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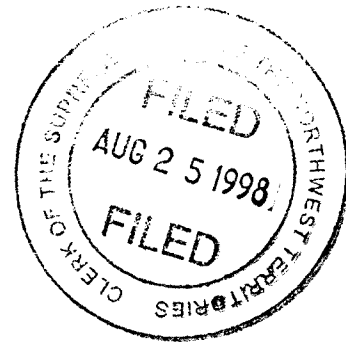
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

PAUL LEROUX



Transcript of Similar Fact and Severance Ruling
delivered by the Honourable Justice J. Vertes,
sitting at Inuvik, in the Northwest Territories,
on the 11th day of August, A.D. 1998.

APPEARANCES:

Mr. S. Couper
Ms. D. Sylvain

For the Crown

Mr. J. Brydon

For the Defence

1 THE COURT: There are two motions before me.
2 One is a Crown motion seeking the use of similar
3 fact evidence. The other is a defence motion for
4 severance of counts.

5 The accused was originally charged in a
6 44-count indictment. At the opening of trial,
7 guilty pleas were entered to 9 counts, and the
8 Crown stayed 6 others. By the conclusion of the
9 Crown's case, a further 17 counts were dismissed.
10 There are 12 counts remaining to which the accused
11 has pleaded not guilty. The Crown has led evidence
12 with respect to all those counts as well as to the
13 counts to which guilty pleas have been entered
14 since there is a dispute as to the facts on some of
15 those counts.

16 The Crown seeks to use as similar fact
17 evidence the evidence from each count to support
18 every other count including those relating to the
19 guilty pleas. The general rule in a multi-count
20 indictment is that each count must be assessed
21 individually and independently of every other
22 count. Here the Crown wishes to use all of the
23 evidence presented in support of all of the
24 counts.

25 In addition, the Crown led evidence from one
26 Andy Andre which it also seeks to use as similar
27 fact evidence. This was not the subject matter of

1 any count. Mr. Andre described two incidents from
2 1972 which may be described generally as
3 allegations of sexual touching or indecent assault
4 (as that term was used at the time).

5 The 21 counts which are still before the court
6 because of guilty or not guilty pleas, all relate
7 to alleged incidents of sexual abuse occurring
8 between 1967 and 1979 during the time when the
9 accused was the senior boys' supervisor at the
10 Grollier Hall residential school. With one
11 exception, all of the complainants were residents
12 in the hostel. All of the complainants were young
13 boys or teenagers. Most of the alleged incidents
14 involve sexual touching, some involve acts of
15 fellatio and some involve acts or attempted acts of
16 anal intercourse. Most of these incidents were
17 alleged to occur in the accused's room in the
18 hostel, some in the boys' rooms in the dorm, and
19 some in other areas of Grollier Hall. Many of the
20 complainants testified as to how the accused would
21 give them alcohol, would show them books and
22 magazines with explicit sexual content, and would
23 encourage them to participate in sexual
24 activities.

25 The Crown's submission is that the similar
26 fact evidence is relevant to show a pattern of
27 behaviour by the accused which in turn will assist

1 in the evaluation of each particular complainant's
2 credibility. As noted in a number of recent
3 judgments, in cases of sexual offences, where
4 identification is not an issue, similar fact
5 evidence is introduced to support the credibility
6 of a particular allegation. In addition, in cases
7 of sexual assault, the similarities or
8 dissimilarities as between the particular sexual
9 acts that are alleged are often not as compelling
10 as the circumstances surrounding the incidents.
11 The circumstances of different allegations, if they
12 reveal a pattern of behavior, can provide a
13 connecting link so that each allegation is made
14 more probable.

15 Similar fact evidence is an exception to the
16 rule that prohibits the prosecution from adducing
17 evidence of the accused's bad character or the
18 accused's propensity for unlawful or immoral
19 conduct. Such evidence is not considered to be
20 logically probative with respect to the actual
21 crime charged. Similar fact evidence, however,
22 will be admissible if it has probative value in
23 relation to a matter in issue other than its
24 tendency to show disposition and if that probative
25 value outweighs the prejudicial effect on the
26 accused at trial.

27 The cumulative effect of a large number of

1 similar offences can be regarded as having an
2 inherently prejudicial effect. The probative value
3 must be high to overcome this prejudicial effect.
4 Here, the compartmentalization of the evidence, if
5 there is to be any, is somewhat different however
6 since this is a judge-alone trial. Judges are
7 expected to engage in that compartmentalization
8 exercise far more readily than juries.

9 As I noted before, recent cases have held,
10 especially in respect of sexual offence trials,
11 that evidence of similar acts may be relevant with
12 respect to a complainant's credibility, the
13 necessity for the trier of fact to understand the
14 context within which an alleged offence occurred,
15 including the accused's relationship with the
16 accusers, the background to the circumstances in
17 which an alleged offence occurred, and whether the
18 alleged crime is part of a pattern of behavior by
19 the accused. Similar fact evidence may render
20 other evidence more plausible. There must,
21 however, be some link or nexus between the similar
22 facts and the alleged crime, or between the
23 different counts, either in proximity of time, in
24 method, or in circumstances which indicate a
25 pattern.

26 Here, there is a clear nexus in the
27 time-frame, the relationship between the accused

1 and the complainants, the circumstances in which
2 these offences allegedly occurred, and the manner
3 in which they allegedly occurred. The common
4 elements could show an underlying course of conduct
5 which provides that connecting link so that each
6 story renders the next story more plausible.

7 In my opinion, the evidence is highly
8 probative and relevant. Its prejudicial impact is
9 ameliorated to some extent simply by the fact that
10 this is not a jury trial. As the trier of fact, I
11 think I can remind myself that the accused's guilt
12 or innocence must be determined on the basis of the
13 evidence marshalled against him with respect to the
14 charges and not on evidence of bad character.
15 Hence the probative value of the similar fact
16 evidence is not outweighed by its prejudicial
17 effect.

18 The Crown's application to use evidence of all
19 counts, and the evidence of Mr. Andre, as similar
20 fact evidence is therefore granted.

21 The accused's motion for severance raises
22 different concerns.

23 The accused gave notice prior to trial that he
24 wished to sever those 9 counts to which he has
25 pleaded guilty from the rest of the indictment.
26 With respect to the 12 counts to which not guilty
27 pleas were entered, he wishes to have each one of

1 those counts treated as separate indictments. The
2 purpose of this request is clear. If the accused
3 chooses to take the witness stand in his defence,
4 he wishes to be able to choose on what counts he
5 will testify on, and on what counts he will remain
6 silent.

7 Since this is a judge-alone trial, all parties
8 agreed that I could hear all of the Crown's
9 evidence before hearing both this motion for
10 severance and Crown's motion for similar fact
11 evidence. This avoided the inconvenience of
12 hearing evidence twice, once on a voir dire and
13 then during the trial proper. Furthermore, the
14 defence motion is not to have separate trials,
15 i.e., before different judges; it is simply to
16 treat each count separately. Section 591(4) of the
17 Criminal Code allows a motion for severance before
18 or during the trial.

19 Section 591(1) of the Code permits the joinder
20 in one indictment of any number of counts for any
21 number of offences. Subsection (2) says that,
22 where there is more than one count in an
23 indictment, each count may be treated as a separate
24 indictment. Subsection (3) says that the court
25 may, where the interest of justice so require,
26 order that the accused be tried separately on each
27 count. The distinction between subsections (2) and

1 (3) suggests to me that what the accused is seeking
2 can be accomplished without the necessity of
3 ordering separate trials. In other words, there is
4 no principle that precludes an accused from
5 testifying on only some counts of a multi-count
6 indictment. What the accused must do is show that
7 the interests of justice require the relief
8 sought.

9 The factors that trial judges should consider
10 on a severance application are well-known:

- 11 (a) the factual and legal nexus
12 between the counts;
13 (b) general prejudice to the appellant;
14 (c) the undue complexity of the evidence;
15 (d) whether the accused wishes to
16 testify on some counts but not others;
17 (e) the possibility of inconsistent
18 verdicts; and,
19 (f) the desire to avoid a multiplicity
20 of proceedings.

21 The last two factors are not material on this
22 application since all counts, whether the accused
23 testifies or not, will be decided by me.

24 I have already commented on the factual nexus
25 as between the counts. They also have a legal
26 nexus in that they all allege crimes of a sexual
27 nature. There is prejudice to the accused, so it

1 is submitted, from the stacking of so many counts
2 and from the accused's inability without the order
3 sought to choose to remain silent on some counts.
4 There is nothing unduly complex about the
5 evidence. The case rests on the credibility of the
6 complainants. Finally, the accused so far has only
7 said that he wishes to remain silent on three of
8 the counts to which he has pleaded guilty. He has
9 not yet decided whether he will testify on all,
10 some, or none of the other counts.

11 I can readily understand why an accused person
12 would seek the remedy sought by the accused here.
13 There are numerous counts. On some the accused may
14 feel the Crown's evidence is insufficient so he
15 wishes to remain silent. He thinks he has no case
16 to answer. On some others he may feel he has a
17 good defence that he wants to assert from the
18 witness box. But he does not want to expose
19 himself to questioning on the others in case he may
20 say something detrimental to his case. These are
21 tactical decisions that have to be made in every
22 multi-count case.

23 In my opinion, the only justifiable case for
24 severance is with respect to the nine counts to
25 which the accused has pleaded guilty. Those counts
26 involve a dispute over the full facts of the crimes
27 and not over guilt or innocence. That dispute is

1 only relevant to sentencing on those counts.
2 Therefore, if the accused chooses to not testify
3 with respect to any of those counts, all it simply
4 means is that there is nothing to contradict those
5 facts led by the Crown and therefore it is more
6 likely that any aggravating facts, not explicitly
7 accepted by the accused, will be found to have been
8 proven beyond a reasonable doubt.

9 On the other counts, the issue is guilt or
10 innocence. The accused has a fundamental right to
11 make full answer and defence. He has not said,
12 however, how he wishes to do that. At this point
13 he simply wants to leave his options open.

14 In my opinion, it would not be in the
15 interests of justice to simply let the accused pick
16 and choose in these circumstances. The interests
17 of justice are not only the interests of the
18 accused but also the interests of society
19 generally. The Crown has been given a discretion
20 to try together various counts in one indictment.
21 Here the issue on all charges is substantially
22 credibility. There is a close nexus in the place,
23 time, and circumstances in relation to all counts.
24 I have therefore concluded that it is in the
25 interests of justice that all the other counts be
26 tried together.

27 I therefore order that those counts to which

1 the accused has pleaded guilty (those being
2 Counts 7, 10, 12, 15, 22, 27, 32, 35, and 44) be
3 treated as separate indictments. The accused may
4 testify on all, some, or none of those counts as he
5 may choose. All other counts will remain as part
6 of one indictment. This means that the accused may
7 choose to remain silent or to testify on all or
8 only some of the 9 counts to which he pleaded
9 guilty; he may choose to remain silent on all the
10 counts to which he pleaded not guilty (even if he
11 testifies on some of the 9 severed counts); but if
12 he chooses to testify on the counts to which he
13 pleaded not guilty, he may be questioned with
14 respect to any or all of those counts.

15
16 Certified pursuant to Practice Direction #20
dated December 28, 1987.

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Eva Robinson
22 Court Reporter
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