

R v. Khan
[1990] 2 SCR 531

Lamer CJ and Wilson, Sopinka, Gonthier, and McLachlin JJ:

On appeal from the Court of Appeal for Ontario

McLACHLIN J: This case raises the question of the admissibility of a child's unsworn evidence and statements made by a child to an adult concerning sexual assault.

The Facts

On March 26, 1985, Mrs. O. and her daughter T., who was three and a half years old, attended at the office of their family doctor, Dr. Khan for a general examination of the mother and a routine immunization of T.

Dr. Khan examined T. first, in the presence of her mother. He then told her to wait in his private office while he conducted the examination of her mother. Dr. Khan and T. were alone in his private office for a period of five to seven minutes while the mother undressed and put on a hospital gown. T. was alone in the office for the following fifteen minutes while her mother's examination was being conducted. T. did not come into contact with any other male person during this period.

When the mother rejoined T., she noticed the child picking at a wet spot on her sleeve. They left and went to a nearby drugstore. Upon leaving the store, approximately fifteen minutes after leaving Dr. Khan's office, mother and child had essentially the following conversation.

Mrs. O. So you were talking to Dr. Khan, were you? What did he say?

T. He asked me if I wanted a candy. I said yes. And do you know what?

Mrs. O. What?

T. He said "open your mouth." And do you know what? He put his birdie in my mouth, shook it and peed in my mouth

Mrs. O. Are you sure?

T. Yes.

Mrs. O. You're not lying to me, are you?

T. No. He put his birdie in my mouth. And he never did give me my candy.

The mother testified that the word "birdie" meant penis to T. As a result of the police investigation T.'s jogging suit was examined and the spot on the sleeve was determined to have been produced by a deposit of semen and, in some areas, a mixture of semen and saliva that had soaked through the fabric before it dried. The concentration of the mixture suggested to the forensic biologist that the substances were probably mixed before they were applied to the material.

The appellant was charged with sexual assault. At trial he elected to call no evidence. With respect to the Crown's case, the trial judge made two significant rulings. The trial judge held

that T. was not competent to give unsworn evidence and also refused to admit the evidence of the mother as to the above noted conversation on the basis that the statement was not contemporaneous with the event. The trial judge acquitted the appellant of the charges. The Crown appealed the acquittal to the Court of Appeal for Ontario, which allowed the appeal, set aside the acquittal and ordered a new trial: (1988), 42 CCC (3d) 197.

Relevant Statutory Provision

Canada Evidence Act, RSC 1970, c. E-10, s. 16 (since repealed and replaced by S.C. 1987, c. 24, s. 18):

16(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

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Analysis

1. Did the Trial Judge Err in Law in Holding That the Child Was Incompetent to Give Unsworn Evidence?

T. was called as a witness at the trial. She was four years and eight months old. Questioning revealed that she did not understand what the Bible was and did not understand the nature of telling the truth "in court." The Crown did not contend that she was competent to give evidence under oath. It submitted, however, that her unsworn evidence should be received under s. 16 of the *Canada Evidence Act*:

[Section 16 cited.]

The trial judge refused to receive T.'s unsworn evidence on the ground that while she possessed sufficient intelligence to justify the reception of the evidence, he was not satisfied that she understood the duty of speaking the truth.

The Court of Appeal, per Robins JA, concluded that the trial judge had erred in rejecting T.'s testimony. It found he made two errors.

The first error, in the view of the Court of Appeal, was to apply the test in *R v. Bannerman* (1966), 48 CR 110 (Man. CA), aff'd [1966] SCR v, a case where the issue was the reception of evidence *under oath*, and in particular the statement of Dickson J that "[t]he object of the law in requiring an oath is to get at the truth relative to the matters in dispute by getting a hold on the conscience of the witness." (p. 138) Robins JA stated, at p. 206:

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to

whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so. It is to be borne in mind that under s. 16(2) the child's unsworn evidence must be corroborated by some other material evidence. Any frailties that may be inherent in the child's testimony go to the weight to be given the testimony rather than its admissibility.

The second error, the Court of Appeal concluded, was to place too much weight on the fact that the child was very young, in effect drawing a distinction between children of very tender years and older children. It is clear that the trial judge was concerned by the very young age of the witness. He pointed out that most of the cases concerned children of ten to thirteen years and that he could find no case of the evidence of a child under five being received. While acknowledging that theoretically a child of any age could be proffered in court, he noted in his concluding comments:

T. ... , however intelligent she may be to this day, is still very much an infant who is just beginning to embark upon childhood. She is still mentally and physically normal but very immature.

I agree with the Court of Appeal that the trial judge made the two errors to which it referred. He erred first in applying the *Bannerman* test to s. 16 of the Canada Evidence Act and emphasizing that T. did not understand what it meant to lie "to the court." While the distinction between the ability to testify under oath and the ability to give unsworn evidence under s. 16 has been narrowed by rejection in cases such as *Bannerman* of the need for a religious understanding of the oath, it has not been eliminated. Before a person can give evidence under oath, it must be established that the oath in some way gets a hold on his conscience, that there is an appreciation of the significance of testifying in court under oath. It was wrong to apply this test, which T. clearly did not meet, to s. 16, where the only two requirements for reception of the evidence are sufficient intelligence and an understanding of the duty to tell the truth.

The trial judge also erred in placing critical weight on the child's young age. The Act makes no distinction between children of different ages. The trial judge in effect found that T. met the two requirements for permitting a child to testify under s. 16, but, emphasizing her immaturity, rejected her evidence. He found that T. had sufficient intelligence, and conceded that she "seemed to be aware at least of the consequences of telling a lie." This is clear from T.'s evidence, as revealed by the following portions of the transcript:

Q. Yes, and do you know what it is to tell the truth? You're sort of shrugging your shoulders there and smiling. Do you know what it is to tell a lie?

A. U-hmm.

Q. What's a lie?

A. If you say you cleaned up the room and you didn't, and your mother and your father went to see it and it's messy, that's a lie.

Q. I see. What happens when you tell a lie?

A. The parent spank their bum.

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Q. I see. You're doing just fine. Tell me, what else happens to you if you tell a lie?

A. I get spanked and I get sent in my room and I get cleaned up and I cry and I come back out and I not cry, and that's okay.

Q. And then everything is fine, is it?

A. (Nod)

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2. Did the Trial Judge Err in Rejecting the Mother's Statement of What the Child Told Her After the Incident?

Fifteen minutes after leaving Dr. Khan's office, in response to her mother's query, "So you were talking to Dr. Khan, were you?" T. told her mother about the sexual act the doctor had performed on her. The issue is whether the mother's statement of what she was told is admissible in evidence. The trial judge rejected the statement, holding that it was hearsay and did not fall within any of the established exceptions to the hearsay rule, and in particular the spontaneous declaration exception. The Court of Appeal held that the statement should have been received on the ground that the inherent reliability of the child's statement was such that the usual requirements for spontaneous declarations of contemporaneity and intensity or pressure should be relaxed.

I am satisfied that applying the traditional tests for spontaneous declarations, the trial judge correctly rejected the mother's statement. The statement was not contemporaneous, being made fifteen minutes after leaving the doctor's office and probably one-half hour after the offence was committed. Nor was it made under pressure or emotional intensity which would give the guarantee of reliability upon which the spontaneous declaration rule has traditionally rested. The question then is the extent to which, if at all, the strictures of the hearsay rule should be relaxed in the case of children's testimony. The issue is one of great importance in view of the increasing number of prosecutions for sexual offences against children and the hardships that often attend requiring children to retell and relive the frequently traumatic events surrounding the episode in a long series of encounters with parents, social workers, police and finally different levels of courts.

The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.

This Court took such an approach in *Ares v. Venner*, [1970] S.C.R. 608. The plaintiff was suing for medical malpractice which had resulted in amputation of his leg for gangrene. He wanted to introduce hospital records containing entries by nurses as evidence of the onset of symptoms which the doctor should have noticed and treated. He was met with the objection that the records were hearsay and he should call the nurses who made the notations. But he could not prove which nurse had made which entry, which made that approach impossible.

This Court held that the records should be admitted, notwithstanding that on the traditional rules, they were inadmissible. The Court accepted (at p. 624) the proposition that "[t]he common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds", particularly in the field of procedural law: *per* Lord Donovan, dissenting, in *Myers v. Director of Public Prosecutions*, [1965] A.C. 1001, at p. 1047. Hall J. at p. 624 quoted the following passage from the reasons in *Myers* of Lord Pearce, dissenting (at pp. 1040-41):

I find it impossible to accept that there is any "dangerous uncertainty" caused by obvious and sensible improvements in the means by which the court arrives at the truth. One is entitled to choose between the individual conflicting obiter dicta of two great judges and I prefer that of Jessel M.R. His dictum was as follows, 1 P.D. 154, 241: "Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases." On that expression of principle he admitted the extension which has been acted on ever since in the Probate Division.

In the result, this Court concluded that the nurses' records should be admitted, noting however that the admission "should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so" and adding that "the nurses were present in court and available to be called as witnesses if the respondent had so wished" (p. 626).

Lord Pearce's four tests may be resumed in two general requirements: necessity and reliability. The child's statement to the mother in this case meets both these general requirements as well as the more specific tests. Necessity was present, other evidence of the event, as the trial judge found, being inadmissible. The situation was one where, to borrow Lord Pearce's phrase, it was difficult to obtain other evidence. The evidence also bore strong indicia of reliability. T. was disinterested, in the sense that her declaration was not made in favour of her interest. She made the declaration before any suggestion of litigation. And beyond doubt she possessed peculiar means of knowledge of the event of which she told her mother. Moreover, the evidence of a child of tender years on such matters may bear its own special stamp of reliability. As Robins J.A. stated in the Court of Appeal (at p. 210):

Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.

Because of the frequent difficulty of obtaining other evidence and because of the lack of reason to doubt many statements children make on sexual abuse to others, courts in the United States have moved toward relaxing the requirements of admissibility for such

statements. This has been done in the context of the doctrine of spontaneous declarations. In *McCormick on Evidence* (3rd ed. 1984), at p. 859, n. 49, the authors refer to this development as the "tender years" exception to the general rule, and describe it as follows:

A tendency is apparent in cases of sex offences against children of tender years to be less strict with regard to permissible time lapse and to the fact that the statement was in response to inquiry.

Similarly, *Wharton's Criminal Evidence* (13th ed. 1972), at p. 84, states that while "[t]he res gestae rule in sex crimes is the same as in other criminal actions," the rule "should be applied more liberally in the case of children." In an attempt to analyze the many authorities in this area and arrive at some general "rule of thumb" with respect to the generally permissible time lapse between the alleged sexual assault and the spontaneous declaration, the author notes that declarations made up to an hour following the assault will generally be admissible, whereas such declarations "will not ordinarily be regarded as part of the res gestae where the time interval between the crime and the declaration is more than one hour" (p. 90).

These developments underline the need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse. In so far as they are tied to the exception to the hearsay rule of spontaneous declarations, however, they suffer from certain defects. There is no requirement that resort to the hearsay evidence be necessary. Even where the evidence of the child might easily be obtained without undue trauma, the Crown would be able to use hearsay evidence. Nor is there any requirement that the reliability of the evidence in the particular case be established; hence inherently unreliable evidence might be admitted. Finally, the rule being of an absolute "in-or-out" character, there is no means by which a trial judge could attach conditions on the reception of a particular statement which the judge might deem prudent in a particular case, as for example, the right to cross-examine the deponent referred to in *Ares v. Venner*. In addition to these objections, it can be argued that to extend the spontaneous declaration rule as far as these cases would extend it, is to deform it beyond recognition and is conceptually undesirable.

In Canada too, courts have been moving to more flexibility in the reception of the hearsay evidence of children, although not under the aegis of the spontaneous declaration exception to the hearsay rule. Relying on *Official Solicitor v. K.*, [1963] 3 All ER 191, where the House of Lords admitted such evidence in child protection proceedings, the British Columbia Court of Appeal admitted similar evidence in *D.R.H. v. Superintendent of Family and Child Services* (1984), 41 RFL (2d) 337 (BCCA). At issue was hearsay evidence in the context of child protection proceedings. A five-year-old child had been apprehended after allegations of sexual abuse committed by the father. Counsel sought to introduce evidence of statements made by the child to a psychologist. Counsel for the parents objected to the use of these statements for their truth and argued that the decision of this Court in *R v. Abbey*, [1982] 2 SCR 24, was applicable. Hinkson JA, for the court, justified the reception of the evidence on the nature of the proceedings, stating (at pp. 340-41):

The concern with admitting hearsay evidence and acting upon it when dealing with a grave allegation of misconduct on the part of a parent to a child is not to be overlooked. ...

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However, in proceedings involving children this court has adopted another approach which is exemplified by the decision in *R v. Arbuckle*, 59 WWR 605. ...

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In my opinion the principle discussed in *R v. Abbey*, supra, should not be applied to the inquiry with which we are concerned. Rather, in this type of inquiry, the approach adopted in the *Arbuckle* case, supra, is to be followed. Thus a judge, conducting an inquiry of this nature, involving a child of tender years who is too young to testify in the inquiry, can receive hearsay evidence and rely upon such evidence in coming to the decision as to whether or not the child is in need of protection.

The P.E.I. Court of Appeal in *M. (W.) v. Director of Child Welfare for P.E.I.* (1986), 3 RFL (3d) 181 also found in child protection proceedings that hearsay evidence was admissible. The court did not justify the decision on the ground of the type of proceeding in question. Rather, Mitchell JA held that the proceedings were subject to the same procedural standards that apply to other civil cases but asserted that "[t]he list of exceptions has never been closed" (p. 185). Mitchell JA, for the court, stated at p. 185:

Oftentimes in cases of alleged sexual abuse of a young child the only evidence available is contained in a statement made by the child to some third party. Usually such statements are not made in circumstances that would meet the criteria for admission under the traditional exceptions to the hearsay rule. If the child can not or for some valid reason does not testify about the facts asserted in the out-of-court statement and hearsay is excluded the court will be deprived of hearing what could be the most relevant of evidence. Faced with that situation, the court may admit the third party's evidence as proof of the facts contained in the child's statement, even though that evidence be hearsay, provided that, as groundwork for its admission, sufficient evidence is first led to establish the reliability of the out-of-court statement, and of the circumstances which establish the need to introduce the content of the child's statement through hearsay. In such cases, the court must always proceed with great caution both with regard to satisfying itself on the question of the reliability of the child's statements, as well as with respect to those circumstances which justify the need for the admissibility of the out-of-court statements.

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In *F. (J.K.) v. F. (J.D.)*, [1988] B.C.J. No. 278 (C.A.), in an access hearing, reception of hearsay evidence of a child's statement was justified on the basis of *Ares v. Venner*. The child had told a day-care worker of an assault. Anderson J.A., for the court, noted at pp. 16-17 the dangers inherent in receiving such evidence:

The concern with admitting hearsay evidence and acting upon it when dealing with a grave allegation of misconduct on the part of a parent to a child is not to be overlooked. Clearly, no judge would be satisfied to act upon it in a case where direct evidence would be produced. But that consideration does not resolve the problem.

However, he went on to find it admissible (at p. 20):

Quite apart from the *D.R.H.* case, the reception of hearsay evidence in this case is justified on grounds of necessity and reliability. See *Ares v. Venner* (1970) S.C.R. 608, where nurses' notes, although hearsay, were admitted in evidence as proof of the

truth of their contents on grounds of necessity and reliability. The judgment of the Supreme Court of Canada in that case indicates that the rules of evidence relating to hearsay evidence in civil cases are not entirely inflexible.

These cases point the way in the correct direction. Despite the need for caution, hearsay evidence of a child's statement may be received where the requirements of *Ares v. Venner* are met. The general approach is summed up in the comment of Wilson J. in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at p. 55:

In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development.

The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary." The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.

The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.

In determining the admissibility of the evidence, the judge must have regard to the need to safeguard the interests of the accused. In most cases a right of cross-examination, such as that alluded to in *Ares v. Venner*, would not be available. If the child's direct evidence in chief is not admissible, it follows that his or her cross-examination would not be admissible either. Where trauma to the child is at issue, there would be little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination. While there may be cases where, as a condition of admission, the trial judge thinks it possible and fair in all the circumstances to permit cross-examination of the child as the condition of the reception of a hearsay statement, in most cases the concerns of the accused as to credibility will remain to be addressed by submissions as to the weight to be accorded to the evidence, and submissions as to the quality of any corroborating evidence.

I add that I do not understand *Ares v. Venner* to hold that the hearsay evidence there at issue was admissible where necessity and reliability are established only where cross-examination is available. First, the Court adopted the views of the dissenting judges in *Myers v. Director of Public Prosecutions* which do not make admissibility dependent on the right to cross-examine. Second, the cross-examination referred to in *Ares v. Venner* was of limited value. The nurses were present in court at the trial, but in the absence of some way of connecting particular nurses with particular entries, meaningful cross-examination on the accuracy of specific observations would have been difficult indeed.

I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject

to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence. This does not make out-of-court statements by children generally admissible; in particular the requirement of necessity will probably mean that in most cases children will still be called to give viva voce evidence.

I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence. Having said this, I note that it may not be necessary to enter the statement on a new trial, if the child's viva voce evidence can be received as suggested in the first part of my reasons.

Conclusion

I would dismiss the appeal and direct a new trial.

Appeal dismissed.