Date: 1999 07 27
Docket: CR 03708

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ALEX NILAULAK

Ruling regarding the admissibility of similar fact evidence.

Voir dire held at Yellowknife, NT, July 22, 1999

Reasons filed: July 27, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Crown counsel: Ari Slatkoff

Defence counsel: Thomas H. Boyd

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REASONS FOR JUDGMENT

[1] The accused's jury trial on a sexual assault charge is scheduled for next week in Rankin Inlet. On this *voir dire* the Crown seeks a ruling regarding similar fact evidence it wishes to have considered by the jury.

[2] The 24-year-old complainant says that the assault occurred while she was sleeping in her bedroom at her home in Rankin Inlet between 3:00 a.m. and 4:00 a.m. on the date in question. Her infant child was sleeping in the bed with her, and her own mother was sleeping in another bed in the same room. The complainant says she felt someone touching her in the vaginal area underneath her pants and panties and she awakened to see the accused there in the bedroom. He had not been invited into that residence. The complainant called to her mother whereupon the accused took money from his wallet, held it out to the complainant and motioned for her to keep quiet. She continued to call for her mother in an effort to awaken her whereupon the accused man left the bedroom. He subsequently fled from the house.

[3] It is the position of the accused that he was in the complainant's residence for an innocent purpose; i.e., to purchase liquor. It is his position that he touched the hip of the complainant over her clothes, while she lay in bed, in order to awaken her so that he could purchase liquor from her. At the first trial (at which the jury was unable to reach a unanimous verdict) this position was put both during cross-examination of the

complainant and during the accused's own testimony. On this *voir dire* defence counsel confirms that this is the accused's position.

[4] The accused has a substantial criminal record. Among his convictions the Crown alleges that there are eight particular convictions each of which involved conduct by the accused man which is strikingly similar to his alleged conduct in the present case. Specifically, it is said that on these other occasions he was in someone else's home, uninvited, in the early morning hours, and made unwanted sexual contact with a female victim.

[5] By agreement of counsel, for the purposes of the *voir dire*, I was provided with a summary of the factual circumstances of these earlier incidents as follows:

(1) At 6:00 a.m. on September 3, 1979, this accused, then 20 years of age, entered a Rankin Inlet residence, uninvited, in an intoxicated condition. The woman who lived there was sleeping on the living room couch. The accused began kissing her until she awakened. When she awoke there was a physical altercation during which she was struck by the accused. The accused left. He pleaded guilty to being unlawfully in a dwelling house.

(2) At 6:00 a.m. on July 6, 1980, this accused, then 21 years of age, entered a Rankin Inlet residence, uninvited, in an intoxicated condition. The woman who lived there was sleeping but woke when she heard a noise. She confronted the accused and asked what he was doing in the house. He said he wanted sex in exchange for money. The woman said no, and the accused persisted saying he would leave if she kissed him. After the kissing the woman pushed him away and fled the house with her children. The police arrived shortly thereafter to find the accused asleep in the woman's house. He was convicted of being unlawfully in a dwelling house.

(3) At 4:30 a.m. on January 30, 1981, the accused entered a Rankin Inlet residence, uninvited, in an intoxicated condition. He entered through the bedroom window of a 12-year-old girl. He told her he was going to have sex with her mother and threatened her not to say anything. He then went to the mother's bedroom and forced himself on her, despite her resistances. The accused pleaded guilty to rape.

(4) At 1:30 a.m. on February 23, 1983, a 13-year-old girl returned to her home in Rankin Inlet. She found the accused there, in an intoxicated condition.

He had not been invited into that residence. He threatened her and then had non-consensual sexual contact with her. He pleaded guilty to sexual assault.

(5) At 3:00 a.m. on November 28, 1985, the accused entered a Rankin Inlet residence, uninvited. A woman and her husband were asleep in their bed. The woman awoke to find the accused touching her around the waist and trying to take her panties down. He pleaded guilty to being unlawfully in a dwelling house.

(6) At 6:30 a.m. on November 11, 1986, the accused entered a Rankin Inlet residence, uninvited. The woman who lived there awoke when she heard a noise. She then saw the accused looking at her through the opening in the bedroom door. She scolded him and he left. She later noticed a purse was missing from the house. The accused was convicted of break, enter and commit theft.

(7) At 8:30 a.m. on the same date (November 11, 1986) the accused entered another Rankin Inlet residence, uninvited. A woman and her two young daughters were home. The woman asked the accused to leave but he refused to do so and instead he threatened her and her daughters. After the accused sexually assaulted the woman, she fled the house to get help. The accused then sexually assaulted the 9-year-old daughter. The accused pleaded guilty to two counts of sexual assault.

(8) Between 5:00 a.m. and 6:00 a.m. on June 27, 1998, the accused entered a Rankin Inlet residence, uninvited. In that residence was a 15-year-old girl who was babysitting two young children. The accused engaged the girl in conversation telling her he was interested in her, while rubbing his own genital area. At one point the accused prevented the girl from leaving the house when she attempted to do so. The accused pleaded guilty to being unlawfully in a dwelling house.

[6] The Crown seeks to rely on this proposed evidence to support the credibility of the complainant's testimony (if, as expected, it is attacked by the accused) and also to rebut any suggestion by the accused that his presence in the house was for an innocent or non-sexual purpose.

[7] The evidentiary rule which allows for the admissibility of similar fact evidence was reviewed by the Supreme Court of Canada most recently in *R v. Arp*, [1998] 3 S.C.R. 339. Cory J. described the rule as an "exception to an exception" to the basic rule that all relevant evidence is admissible:

> Relevance depends directly on the facts in issue in any particular case. The facts in issue are in turn determined by the charge in the indictment and the defence, if any, raised by the accused. ... To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". ... As a consequence, there is no minimum probative value required for evidence to be relevant. ...
>
> Evidence of propensity or disposition (e.g. evidence of prior bad acts) is relevant to the ultimate issue of guilt, insofar as the fact that a person has acted in a particular way in the past tends to support the inference that he or she has acted that way again. Though this evidence may often have little probative value, it is difficult to say it is not relevant.
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> . . .
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> Thus evidence of propensity or disposition may be relevant to the crime charged, but it is usually inadmissible because its slight probative value is ultimately outweighed by its highly prejudicial effect. As Sopinka J. noted in *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, at pp. 127-28, there are three potential dangers associated with evidence of prior bad acts: (1) the jury may find that the accused is a "bad person" who is likely to be guilty of the offence charged; (2) they may punish the accused for past misconduct by finding the accused guilty of the offence charged; or (3) they may simply become confused by having their attention deflected from the main purpose of their deliberations, and substitute their verdict on another matter for their verdict on the charge being tried. Because of these very serious dangers to the accused, evidence of propensity or disposition is excluded as an exception to the general rule that all relevant evidence is admissible.
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> However, as Lord Hailsham stated in *Boardman, supra,* at p.453, "what is *not* to be admitted is a chain of reasoning and not necessarily a state of facts" (emphasis added). That is, disposition evidence which is adduced solely to invite the jury to find the accused guilty because of his or her past immoral conduct is inadmissible. However, evidence of similar past misconduct may exceptionally be admitted where the prohibited line of reasoning may be avoided. In R. v. B. (C.R.), [1990] 1 S.C.R. 717, McLachlin J. writing for the majority carefully reviewed the issue of similar fact evidence. She reviewed the reasoning put forward in *Boardman, supra*, and, at p. 730 observed:

> This view of similar fact evidence posits a test which is related to, yet distinct from the general rule that evidence is not admissible if its prejudicial effect outweighs its probative value: see *R. v. Wray*, [1971] S.C.R. 272. That rule is an exclusionary rule applied to evidence which would otherwise be admissible. The reverse is the case with similar fact evidence. In determining its admissibility, one starts from the proposition that the evidence is inadmissible, given the low degree of probative force and the high degree of prejudice typically associated with it. The question then is whether, because of the exceptional probative value of the evidence under consideration in relation to its potential prejudice, it should be admitted notwithstanding the general exclusionary rule.

After a review of the other pertinent authorities she concluded at pp. 734-35:

> This review of the jurisprudence leads me to the following conclusions as to the law of similar fact evidence as it now stands in Canada. The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition. As affirmed in *Boardman* and reiterated by this Court in *Guay, Cloutier, Morris, Morin* and *D. (L.E.)*, evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

It can be seen that in considering whether similar fact evidence should be admitted the basic and fundamental question that must be determined is whether the probative value of the evidence outweighs its prejudicial effect.

(at p.360-363)

[8] In the present case, as in most sexual assault allegations which become the subject of criminal prosecution, there are no witnesses to the actual assault and it is the complainant's word against that of the accused. In these circumstances, the credibility of the complainant is of crucial importance to the determination of guilt or innocence. Similar fact evidence may indeed be useful to the trier of fact on the central issue of credibility. See *R. v. C.R.B.*, (1990) 76 C.R.(3d) 1 (S.C.C.).

[9] Also, it has been accepted that similar fact evidence can be used to rebut a defence of legitimate association or attendance, or innocent purpose. *R. v. C.R.B.*, *supra*.

[10] Upon careful consideration, I am of the view that the proposed evidence satisfies the test of admissibility; i.e., its probative value outweighs its prejudicial effect.

[11] The probative value is substantial, as:

a) with the exception of incident (6), the prior incidents are remarkably similar as to the actual reasons for the accused's presence in other people's homes in the early morning hours;

b) all of the similar facts have either been admitted by the accused or have been proven beyond a reasonable doubt;

c) there is no issue as to the accused's identity;

d) there are not one or a few, but <u>several</u> similar incidents over a period of years;

e) there is an objective unlikelihood of coincidence.

[12] The prejudicial effect is slight, as:

i) the accused has already had an opportunity to refute or deny these earlier acts;

ii) the Crown is not seeking to draw the jury's attention to all the precise details or circumstances of the earlier criminal acts but merely that the accused was present, uninvited, in strangers' homes in the early morning hours for unlawful or immoral purposes and not for innocent purposes;

iii) the jury can be carefully instructed as to the permitted use of this evidence and to avoid improper inferences and a prohibited line of reasoning.

[13] If the jury discerns from this evidence a pattern of behaviour by the accused when visiting Rankin Inlet residents in the early morning hours, this may assist the jury in a) resolving any contradiction if the complainant and the accused testify to different versions of the event at the complainant's home, or b) finding corroboration or support for the credibility of the complainant should the accused attack her evidence by cross-examination.

[14] Accordingly, with the exception of the evidence of incident (6) described earlier in these reasons, I rule that the proposed evidence outlined to me on the *voir dire* is admissible evidence at the jury trial, subject to any specific objection or concern that may arise during the course of the trial. Incident (6), in my view, does not have the same strength of similarity on the "sexual purpose" aspect to warrant admission.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
27th day of July 1999

Crown counsel: Ari Slatkoff
Defence counsel: Thomas H. Boyd

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