R. v. B.(D.C.): A Pigeonhole Without a Principle

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I. INTRODUCTION

IN THE CASES OF *R.* v. *Khan*[1] and *R.* v. *Smith*[2] the Supreme Court of Canada enunciated the proposition that evidence could be admitted outside of the traditional exceptions to the hearsay rule if that evidence met the broad principles of "necessity and reliability." The Court determined that the admissibility of evidence would not be determined by whether or not it fit within a category or "pigeonhole." Rather, evidence would be admitted when it met certain principled tests. This approach clearly removes the problems of what to do when the facts of a given case come close, but do not exactly fit the "pigeonhole." It also results in evidence being dealt with on a case by case basis. In *R.* v. *B.(C.D.)*[3] the Manitoba Court of Appeal chose to deal with evidence outside of the traditional "pigeon-holes" by creating a new category rather than using a principled approach to the evidence.

II. THE FACTS

THIS TYPE OF CASE is unfortunately becoming all too common in Canadian Courts. The accused's stepdaughter (ten years old at the time of the trial) was assaulted by three young boys at lunch hour in the playground of her school. There were sexual overtones to this assault.

As a result of this assault, she was seen by a school counsellor. After a period of about one hour, the complainant calmed down and in response to a question by the counsellor related that she had been sexually assaulted by the accused and her stepbrother. She further informed the counsellor that the accused's twin daughters,

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[1] (1990) 59 C.C.C. (3d) 92 (S.C.C.).

[2] (1992) 75 C.C.C.(3d) 257 (S.C.C.).

[3] (1994) 91 C.C.C. (3d) 357 (Man. C.A.).

(aged nine at the time of the trial) had been similarly abused. The counsellor then spoke to the twins who confirmed these allegations. The accused subsequently was charged with five counts of sexual touching and three counts of sexual assault arising from these disclosures.

III. THE PROCEEDINGS

A. The Trial

The trial was held before a Judge sitting without a jury. At the trial, all three complainants testified. The accused testified and denied the allegations. In addition, Ms. Fishman, the school counsellor testified. Her testimony included the details of the disclosures made to her by the children. Her testimony was received without objection on the part of the accused. In fact, she was cross-examined at length on the details of the disclosures. The objective of the defence seemed to be to bring out inconsistencies between the initial disclosures and the evidence at trial.

The trial judge convicted the accused on all counts. He made the following observations in his ruling:

> After observing these children and hearing their evidence, together with the other evidence led in this matter, *and in particular the evidence of* Gail *Fishman*, I have come to the conclusion that ... there is an underlying ring to the truth of these three children.
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> *...the evidence of* Gail *Fishman ... is important to me and assists me in arriving at my conclusions with respect to their evidence.*[4]

In the result, the accused was convicted on all counts and subsequently sentenced to three years imprisonment.

B. The Appeal

The accused appealed the convictions. His grounds of appeal questioned the findings of credibility on the part of the trial judge. In effect he was arguing that the verdict was unreasonable.[5] The accused did not argue that the evidence of Ms. Fishman was improperly admitted into evidence.

In an unusual course of events, the Court itself, in particular Twaddle J.A., raised the issue of the admissibility of this evidence. Although the Court unanimously agreed that the Appeal should be dismissed upon the Accused's grounds of appeal, they went on to discuss the admissibility of the evidence they themselves

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[4] *Ibid.* at 361.

[5] *Criminal Code of Canada*, R.S.C. 1985, C. c-46, s. 686(1)(a)(i).

had brought into question. Each of the three members of the panel wrote separate judgments.

C. Philp J.A.

Philp J.A. somewhat incongruously determined that the accused could not challenge the evidence of Ms. Fishman on the appeal as he had not objected to the admissibility of the evidence at the trial. This reasoning is unusual since the accused did not choose to challenge the evidence at the appeal; it was the Court itself that brought the issue into question.

However, he went on to discuss the admissibility of the evidence in what can only be considered *obiter* comments. He stated that if necessary, he would be prepared to rule the evidence admissible for the purpose of enhancing the credibility of the complainants. He was prepared to hold that, absent an allegation of recent fabrication, the rule pertaining to previous consistent statements of a witness does not apply where that previous evidence was a young child's complaint of sexual abuse.

The reasons for making this change are somewhat unclear. In his view, this change was necessary in order to assist the trial judge in finding the truth in what he called "troubling" and increasingly prevalent cases of child sexual abuse. There is no clear delineation in his reasons of how the Court will be assisted by the reception of this evidence.

In his view, the combination of the Supreme Court of Canada's rulings that children's evidence was to be judged not by adult standards but by a "common sense"[6] attitude and Parliament's repeal of the requirement that children's evidence had to be corroborated were not sufficient to accomplish this objective. In order to render assistance to a trial judge, a more appropriate way must be found. Again, there is no clear statement of why the previous changes were not sufficient.

As a result, a trial judge could use the fact of consistency in his or her assessment of credibility. He states that this evidence should only be admissible in "appropriate cases" subject to such safeguards that the Judge may deem necessary. The circumstances of the making of these statements is left to weight.

It seems that Philp J.A. is prepared to hold that the mere fact of consistency enhances credibility. The Courts have uniformly held that this is not the case where adults are concerned.[7] Notwithstanding this long standing body of law, there are no reasons given or evidence presented by Philp J.A. why this would be the case for young children and in particular where that child alleges sexual abuse.

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[6] R. v. *B.(G.)* (1990), 56 C.C.C. (3d) 200 (S.C.C.); *R.* v. *W.(R.)* (1992), 74 C.C.C. (3d) 134 (S.C.C.).

[7] R. v. *Beland* (1987), 36 C.C.C. (3d) 481 (S.C.C.).

D. Twaddle J.A.

Twaddle J.A. took the position that the accused was not prevented from raising this issue on appeal, particularly since the matter was raised by a member of the Court. However, he was prepared to go much farther than Philp J.A. He indicated that evidence of a child's complaint would be admissible for all purposes, including the truth of the contents of the complaint. These complaints would only be admitted where the child testifies at the trial.

He viewed the rule that he was making as a change in the rules affecting previous consistent statements, not as an exception to the hearsay rule. This is seemingly based on his perception that once a witness is available for cross-examination, the hearsay rule has no application. This is clearly in error, for the essence of the hearsay rule is the purpose for which the out of court statement is offered. If the purpose is to prove the truth of the contents of the statements, then the statement is hearsay. Subject to any exceptions that may exist, it is inadmissible. If the statement is admitted for some other purpose, admissibility is determined on the basis of relevancy.[8] This error does not affect Twaddle J.A.'s reasoning, but had he been prepared to categorize the statements as hearsay, he would have had some difficulty in setting out the rule in the way that he did. He would have been limited by the Supreme Court of Canada decision in *R.* v. *Khan*.[9] This case stated that the admissibility of hearsay statements are governed by the principles of "necessity" and "reliability." Twaddle J.A. did not enunciate either of these propositions as a *sine qua non* of admissibility. If he had, the previous statements would not have been admitted. There was no indication that this evidence was necessary. All the complainants testified, there was no indication that they were intimidated or that their testimony was in any way affected by the Court proceedings, nor was there any indication that they were as a result of their age unable to give a full and complete account of the events that gave rise to the allegations.

Twaddle J.A. also discussed the issue of whether the rule he was proposing violated the rules against self-corroboration, i.e., the rule against previously consistent statements. He argued that it did not violate this rule as the purpose of the rule is to prevent redundant evidence from being admitted. He then stated that given that the Supreme Court of Canada had held that the statutory provision permitting a child's videotaped testimony to be admitted at trial did not violate this rule,[10] as there was no reason to differentiate between the two situations. In his view, such statements can scarcely be called redundant, whether videotaped or not.

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[8] J. Sopinka, S. Lederman, & A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 156.

[9] *Supra* note 1.

[10] *R.* v. *L.(D.O.)* (1983), 85 C.C.C. (3d) 289 (S.C.C.).

His reasons for making the change are based on the perception that the present rules of evidence are unsuitable for the child witness. That is, the criteria that a finder of fact uses to assess the credibility of an adult witness, may not be of assistance in determining the credibility of children. In fact, in light of a child's inherent difficulties in giving testimony, such as lack of detail, inconsistencies and even contradictions, these criteria will often result in findings of the child being incredible. As a result, in his view, there is a need for changes in the rules of evidence that would allow the finder of fact to receive a full account of the events complained of. As well, credibility can be more readily judged in a child by considering the circumstances of the first complaint.

Based on these factors, Twaddle J.A. enunciated a broad based rule admitting evidence of the complaints of children where the person receiving the complaint testifies as to the circumstances of the making of the complaint. These circumstances, together with the form in which the statement is recorded, are matters of weight and not admissibility. In his view, although the rules against recent complaint were abrogated by Parliament,[11] the rule he set out did not reinstate that rule since its purpose was not to counter the archaic view that absent recent complaint, consent could be inferred nor did his rule require that the complaint be made at the first opportunity.

Finally, he stated that, in accordance with the edicts of the Supreme Court of Canada, the change was one that was "slow and incremental" rather than "major and far reaching."[12]

E. Kroft J.A.

Kroft J.A. sat on the fence. Although the rationale of his decision is not completely clear, he seems to have concurred more with Philp J.A. than Twaddle J.A. He stated that he agreed with the "conclusions" reached by Philp J.A., including the fact that the accused cannot be seen to complain where he consented to the admissibility of the evidence and also made use of it in his case.

As a result, he stated that he need not comment on the differences between Philp J.A. and Twaddle J.A. However, he went on to say, that at a minimum, the evidence of a child's spontaneous account of sexual abuse, may be "very relevant to a trial judge's determination of credibility and should be admitted."

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11 *Criminal Code*, s. 275.

12 *Watkins* v. *Olafson* (1989), 61 D.L.R. (4th) 577 (S.C.C.); *R.* v. *Salituro* (1991), 68 (C.C.C.) (3d) 289 (S.C.C.).

IV. COMMENTARY

IN A SOMEWHAT UNCLEAR and contradictory decision, the Manitoba Court of Appeal has created a new category or "pigeonhole" of admissible evidence. One would have hoped that in making this type of decision, the reasons would be clearly delineated and supported in the reasons for judgment. Unfortunately they are not.

Philp J.A. would permit the use of a child's previous statements for the purpose of enhancing the child's credibility. His reasons for changing the existing rules are that the recent Supreme Court pronouncements on children's evidence calling for a "benign attitude" and a "common sense" approach[13] to such evidence do not sufficiently permit a court to find the truth in such cases. In his view, a more "appropriate" way must be found. If his conclusion is correct, it might well provide a reason for changing the traditional rules in respect of previous consistent statements when it comes to children. However, he provides no evidence to support this conclusion. For example, there are no statistics provided which indicate that in the face of the above pronouncements children are still less likely to be believed than adults or that the courts still treat the evidence of children with caution.

His conclusion is based on the assumption that a child's credibility will be enhanced if that child has made a previous statement consistent with the testimony given at trial. He cites no evidence to support this proposition. If the fact of consistency in and of itself enhances credibility, why limit this exception to the evidence of children? If this consistency enhances a child's evidence, where is the proof in the form of scientific studies or expert evidence to support this proposition? Philp J.A. provides none. If the proposition is true, why limit the exception to cases of sexual abuse. Again, no reasons are given.

In light of the movement away from the creation of pigeonholes in the law of evidence, the reasons of Philp J.A. do not justify the creation of a new category of admissibility.

A similar conclusion can be reached in respect of the reasons of Twaddle J.A. His reasons for admitting the previous statements of a child are based on two propositions. First that the present rules fail to recognize the difficulty of obtaining a full account of the events from the child and second that the credibility of a child may be more readily judged by considering the circumstances in which the complaint was made.

The first proposition does not provide a sufficient basis for the creation of a new category of admissible evidence. Surely, a principle permitting the reception of previous consistent statements where the witness was having difficulty giving a full account of the events would equally solve the problem. The evidence would be

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[13] *Supra* note 6.

admitted on a case by case basis to be determined by the principle of necessity. This would be in accordance with the movement away from creating new categories of admissible evidence.

The second proposition also does not support the proposed rule. If one accepts the proposition that credibility can be more easily judged by knowing the *circumstances* of the making of the complaint, the *content* of the complaint does not assist in that determination. As a result, the rule enunciated by Twaddle J.A. does not serve the purpose intended. The Supreme Court of Canada has enunciated two principles which would permit the reception of this evidence for its truth, these are necessity and reliability,[14] and there is nothing in Twaddle J.A.'s reasoning, nor does he provide any evidence, to show that these principles do not meet the needs of the justice system. A good example is the instant case. The child witnesses seemingly had no difficulty giving a full account of the events, nor was there any indication that admitting the previous statements for their truth would have assisted the trial judge in coming to his conclusion. Even though he relied on the circumstances of the making of the statements, he stated that there was "an underlying ring to the truth of the story told by these three children." In fact, he was able to say this notwithstanding some contradictions between the evidence given in court and the previous statements.

In conclusion, the Manitoba Court of Appeal has engaged in a form of judicial overkill in attempting to solve a perceived problem. If the problem is a real one (although there was no evidence cited by the court to substantiate that proposition) a better solution would have been to set out the principles underlying the need for the evidence and permit evidence to be admitted on a case by case basis in accordance with those principles. What the Court did was create an all encompassing, unneeded pigeonhole.

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[14] *Supra* notes 1 and 2.