

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. Ward, 2009 NSSC 406

**Date:** 20091218

**Docket:** CRH 303841

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Matthew Ward and Shane Ward

**Restriction on publication:** s. 539 C.C.C.

**Judge:** The Honourable Justice Felix A. Cacchione

**Heard:** December 18, 2009, in Halifax, Nova Scotia

**Written Decision:** January 7, 2010

**Counsel:** John Feehan and Eric Taylor, for the Crown  
Luke A. Craggs, for Matthew Ward  
Alfred Seaman, for Shane Ward

**By the Court:**

[1] This *voir dire*, known as a Scopelliti hearing, was held to determine the admissibility of evidence relating to the deceased's character, in particular his propensity for violence.

[2] The defendant Shane Ward argued that such evidence was necessary in order that he be able to make full answer and defence to the charge of second degree murder he is presently facing.

[3] The applicant presented one witness, Ms. Catherine Hodges, who witnessed two incidents involving the deceased Philip Love and the defendant Shane Ward which are said to be relevant to the proceedings in this case.

[4] The first incident occurred in the summer of 2005 in Ottawa. It involved the deceased bursting into Ms. Hodges' residence, throwing open her fridge door and grabbing a bottle from the fridge. The deceased's action of throwing open the fridge door caused the door to hit a wall and puncture the wall. The deceased left the apartment and Ms. Hodges went after him to tell him that he would not be allowed back in her apartment if he were to behave that way. Ms. Hodges testified that the deceased, who was at that point at the bottom of the stairs some 15 to 20 feet away, came at her in an aggressive fashion. She testified that he walked really fast and looked mean and angry. By the time the deceased reached the top of the stairs the applicant Shane Ward was standing next to Ms. Hodges. She then re-entered her apartment and saw nothing further.

[5] Ms. Hodges did not see any physical altercation between the deceased and the applicant on that occasion.

[6] The second incident occurred in late September or early October 2006 approximately three months before the incident which is the subject matter of the present charges. Ms. Hodges testified that on that occasion she witnessed Shane Ward and his brother Matthew Ward, a co-accused in these proceedings, wrestling in the kitchen area of the residence she was then occupying with Matthew Ward. The brothers appeared to be angry at each other.

[7] Ms. Hodges saw a knife on the counter and wanted to get it out of that area so that no one would get hurt. The deceased grabbed her from behind in a bear hug and prevented her from reaching the knife.

[8] While Matthew Ward was holding his brother Shane's arms behind his back, the deceased punched Shane Ward. Ms. Hodges testified that the deceased also kicked Shane Ward when he was on the floor wrestling with his brother Matthew. Her evidence was that Shane could not defend himself because his arms were being held behind his back by his brother Matthew.

[9] In cross-examination Ms. Hodges agreed that during the first incident in Ottawa the deceased did not have his arms raised nor did he have his voice raised in an aggressive manner. Rather it was the deceased's body language which led her to conclude that he was acting in an aggressive manner. Her evidence was that on seeing the deceased and the Ward brothers later on that summer it appeared as if this event had never happened.

[10] As a result of the incident which is the subject matter of the charges presently before the court, Ms. Hodges was interviewed by the police who were looking for a history of the relationship between the accused Ward brothers and the deceased Philip Love. In her statement to the police no mention was made of the Ottawa incident and many of the observations she testified to regarding the second incident were not included in her statement. When questioned about the omissions in her statement to the police, Ms. Hodges testified that she only answered the questions she was asked.

[11] The policy concerns that exclude evidence of an accused's bad character do not generally apply to the character of others provided that the evidence is relevant and is not otherwise barred by an exclusionary rule of evidence.

[12] In the case of *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 at p. 298 the Supreme Court of Canada stated:

“...the danger of a wrongful conviction does not arise where the character evidence pertains not to the accused, but to a third party witness. Consequently, so long as it is relevant and not otherwise excluded by a rule of evidence, evidence of the bad character of a third party can be adduced by the defence: *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481.

[13] The court in *Arcangioli* ruled that provided the evidence is relevant, the disposition of a third party may be established by reliance on one event (p. 297).

[14] Evidence of a person's character may be introduced by the defence to establish that they acted in conformity with their character in a way that is relevant to an issue in the case. It is not necessary that the evidence have significant probative value in order to be admissible: *R. v. Yaeck* (1989), 68 C.C.C. (3d) 545 at 564-565.

[15] Because the evidence of a third party's character is generally irrelevant to whether the accused committed an offence, such evidence must be relevant to a live issue at trial. In *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.) at pp.327-328 Doherty J.A. stated:

...Evidence suggesting that an accused is a person of bad character is subject to a specific exclusionary rule to which there are exceptions. There is, however, no such exclusionary rule in criminal cases where otherwise relevant evidence suggests that the deceased (or some other third party) is a person of bad character: *R. v. Arcangioli*, supra. Where such evidence is relevant, it will be received unless the trial judge concludes that its potential to prejudice the jury substantially outweighs its probative value. In this context, prejudice refers to the possibility that the jury will misuse the evidence by concluding that the deceased's bad character somehow justified or excused the otherwise criminal conduct of the accused. Put bluntly, there is a concern that the jury will base their verdict in part at least on an assessment that the deceased's bad character rendered the deceased unworthy of the protection of the law.

[16] The prior acts of violence must have instilled some apprehension and fear for personal safety in the accused.: *R. v. Ryan* (1989), 49 C.C.C. (3d) 490 (NfldCA) .

[17] In *R. v. Scopelliti* (supra) and *R. v. Varga* (2001), 159 C.C.C. (3d) 502 (Ont. CA) the court held that an accused may introduce evidence of a deceased's disposition for violence in support of a plea of self-defence.

[18] When self-defence is not open, but a material issue at trial is, who first attacked whom as between the deceased and the accused, evidence of the deceased's violent disposition may be relevant: *R. v. Sims* (1994), 87 C.C.C. (3d)

402 (BCCA). The evidence may be of one incident, or where the defence points to individual incidents the cumulative effect of them must be weighed.

[19] When such evidence is admitted, the jury should be cautioned that the evidence must only be used in relation to the specific issues to which it is relevant; and must not be used to conclude that, because of such violent disposition, the deceased deserved injury or other consequences that the accused is alleged to have caused.

[20] In *Scopelliti* and also in *R. v. Hamilton* (2003), 180 C.C.C. (3d) (BCCA) it was held that evidence of the deceased's disposition for violence may be established by evidence of the deceased's reputation for violence; evidence of specific acts of violence, which need not be similar acts; or expert opinion.

[21] I am not satisfied that the Ottawa incident should be put before the jury for the following reasons. This incident occurred almost two years before the incident which is the subject matter of these proceedings. The incident itself was not violent. The puncture in the wall of Ms. Hodges' apartment caused by the opening of the fridge door could have been as much the result of an accident as of an intentional act by the deceased. The deceased was not waving his arms or raising his voice in an aggressive fashion toward Ms. Hodges. There was no physical altercation between the deceased and Shane Ward.

[22] The second incident is one which was much more proximate in time to the event which is the subject matter of these proceedings. It was one which also included some unprovoked violence by the deceased toward the accused Shane Ward. It also involved a situation where, if Ms. Hodges evidence is accepted, Shane Ward was unable to defend himself because he was being restrained by his brother at the time when the deceased struck him.

[23] In the present case the accused Shane Ward is advancing the defence of self-defence. It would appear as well that Shane Ward will also be arguing that the deceased attacked him first.

[24] For these reasons I am satisfied that evidence relating to the second incident is properly admissible and should be heard by the jury. The jury will be instructed as to the limited use that can be made of this evidence as it relates to the specific

issues to which this evidence is relevant as well the jury will be instructed regarding the prohibited use of this evidence.

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Cacchione, J.