WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. P.G., 2012 ONCA 859
DATE: 20121206
DOCKET: C54084

Sharpe, Lang and Tulloch JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

P.G.

Applicant/Appellant

Catriona Verner and Victor Giourgas, for the appellant

John Pearson, for the respondent

Heard: November 13, 2012

On appeal from the conviction entered on February 2, 2011 by Justice J.C. Corkery of the Superior Court of Justice, sitting with a jury.

Sharpe J.A.:

[1] The appellant was convicted of sexual assault and invitation to sexual touching following a trial before a Superior Court judge sitting with a jury. He was sentenced to 42 months imprisonment. He appeals the convictions.

[2] The complainant was the appellant's biological daughter, three years old at the time of the alleged offences and age 11 at the time of trial. The Crown's case rested entirely on the complainant's unsworn, out-of-court statements made to

her foster parents and to the police when she was four years old. At the time of trial, the complainant had no recollection of the alleged abuse or of having complained about it.

[3] The central issue on this appeal is the admissibility of the out-of-court statements.

Facts

[4] The facts may be stated briefly. The complainant and her brother lived with their parents until they were placed in foster care in March or April of 2003, when the complainant was four and her brother was eight. On September 17, 2003, several months after she had been placed in foster care, the complainant made allegations of sexual abuse to her foster parents, RP and LP.

[5] RP noted that the complainant was masturbating under her clothes. He asked her why she was doing this and she told him it reminded her of her daddy who had spanked her “puddie” – her word for vagina – and it felt good. She reported that her father would take down his pants and “bang bang banged” his penis and then pee on her. She stated that it was not toilet pee, that it stunk and that she rubbed the pee on her face and her mother told her she looked pretty. She said her daddy told her it was a secret. She refused RP’s request that she repeat the statement to a police officer “because daddy will go to jail”.

[6] Despite being advised by social workers not to encourage the complainant to speak about her allegations, RP had a second conversation with the complainant. She reported in response to leading questions that her father had touched her privates with his penis, that he had penetrated her from the front when she sat on his lap facing away from him, that there had been bleeding, and that she experienced pain all the way down her leg. She also told RP that the appellant had “toilet peed” on her while she was taking a bath.

[7] LP took notes of her conversation with the complainant later that evening when the complainant reported, inter alia, that she had played a game with her father during which he peed all over her and her mummy said it was pretty.

[8] A week later RP and LP took the complainant to the police where she made a videotaped statement. She told the police that the appellant had pulled his pants down in her room, that she saw his privates, and that he had touched his privates. She further stated that he peed at her and, when asked if it was normal pee, she said yes. When asked how often this happened she initially estimated five times but then stated 50 times. She also alleged acts of oral sexual contact.

[9] When asked if she understood what it means to tell the truth, she was unable to give a coherent answer. She also stated that she was five years old (she was actually four years old) and that she was in grade five.

[10] After leaving the police station, the complainant made further allegations to RP and LP involving sexually inappropriate behaviour on the part of her mother, sexual abuse of her brother, and inappropriate photographs of her taken by her parents. She returned to the police the next day to repeat these allegations.

Procedural history

[11] This case has a long and complicated history. The appellant was originally charged in September 2003 and convicted after his first trial in July 2006. In January 2009, this court allowed the appellant's appeal from conviction and ordered a new trial on the ground that an expert, called by the Crown to offer the opinion that the complainant had suffered sexual assault, was allowed to give testimony that indicated to the jury his views of the veracity of the complaint: *R. v. P.G.*, 2009 ONCA 32, 242 C.C.C. (3d) 558.

[12] The second trial commenced in March 2010 when pre-trial motions began. The Crown sought a ruling pursuant to *R. v. Khan*, [1990] 2 S.C.R. 531 to admit the complainant's out-of-court statements on the ground that she would be too traumatized to testify. However, the expert evidence in support of the application was dated and no longer reflected the situation of the complainant who, by then, had no recollection of the alleged abuse. The Crown abandoned that ground for admission and sought to have the statements admitted on the ground that the complainant had no recollection of the incidents of alleged abuse. The trial judge dismissed the Crown's application for an adjournment to call further evidence in

support of that application, dismissed the Crown's motion to amend its notice to advance the new ground and admonished the Crown for inadequate preparation. Then, after formally dismissing the Crown's *Khan* application, the trial judge permitted the Crown to renew the *Khan* application on the basis of the complainant's evidence that she had no recollection.

[13] The trial commenced in July 2010 and the complainant testified that she had no memory of making the allegations and no memory of being abused by her father. As the basis of the *Khan* application had shifted, defence counsel sought an adjournment to consult with an expert to respond. A day later, defence counsel indicated that the expert he intended to call was not available in the immediate future. At that point, the trial judge declared a mistrial.

[14] The matter resumed in December 2010 when pre-trial motions were argued. The appellant's s. 11(b) application was dismissed, the jury was empanelled and the trial itself resumed in January 2011.

[15] The complainant testified and was cross-examined on a *voir dire* but she did not testify before the jury. On the *voir dire*, the complainant testified that she had no recollection of the alleged abuse or of having made any complaints about the alleged abuse. Her memory was not improved by watching the videos of her statements to the police.

[16] The appellant testified and denied the allegations. His evidence was supported by that of the complainant's mother and brother who contradicted significant aspects of the complainant's out-of-court statements.

The trial judge's *Khan* ruling

[17] The trial judge admitted the complainant's out-of-court statements during the trial and indicated that he would give his reasons later. Those reasons were delivered after the jury had found the appellant guilty. He ruled that as the complainant could not recall the alleged abuse, the necessity requirement was satisfied. The trial judge also ruled that the complainant's out-of-court statements were sufficiently reliable to warrant admission.

[18] No issue is taken with the ruling as to necessity.

[19] The trial judge found, on a balance of probabilities, that he was satisfied that the statements were reliable. He indicated: "[t]he statements were provided relatively close in time to the events described". He found that although there was no exact record of the complainant's statements to the foster parents , he was satisfied that their "records and recollection were sufficiently accurate to meet the requirement of threshold reliability." He recognized that some of the questions put to the complainant were leading but found "given the nature of [the complainant's] answers, the wording that she used and the nature of what she

was discussing that the recollection of [RP and LP] substantially reflect what [the complainant] said and that what she said was reliable."

[20] The trial judge noted that the statements were spontaneous and they disclosed matters one would not expect a young child to know of. He found that in her video statement she "presented as a spontaneous, bright and candid child" and that she was "articulate for her age and revealed no deliberate hesitation that would suggest her answers were unreliable".

[21] The trial judge observed that "she was unable to understand the officer's distinction between what the [sic] true and what is a lie, given her age this is not surprising." He added: "[t]he nature of the acts she described are in and of themselves, sufficient to make her statements reliable."

[22] The trial judge rejected the defence request that the complainant be made available for cross-examination before the jury as the complainant's evidence was restricted to her out-of-court statements.

Issues

[23] The appellant raises several grounds of appeal:

1. Did the trial judge err by not finding that issue estoppel precluded the Crown from renewing the *Khan* application?
2. Did the trial judge err by dismissing the appellant's s. 11(b) application?

3. Did the trial judge err by ruling that the complainant's out-of-court statements satisfied the reliability component of the *Khan* test?
4. Did the trial judge err by refusing the appellant's request that the complainant be made available for cross-examination?
5. Did the trial judge err by dismissing the appellant's motion to introduce the complainant's brother's prior consistent statement to rebut an allegation of recent fabrication?

Analysis

[24] The central issues before us relate to the admission of the complainant's out-of-court statements and the related ground of the dismissal of the appellant's request that the complainant be made available for cross-examination before the jury. As I view those grounds of appeal to be dispositive, it will not be necessary for me to consider the remaining grounds of appeal.

[25] Hearsay evidence is presumptively inadmissible but may be admitted if it falls within one of the recognized hearsay exceptions or under the principled approach if the requirements of necessity and reliability are met: *R. v. Khelawon* 2006 SCC 57, [2006] 2 S.C.R. 787.

[26] The appellant concedes that as the complainant had no recollection of the events giving rise to the allegations against him, the necessity element was

satisfied. The issue for us to decide is whether the trial judge erred in ruling that the element of reliability was also satisfied.

[27] The principled approach to hearsay evidence focuses on whether there is some fact or circumstance that "compensates for, or stands in the stead of" the safeguards of reliability that exist when a witness gives first-hand evidence in the court room, namely, that the witness: (1) testifies under oath; (2) is present before the trier of fact to facilitate assessment of credibility; and (3) is subject to being tested by cross-examination: see *R. v. B.(K.G.),* [1993] 1 S.C.R. 740, at p. 787ff.

[28] In *Khelawon*, at paras. 62-63, the Supreme Court of Canada pointed to two ways the reliability requirement can be satisfied. The first is by showing "that there is no real concern about whether the statement is true or not because of the circumstances in which it came about". Second, it can be satisfied by showing that although the statement is in the form of hearsay, "its truth and accuracy can nonetheless be sufficiently tested."

[29] In my view, the trial judge failed to pay sufficient attention to the fact that these statements did not benefit from any of the hallmarks of reliability that have been identified in the case law as important to compensate for the absence of or stand in the stead of the oath, the presence of the witness before the trier of fact and the availability of cross-examination.

[30] First, none of the statements were made under oath and the complainant could not provide the police with a coherent explanation to demonstrate that she understood the difference between telling the truth and telling a lie. Although the trial judge found that the complainant did not appear to understand the difference between telling the truth and telling a lie, he gave that no weight in his reliability assessment. Moreover, he failed to deal with obvious misstatements she made as to her age and school grade or her confusion as to the number of times her father had “peed” on her. The trial judge found that reliability could be attributed to the fact that a young child would not have knowledge of the sexual acts described, yet he failed to deal with RP’s evidence that he thought that she might have acquired that knowledge by watching pornography.

[31] A related point arises from the trial judge’s finding that “[t]he statements were provided relatively close in time to the events described” and the use of that finding as an indicia of reliability. This reasoning reveals both a misapprehension of the evidence and a misreading of the leading case of *Khan*. It is clear from the record that the statements were not provided until at least several months after the events described. This stands in stark contrast to the situation in *Khan* where the infant complainant reported an act of sexual abuse within minutes of its occurrence. The delay in disclosure here was a factor that detracted from its reliability yet the trial judge treated the timing as a factor favouring reliability.

[32] Second, the complainant's statements to RP and LP were not recorded and the jury had only their recollection of what the complainant said to them. The statements to the police were recorded but they varied considerably from the statements made to RP and LP. Moreover, to the extent that the reliability assessment had to be made on the basis of the recollections of RP and LP, there were features of those statements that give rise to serious concerns as to reliability. The trial judge failed to advert to or explain those features. In particular, the suggestion that the complainant's mother said she looked "pretty" with her father's semen smeared on her face is highly implausible as was the suggestion that the appellant penetrated her from the front while she was on his lap, an allegation the trial judge expressly rejected in his reasons for sentence. Likewise, the trial judge failed to provide an adequate reason to alleviate the concern that significant aspects of the initial disclosure to RP were given in response to leading questions.

[33] Third, the appellant had no opportunity to cross-examine the complainant on her statements even though this could easily have been dealt with by acceding to the defence request that the complainant be made available for cross-examination. Cross-examination of the declarant is an important safeguard that will often render hearsay evidence sufficiently reliable to warrant admission: *R. v. U.(F.J.)*, [1995] 3 S.C.R. 764, at para. 32; *R. v. B.(K.G.),* at p. 794.

[34] Clearly, in cases involving sexual offences against young children, cross-examination will often not be possible or appropriate. For example, had the necessity element rested on the fact that the complainant would be traumatized by testifying before the jury, cross-examination would be out of the question. However, here the complainant had testified without incident or protest before the mistrial and again on the *voir dire* when the trial resumed. In these circumstances, the trial judge should not have admitted the out-of-court statements unless the appellant had the opportunity to cross-examine her.

[35] In my opinion, admitting the out-of-court statements without affording the appellant the opportunity to cross-examine the complainant before the jury produced an unfair trial. The jury was left with an incomplete and potentially misleading picture. The jury did not know that the complainant had no present recollection of the alleged abuse or of having complained of such abuse. Even if the complainant's hearsay statements were otherwise admissible, fairness required that the appellant have the opportunity to point out to the jury that the complainant claimed to have no present recollection of her allegations of abuse and, if he chose to do so, to explore the reason or explanation for her lack of memory.

[36] I conclude that the trial judge erred by admitting the complainant's out-of-court statements into evidence.

Disposition

[37] In my view, the trial judge's error in ruling that the complainant's out-of-court statements were sufficiently reliable to warrant admission is fatal to the convictions. I would allow the appeal and set aside the convictions.

[38] The appellant has now been before the courts for almost ten years on these charges. He has faced two trials and he has succeeded twice on appeal. His s. 11(b) application was dismissed by the trial judge but at that point, two years ago, the case had reached the outer limit of the recognized guidelines. He has by now served a substantial portion of his sentence. Given my ruling as to the admissibility of the complainant's out-of-court statements, prosecuting a third trial would be problematic. In my view, in these circumstances, it is in the interests of justice to enter a stay of proceedings.

"Robert J. Sharpe J.A."
"I agree Susan E. Lang J.A."
"I agree M.H. Tulloch J.A."

Released: December 6, 2012