the credibility of the child witness in that case. The court held that general behaviourial and psychological characteristics of child sexual-abuse victims are proper subjects for expert testimony. Judge Beck, giving the judgment of the court, noted that child sexual-abuse victims can be reluctant witnesses, sometimes refusing to testify or recanting prior allegations out of fear or coercion. He went on to say at p. 258:

In Middleton the Oregon court explained succinctly how this type of expert testimony assists the jury in understanding and evaluating the evidence:

"If a complaining witness in a burglarly trial, after making the initial report, denied several times before testifying at trial that the crime happened, the jury would have good reason to doubt

seriously her credibility at any time. However, in this instance we are concerned with a child who states she has been the victim of sexual abuse by a member of her family. The experts testified that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful to the jury to know that not just the victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint ... Explaining this superficially bizarre behaviour by identifying its emotional antecedents could help the jury better assess the witness's credibility."

(Middleton, 294 Or. at pp. 435-6, 657 P. 2d at pp. 1219-20.) I find that reasoning to be persuasive.

I think it should now be acceptedby this court that properly qualified expert opinion evidence about the general behaviourial and psychological characteristics of child victims of sexual abuse is admissible for certain purposes. It would violate the rule against oath-helping if a witness were allowed to express an opinion about ***[page72]*** the credibility of a particular witness. However, in order to assist a judge or jury in deciding whether, in a particular case, a recantation by a child of his or her allegations of sexual abuse should lead to a doubt about the witness's credibility, expert evidence about the general behaviour patterns of children in similar circumstances could be helpful. The admission of that evidence would fall within the general rule that expert opinions are admissible in order to assist the trier of fact with the significance of proved facts in an area where the expert has special knowledge outside the knowledge of the trier of fact. This rule is referred to by McIntyre J. in R. v. Beland and Phillips, supra, at pp. 493-4:

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 expert 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.

I would think that it is probably not generally known that children who have been sexually abused, and have reported it, commonly recant their allegations. Thus, in order for the trial judge in this case to decide whether this child's testimony should have been disbelieved because of the letter, he was entitled to know that recantations are common.

I have not arrived at this conclusion without some reluctance. The admission of evidence of that kind, as well as being probative, could have a very serious prejudicial effect. The crucial issues in the criminal law, the credibility of witnesses and the guilt or innocence of accused persons, must not be decided by expert witnesses, no matter how high their qualifications. An impressively qualified expert must not be allowed to appear to put his or her stamp of approval upon the testimony of a witness. Worrisome as I find those concerns to be, I am unable to say that they could prevent the evidence from being admitted. However, they do call for the greatest care on the part of trial judges in the use of such evidence.

The psychologist in this case, as has been noted, gave evidence not only about the general behaviourial patterns of children involved in sexual-abuse cases, but he also said that he had not seen one case where the recantation was truthful. That latter part of his evidence was clearly inadmissible. Similar comments were held to be inadmissible by this court in R. v. Taylor, supra, and by the Manitoba Court of Appeal in R. v. Kostuck, supra. In a ***[page73]*** case such as this, where everything turns upon the credibility of two witnesses, the admission of that evidence might be fatal to the validity of a jury trial. This case, however, was tried by a judge without a jury. In R. v. Beliveau, supra, at p. 203, Craig J.A. pointed out that a judge can be expected to ignore inadmissible evidence in coming to his or her decision.

An examination of the reasons for judgment of the trial judge in this case shows that when he decided that M.E.'s letter should not impeach her credibility he did so because the letter was "understandable and consistent with the pattern of behaviour of children in abuse cases". Nowhere does he refer to the psychologist's opinion about the trustworthiness of children in sexual abuse-cases. I am satisfied that the admission of that opinion occasioned no prejudice to the appellant.

In this case the trial judge was correct when he admitted the evidence of the psychologist. He disregarded that portion of the expert's evidence which was not admissible. He properly admitted the evidence and he made proper use of it. In my opinion, this ground of appeal must fail.

The Childrens' Aid Society worker also testified that the letter was part of the scenario seen with a lot of abused children. The next ground of appeal was that this evidence was inadmissible. I can deal with this ground of appeal shortly. It is my opinion that the evidence of the social worker was admissible upon the same basis as the evidence of the psychologist. The trial judge made correct use of that evidence.

Counsel for the appellant also argued that the trial judge erred in admitting evidence which had the effect of putting the character of the appellant in a bad light. Because of the circumstances surrounding the charges, it was inevitable that a good deal of family history was put before the trial judge. That history included evidence about the conduct of the appellant during the years covered by the charges. Unfortunately for him, much of that evidence was unflattering. It was, however, admissible.

Regrettably, cross-examination by Crown counsel went beyond the bounds of what is fair. It is important for Crown counsel to keep constantly in mind that his or her enthusiasm for the case being presented must not allow compromise of the Crown's responsibility to be fair. I will simply say this: parts of the cross-examination, relating to conduct of the appellant which had no bearing on the charges he faced, were unseemly.

Notwithstanding the fact that the cross-examination went beyond the bounds of fairness I am satisfied, in all of the circum-***[page74]*** stances of this case, that it did not cause any substantial wrong or miscarriage of justice.

Finally, the appellant contends that a remark made by the trial judge to the appellant's daughter when she completed her evidence created the appearance of unfairness. The remark was a

humane one intended to convey compassion for a person who had just performed a most difficult and obviously disagreeable task. In my view, the comment did not indicate a prejudgment of the issue of credibility nor could it have given any such impression to any fair-minded observer of the proceedings. No objection was made about it at the trial. I do not think that there is merit in this ground of appeal.

In the result I would dismiss the appeal from conviction.

As I have said, the Crown seeks leave to appeal from the sentence and, if leave is granted, appeals the sentence of 18 months imposed upon the appellant. The offences of which the appellant was convicted were serious. The trial judge weighed the gravity of the offences and the need for denunciatory sentences in cases of this kind. He weighed the appropriate mitigating factors. I am unable to discern any error in principle in the sentence imposed.

I would grant leave to appeal but would dismiss the Crown's appeal from sentence.

Appeals dismissed.