Case Brief

Case Name & Citation

R v Khan, [1990] 2 SCR 531.

Procedural History

The trial judge acquitted the accused of all charges. The Crown appealed to the Ontario Court of Appeal, where the appeal was allowed and the acquittal was set aside. A new trial was ordered. This is an appeal by the accused to the Supreme Court of Canada.

Facts

The accused, a doctor, was charged with sexual assault of a patient's child, who was three years old. The complainant was a little girl who was left alone with the doctor for 5-7 minutes while her mother left to go put on a hospital gown. When the mother returned back to the room, she noticed a wet mark on her daughter's sleeve. After leaving the doctor's office, the child told her mother what had happened. The child indicated that the accused asked her if she wanted a candy and then he put his "birdie" in her mouth, shook it and peed in her mouth.

Issue(s)

Was the child complainant incompetent to give unsworn evidence? Did the trial judge err in rejecting the mother's statement of what her child told her?

Decision

Appeal dismissed. The trial judge erred in holding the complainant to be an incompetent witness. The child was competent to testify and the statements told to her mother should be admitted.

Reasons

Writing for a unanimous Court, Justice McLachlin noted that the trial judge improperly applied section 16 of the *Canada Evidence Act* that gave the conditions under which a child can testify. The trial judge was wrong in finding that since the child did not understand what it meant to tell a lie in court that she could not give testimony. For a child to testify under section 16, the judge

must only determine if the witness has sufficient intelligence and an understanding of the duty to tell the truth. Here, the judge found that both criteria were satisfied but inevitably placed too much emphasis on the child's age. Justice McLachlin noted, as an issue of policy, leniency must be given to child testimony otherwise offences against children could never be prosecuted.

Justice McLachlin also observed that the judge correctly applied the test for spontaneous declarations. To admit the child's statement as a "spontaneous declaration" would be to deform the exception beyond recognition. However, rather than have the issue disposed of at this juncture, Justice McLachlin held that a "principled approach" must be taken to hearsay statements: if the statement was reliable and necessary, it should be admitted.

In the instant case, the child, having aged considerably since the events, was unable to remember what happened, thus making the statement necessary. The statement was deemed reliable for a number of reasons: the child should not have had an awareness of the type of acts that had taken place at her young age, she made the statement without any prompting from her mother, and she was disinterested in the litigation, in that she had no reason to lie to her mother and was not aware of the implications of what had happened to her. Finally, the child's statement was corroborated by DNA evidence from the semen found on her sleeve.

Ratio

A "principled approach" must be taken to hearsay statements (out of court statements): if the statement was reliable and necessary, it should be admitted.