IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R.*** v. ***W.J.W.***, 2003 NSPC 41

Date: 20030903
Case No.(s): 1139417
1139418
Registry: Halifax

Between:

R.

v.

W. J. W.

Ban on Publication as per s. 486 C.C.C.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision on Voir dire rendered orally on September 3, 2003 in Halifax Nova Scotia
Counsel:	Eric R. Woodburn, for the Crown Michael S. Taylor, for the Defence

BY THE COURT

Introduction

[1] The police have charged the accused, W. J. W., with the sexual assault and unlawful confinement of C. A.. The complainant's testimony was that she without any coercion or intimidation went with the accused, whom she knew on a professional basis and with whom she had on occasions engaged in flirtatious conversations, to a secluded area of a local hospital where they were both employed. At this location behind a set of stairs, where she also went under and behind without any threats or compulsion, the accused, without her consent, pushed her against the wall and, against her repeated lack of consent, commenced kissing her on her lips several times. Additionally, he grabbed her breasts and groped at her vaginal area. He also requested that she perform an act of fellatio which she, at that time, declined to do.

[2] The Crown seeks to introduce similar fact evidence to the effect that the accused has the propensity to touch, in a sexual manner and without their consent, female persons when at work at the same local hospital. The similar fact evidence referred to an incident between the accused and another female co-worker that happened four or five years earlier and which was never reported. Then, the female coworker was retrieving some medical stores in a very small room, in a well-travelled area of the hospital, that had one door which was opened. The accused, who also had legitimate business in the room, came up behind the female worker put one of his arms on her shoulder and the other around her. As she turned to face him, he pulled her toward him. However, she told him in no uncertain terms that she was not amused by his unwelcome touching and that ended the event.

Analysis

[3] The authorities are clear that evidence of the accused disposition would generally be excluded but exceptions may arise when the probative value of the evidence outweighs its prejudicial effects. See for example: ***R. v. B.(C.R.)***, [1990] 1 S.C.R. 717; ***R. v. Arp***, [1998] 3 S.C.R. 339; ***R. v. Handy***, [2002] S.C.J. No.57, 2002 SCC 56.

[4] Here, the Crown identified the issues for which the evidence was proffered to be that of corroboration, credibility, pattern, context, proof of intent and to rebut the defence of innocent association. However, as expressed by Binnie J., in ***Handy***, at para.61:

> ...while identification of the issue defines the precise purpose for which the evidence is proffered, it does not (and cannot) change the inherent nature of the propensity evidence, which must be recognized

> for what it is. By affirming its true character, in my view, the Court keeps front and centre its dangerous potential.

[5] Additionally, as put by Cory J., in ***Arp,*** at para. 48:

> ...where similar fact evidence is adduced to prove a fact in issue, in order to be admissible, the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted.

[6] Moreover, as articulated by Binnie J, in ***Handy*** at para 82:

> Factors connecting the similar facts to the circumstances set out in the charge include:
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> (1) proximity in time of the similar acts: D. (L.E.), supra, at p. 125; R. v. Simpson (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), at p. 345; R. v. Huot (1993), 16 O.R. (3d) 214 (C.A.), at p. 220;
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> (2) extent to which the other acts are similar in detail to the charged conduct: Huot, supra, at p. 218; R. v. Rulli (1999), 134 C.C.C. (3d) 465 (Ont. C.A.), at p. 471; C. (M.H.), supra, at p. 772;
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> (3) number of occurrences of the similar acts: Batte, supra, at pp. 227-28;
>
> (4) circumstances surrounding or relating to the similar acts (Litchfield, supra, at p. 358);
>
> (5) any distinctive feature(s) unifying the incidents:
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> Arp, supra, at paras. 43-45; R. v. Fleming (1999), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.), at paras. 104-5; Rulli, supra, at p. 472;
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> (6) intervening events: R. v. Dupras, [2000] B.C.J. No. 1513 (QL) (S.C.), at para. 12;
>
> (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[7] Since it is the improbability of the repetition of a conduct by mere chance is the essence of the probative value of the similarity of the event, the decided cases suggest the need to consider carefully the similarities in the nature of the conduct, closeness in time and the frequency in which the conduct occurred. Consequently, "care must be taken not to allow too broad a gateway for the admission of propensity evidence..." ***Handy***, para. 115. Further, for example, as credibility is always an issue in criminal trials "identification of credibility as the "issue in question" may, unless circumscribed, risk the admission of nothing more

than general disposition ("bad personhood")." para. 116.

[8] Here, in my opinion, there is no repeated conduct in a particular and highly specific type of situation. The passage of time has affected the relevance and reliability of the proffered evidence. It ostensibly happened four to five years earlier and was neither reported nor documented. The evidence of the accused touching without consent, in my view, gained no cogency given the circumstances of that event and the passage of time.

[9] The earlier incident, in my opinion, did not demonstrate any overt sexual misconduct. It was also dissimilar in that it occurred in a well-travelled work area of the hospital and not in a secluded and obscure corner of the facility. Further, that incident appeared to have been an opportunistic and an equivocal frolicsome act by the accused. Here, I find that the incidents alleged began as mutually agreeable, voluntary and consensual conduct that subsequently allegedly became non-consensual. In my view, the dynamics of these two described situations are not the same and, as a result, they have diluted the probative strength of the proffered evidence and have aggravated its prejudicial effect.

[10] I do not think that there are any distinctive features that unify the incidents. The evidence of the prior incident was that of chance and opportunity. Here there appears to be initially a correspondence of the minds to seek out a secluded spot. The reasonable inference was that they had a mutual intention that was highly suggestive of the need for privacy and, it was capable of raising a further inference that the parties intended to be secretive and secluded for reasons best known to them. The second inference that he proceeded wilfully knowing that the complainant did not consent may be problematic for the reasons mentioned and when there is the ultimate assessment of credibility.

[11] In my opinion, the proffered evidence showed that the accused had a discreditable tendency that was not similarly repetitive. True, the touching incident of many years ago was without consent. But, significantly it did not persist when his co-worker expressed her disapproval of his presumptive conduct. It did not disclose a pattern of sexual predation or the alleged misconduct of an individual whose modus operandi was to lure, on a pretext, female victims to secluded areas in the hospital, demand from them oral sex, persistently grope at their genitals and breasts and kiss them, against their repeatedly expressed lack of consent.

[12] It seems to me, that consent, or lack of it, and the complainant's credibility in relation thereto, appears to be the crucial issue at trial. Therefore, admittance of evidence of the general disposition of the accused would be based on prejudice rather than on proof of the delict and thereby undermining his constitutional protection of the presumption of innocence. Thus, overall and on the analysis that I have made, in my view, the proffered evidence has the potential to be more prejudicial than probative. In other words, its

prejudicial effects outweigh its probative value. Consequently, for the reasons stated, the similar fact evidence, will not be admitted.