



R v. DAI

[2012] SCC 5

Country: Canada

Region: Americas

Year: 2012

Court: The Supreme Court of Canada

Health Topics: Disabilities, Mental health, Violence

Human Rights: Right to due process/fair trial, Right to liberty and security of person

Facts

The Crown alleged that the complainant, a 26-year-old woman with the mental age of a three to 6-year-old was repeatedly sexually assaulted by her mother's partner D.A.I during the four years that he lived in their home. The Crown sought to call the complainant to testify about the alleged assaults. The trial judge found that the complainant had failed to show that she understood the duty to speak the truth and hence was not a competent witness. In a separate hearing, the trial judge also excluded out-of-court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would compromise the accused's right to a fair trial. While the remainder of the evidence raised serious suspicions about the accused's conduct, the complainant's case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result.

The relevant legal provision is Section 16 of the Canada Evidence Act, which reads as:

16. (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence.

(2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

(4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

The central questions in this case was first, whether adult witnesses with mental disabilities must demonstrate an understanding of the duty to tell the truth in order to be deemed competent to testify and secondly, whether finding of testimonial competence without demonstration of understating of obligation to tell truth breaches accused's right to fair trial.

Decision and Reasoning

The majority judges held that the trial judge erred in failing to consider the second part of the test under Section 16, which led him to rule the complainant incompetent to testify. The court allowed the appeal, set aside the acquittal and ordered a retrial.

On the issue of whether the trial judge correctly interpreted the requirements of Section 16 for the testimonial competence of persons of 14 years of age or above with mental disabilities, the Court held that Section 16(3) imposes two requirements for assessing the competence of an adult with mental disabilities to testify: first, the ability to communicate evidence; and second, a promise to tell the truth. It held the court should not conduct abstract inquiries into whether the witness understands what truth means, the difference between truth and falsity, the obligation to give true evidence in court, and what makes a promise binding. The court held that adults with mental disabilities have a practical understanding of the difference between the truth and a lie and know they should tell the truth without being able to explain what telling the truth means in abstract terms.

Rejecting the authorities' suggestion that Section 16(3) requires an abstract understanding of the obligation to tell the truth, the court held that requirement was based on a version of Section 16 that explicitly required that the witness "understands the duty of speaking the truth". The Parliament deleted that requirement. Thereafter, it enacted Section 16.1.7 expressly forbidding the requirement in cases of child witnesses as courts continued to require proof that child witnesses understood the duty to tell the truth. The court held that the express ban of such inquiries in cases of child witnesses did not mean that the courts are required to question mentally disabled adults on the obligation to tell the truth. Section 16(3) only required a promise to tell the truth and Parliament had no reason to expressly ban such questioning of adult witnesses with mental disabilities. The enactment of Section 16.1(7) did not imply that the earlier judicial interpretation of Section 16(3) as it applied to children had been endorsed for adult witnesses. No inference as to the meaning of Section 16(3) flows from the mere adoption of Section 16.1(7) with respect to children. The fact that Section 16 does not have a provision equivalent to Section 16.1 does not mean that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth.

The Court held that when applying Section 16(3), eight considerations are appropriate to be considered which are: First, the voir dire (investigation on admissibility of evidence) on the competence of a proposed witness is an independent inquiry: it may not be combined with a voir dire on other issues. Secondly, it was suggested that all available relevant evidence should be assessed before out rightly preventing a witness to testify. Third, the primary source of evidence for a witness's competence is the witness herself. Questioning a witness with mental disabilities requires special consideration and patience. Questions should be phrased in such a manner to accommodate her understanding. Fourth, persons familiar with the proposed witness must be called as fact witnesses as they understand her the best and could help in the examination of the witness. Fifth, expert witnesses who have been in regular and personal contact with the witness may be called. Sixth, the trial judge must make two inquiries during the voir dire on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence? Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

The dissenting judgment however stated that the complainant's inability to answer simple questions and repeated "I don't know" answers led to the trial judge's determination that the complainant's testimony was unreliable. It also stated that at an appeal stage, there is no valid basis for reversing the judgement of the trial court given his advantage in seeing and hearing the complainant.

Decision Excerpts

"I conclude that s. 16(3) of the Canada Evidence Act, properly interpreted, establishes two requirements for an adult with mental disabilities to take the stand: the ability to communicate the evidence and a promise to tell the truth. A further requirement that the witness demonstrate that she understands the nature of the obligation to tell the truth should not be read into the provision." (Para 53)

"To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable." (Para. 67)

"The requirement that the witness be able to communicate the evidence and promise to tell the truth satisfies the low threshold for competence in cases such as this. Once the witness is allowed to testify, the ultimate protection of the accused's right to a fair trial lies in the rules governing admissibility of evidence and in the judge's or jury's duty to carefully assess and weigh the evidence presented. Together, these additional safeguards offer ample protection against the risk of wrongful conviction." (Para. 73)

