R. v. Larry Wanazah, 2000 NWTSC 59

Date: 2000 09 15
Docket: CR 03845

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

LARRY WANAZAH

Application by Crown respecting similar fact evidence; application by defence respecting severance of courts.

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Heard at Yellowknife, Northwest Territories
on September 7, 2000

Reasons filed: September 15, 2000

Counsel for the Crown: John O'Halloran
Counsel for the Accused: Hugh R. Latimer

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REASONS FOR JUDGMENT

[1] The accused is scheduled to stand trial, before a court composed of a judge and jury, on a nine-count Indictment alleging offences committed between 1988 and 1993 against four different complainants. As the designated trial judge, I heard two pre-trial motions: (a) a motion by the Crown to admit evidence with respect to each count in the Indictment as similar fact evidence with respect to each other count; and (b) a motion by the defence to sever the counts in the Indictment and directing separate trials on the charges relating to each complainant.

[2] It is not uncommon to have these two types of applications heard at the same time. They overlap in certain ways. The Criminal Code allows any number of counts for any number of indictable offences to be joined in the same indictment: s.591(1). The Code does not require that offences charged in the same indictment meet the standard of similar fact evidence. Joinder of a number of counts does not make the evidence on one count admissible on the other counts. Each count must be considered separately by the trier of fact. The Code further provides that an accused may be tried separately on one or more counts "if the interests of justice so require": s.591(3). One of the considerations in deciding whether counts should be severed, however, is the admissibility of similar fact evidence. But, as noted by the Supreme Court of Canada in *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (at 345-346), the question of severance must be kept distinct from the issue of admissibility of similar fact evidence. On a motion for severance, the accused bears the burden of establishing on a balance of probabilities that the interests of

justice require severance of counts. The Crown, however, bears the burden of demonstrating that similar fact evidence should be admitted. One does not necessarily predetermine the other. A trial judge may refuse severance of the multi-count indictment yet still not allow the use of similar fact evidence as between the counts.

[3] The counts in this Indictment are related in the sense that they all emanate from allegations of sexual misconduct with children. The allegations, however, are of distinct acts as opposed to repetitive conduct. The following summary of evidence comes from counsels' submissions and the transcript of the preliminary inquiry:

(A) Count 1 alleges a sexual assault on C.V., a male, sometime between 1988 and 1991. The complainant is now 22 years old and he alleges one act of anal penetration by the accused when he was "around" 8 to 10 years old.

(B) Counts 2 through 5 relate to allegations of sexual assault and threats to cause death to J.T., a female now 20 years old. The first two counts relate to an act of vaginal penetration when the complainant was 11 or 12 years old. This allegedly occurred in the locker room of the school gym. The other two counts relate to another act of vaginal intercourse, sometime in September of 1989, at the complainant's home. On both occasions, the Crown alleges that the accused threatened to kill J.T. if she told anyone what happened.

(C) Counts 6 and 7 allege what was described by the complainant as "sexual abuse" and "touching" on one occasion when the complainant was 5, 6 or 7 years old. The complainant, B.T., is now 15 years old and a sister of J.T., the complainant in counts 2 through 5. It is alleged that the accused used a knife (the evidence refers to a butterknife) in the commission of this sexual assault and made a threat to kill B.T. if she told anyone.

(D) Counts 8 and 9 allege one act of anal penetration on C.L., a female now 20 years old, at a time when she was 11 years old. Again it is alleged that the accused used a knife (the evidence refers to a penknife) and that a threat was made.

[4] In addition to this summary, it should be noted that the accused was himself relatively young at the time of these alleged offences. He is now 27 years old and at least for part of the time frame set out in the Indictment he would have been considered a "young offender". Those offences where the accused would have been subject to the Young Offenders Act were transferred to adult court by consent. Also, the accused is distantly related to the two complainants, J.T. and B.T., but there is no connection to the other complainants.

[5] The defence is a denial that these incidents occurred. It is anticipated that the accused will testify. Counsel expect the trial to be a credibility contest. In addition, the Crown will seek to have admitted into evidence a statement given by the accused to the police. The defence will challenge the admissibility of this statement. Crown counsel says that this statement, if admitted, could be considered somewhat inculpatory with respect to the charges involving the complainants, J.T. and B.T. There is no connection between the statement and the charges involving the other complainants. What the accused will say, if anything, in response to the charges related to the statement is undetermined at this time.

[6] I will address first the Crown's application to have the evidence of each count admitted as similar fact evidence on every other count. In this case the Crown's main submission is that similar fact evidence is relevant to the issue of each complainant's credibility.

[7] Identity is not the issue in this case; nor is consent. The real issue, and the only issue for which the evidence could be relevant, is whether the complainants or any of them are telling the truth; in other words, whether these things happened. In such cases, in the Crown's submission, quoting from the judgment of McLachlin J. (as she then was) in *R. v. B. (C.R.)* (1990), 76 C.R. (3d) 1 (S.C.C.), where the word of a child alleged to have been sexually assaulted is opposed to the word of the accused, similar fact evidence may be useful on the central issue of credibility.

[8] The principles relating to the admissibility of similar fact evidence have been addressed in several recent decisions from the Supreme Court of Canada. Similar fact evidence is an exception to the rule that prohibits evidence of the accused's bad character or the accused's propensity for unlawful or immoral conduct. Such evidence is not considered to be logically probative with respect to the actual crime charged (even if as a matter of instinctive common sense one can say that

evidence of sexual assaults by the accused on some children may indeed be material to determining whether another child was sexually assaulted by him). The danger, of course, is that the trier of fact may assume from the evidence of other bad acts that the accused is a bad person and convict on that basis instead of the evidence on the alleged charge. As often said, an accused must be tried for what he did, not for who he is.

[9] Similar fact evidence, however, will be admissible if it has probative value in relation to a matter at issue other than its tendency to show disposition and if that probative value outweighs the prejudicial effect on the trial. This basic principle was outlined by Iacobucci J. of the Supreme Court in *R. v. B. (F.F.)* (1993), 79 C.C.C. (3d) 112 (at 136):

> The basic rule of evidence in Canada is that all relevant evidence is admissible unless it is barred by a specific exclusionary rule. One such exclusionary rule is that character evidence which shows *only* that the accused is the type of person likely to have committed the offence in question is inadmissible. As Lamer J. (as he then was) wrote for this court in *R. v. Morris* (1983), 7 C.C.C. (3d) 97 at p.106, 1 D.L.R. (4th) 385, [1983] 2 S.C.R. 190:
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> > Thus came about, as a primary rule of exclusion, the following: disposition, i.e. the fact that the accused is the sort of person who would be likely to have committed the offence, though relevant, is not admissible. As a result, evidence adduced *solely* for the purpose of proving disposition is itself inadmissible, or, to put it otherwise, evidence the sole relevancy of which to the crime committed is through proof of disposition, is inadmissible.
>
> However, evidence which tends to show that the accused is a person of bad character but which is also relevant to a given issue in the case does not fall within this exclusionary rule. As Lamer J. went on to write at pp. 106-7:
>
> > This is not to say that evidence which is relevant to a given issue in a case will of necessity be excluded merely because it also tends to prove disposition. Such evidence will be admitted subject to the judge weighing its probative value to that issue (e.g. identity), also weighing its prejudicial effect, and then determining its admissibility by measuring one to the other.
>
> Accordingly, evidence which tends to show bad character or a criminal disposition on the part of the accused is admissible if (1) relevant to some other issue beyond disposition or character, and (2) the probative value outweighs the prejudicial effect.

[10] Where the similar fact evidence is of conduct that is morally repugnant, which is the case here, the potential prejudice is great and the probative value must be high before its reception can be justified. And where, as here, identity is not an issue, and the only question is really a matter of credibility, one of the factors in the determination of probative value is the degree of distinctiveness or uniqueness between the evidence sought to be used as similar facts: *R. v. B. (C.R.), supra* (at 25). This last point was one also made in *R. v. B.(L); R. v. G. (M.A.)* (1997), 116 C.C.C. (3d) 481 (Ont. C.A.), at 499:

> In cases of sexual offences, where identification is not an issue, it may assist to define the inference that is sought to be drawn in terms of the accused having committed the act as *alleged by the complainant*. The evidence of discreditable conduct is sought to be introduced to support the *credibility of the particular allegation*, and not just the fact that the accused in some way acted improperly with the complainant. It therefore becomes important to focus on the details of the specific allegation for which support is sought ...
>
> Focussing on the specifics of the allegation assists in the assessment of the extent to which the evidence of prior discreditable conduct supports the inference that the complainant's allegation is true. It stands to reason that, in this type of case, the more similar the complaints are, the higher the probative value.

[11] Recent cases have held, especially in respect of sexual offence trials, that evidence of similar acts may be relevant with respect to a child complainant's credibility, the necessity for the trier of fact to understand the context within which an alleged offence occurred including the accused's relationship with his accusers, the background to the circumstances in which an assault occurs, and whether the alleged crime is part of a pattern of behaviour by the accused. Similar fact evidence may render other evidence more plausible. The basic and fundamental question, however, is whether the probative value of the evidence outweighs its prejudicial effect.

[12] In this case the only similarity between the charges is that the attacks were on young children. Three of the complainants are female and one is male; the types of assaults are different; in two cases a weapon was used; three times the accused threatened the complainants so they would not say anything; two of the incidents occurred in the complainants' homes while the others occurred in various places; the incidents appear to be ones of opportunity as opposed to a planned course of conduct over time. This last point is the significant one. There does not appear to be the type of pattern behaviour that one finds in many of the cases where

similar fact evidence has been admitted. In *B.(C.R.), supra*, the court found a pattern of similar behaviour in the fact that in each case the accused established a father-daughter relationship with the complainant and the similar fact witness before the sexual violations began. In *R. v. J.K.* (N.W.T.S.C. No. CR 03367; December 18, 1997), Schuler J. held, in a multi-count case, that the allegations revealed a pattern of behaviour by the accused where he was in a position of authority and trust to all of the complainants. In *R. v. Leroux*, [1998] N.W.T.J. No. 139, I held that the relationship between the accused and the complainants and the circumstances in which the offences occurred revealed a course of conduct and pattern of behaviour that was highly probative and rendered each accusation more plausible. But here there is no pattern of behaviour. The accused was not in a position of authority or trust vis-à-vis the complainants, or any one of them, nor did he have any meaningful on-going relationship with any of them. As I noted before, the alleged offences appear to be crimes of opportunity. They are distinct acts with distinct circumstances.

[13] In my opinion, allowing evidence on each count to be used as similar fact evidence on every other count would be highly prejudicial with little probative value. It could lead to the result that the trier of fact would convict on the basis of the accused's disposition or propensity to violate children. What similarities there are in these allegations are not particularly distinctive nor do they reveal a particular pattern of behaviour or context to these offences. What they do reveal is opportunistic violent behaviour by the accused toward people younger than himself.

[14] In some ways this case is similar to *R. v. Huot* (1993), 16 O.R. (3d) 214 (C.A.), appeal dismissed [1994] 3 S.C.R. 827. In that case, the accused was convicted of sexual offences against two adolescent boys who were residents of a reform school where the accused served as a supervisor. The acts alleged were different and the circumstances of each boy were different. The trial judge admitted the evidence on each count as similar fact evidence in order to support the credibility of the complainants and to supply corroboration. The Court of Appeal dismissed the accused's appeal from conviction but held that the trial judge erred in allowing similar fact evidence. Arbour J.A. (as she then was), writing on behalf of the majority, said:

> In the present circumstances, I am of the opinion that similar fact evidence was not admissible. The similarity of the acts alleged by each of the two complainants, in my opinion, was not sufficient to allow the admissibility of the evidence, taking into account the numerous and important differences between their allegations. The probative value of the evidence had to do essentially with the propensity of the appellant to commit

> homosexual acts with adolescents; with respect to this alone, the evidence was certainly inadmissible. Nothing else in this evidence tended to demonstrate the improbability that the allegations of the two young men resulted from a coincidence... Although each of the two complainants report several different occurrences, it is not possible here to say that there was a plan or a system. I am of the opinion that similar fact evidence confirmed the credibility of the complainants only because it disclosed the propensity of the appellant to perform such acts; it should have been declared inadmissible for this purpose. To say that similar fact evidence could be used as corroboration, seems to me also to be erroneous. Similar fact evidence was not evidence which implicated the accused with respect to an essential element of the offence, as is traditionally meant by the word corroboration. Therefore, it seems that the judge used the word corroboration as meaning simply the confirmation of the credibility of the complainants.

The Supreme Court of Canada confirmed that there was no substantial error in the result but did not address specifically the similar fact evidence issue.

[15] In my opinion, just as in *Huot*, the evidence of the complainants in this case, if used as similar fact evidence, would confirm nothing more than the propensity of the accused to commit these types of crimes. As such it has significant potential for prejudice.

[16] On the point regarding the use of similar fact evidence to bolster the credibility of each complainant, Crown counsel urges a similar approach with these complainants, who are now young adults (with the exception of one teenager), as with children. I certainly agree that when children testify then there may be good cause to admit similar fact evidence so as to make their evidence more plausible in the face of denials by an adult accused. There may be a general reluctance on the part of the trier of fact to favour the word of a child over that of an adult. But I am not convinced that the same concerns apply when the complainants are, at the time of trial, young adults and there is no significant age difference between them and the accused (and one cannot say that the accused was in some position of authority or trust).

[17] Canadian courts have, in the past decade, developed a greater awareness of the need to treat a child's evidence with care and not to simply expect the same level of accuracy and cohesion, particularly as to peripheral matters such as times and places, as with an adult witness. But, as a general rule, when an adult testifies about events from that person's childhood, then credibility should be assessed

according to criteria applicable to adult witnesses: *R. v. W.(R.),* [1992] 2 S.C.R. 122. Thus there should be caution in automatically transposing a principle applicable to children's evidence when dealing with adult witnesses. This is illustrated by the recent case of *R. v. Rulli* (1999), 134 C.C.C. (3d) 465 (Ont. C.A.), leave to appeal denied January 27, 2000 (S.C.C. No. 27338). There the accused was charged with numerous offences including assault against his girlfriend. The Crown was allowed to introduce evidence from a former girlfriend who testified as to the accused's assaults upon her. The trial judge permitted the similar fact evidence to be used by the jury in the assessment of the complainant's credibility. The Court of Appeal set aside the accused's conviction on the basis that the admission of similar fact evidence was, as the unanimous judgment put it, "wholly unjustified". In doing so the Court addressed the question of using similar fact evidence to bolster the credibility of an adult witness by referring to the guiding authority of *B.(C.R.)* (at 470):

> The situation in *B. (C.R.)* differs markedly from that in the case in appeal. The testimony of children of tender years who have been trapped in incestuous relationships with adult family members have problems that the courts have been at some pains to address. Juries are reluctant to accept, in the face of denials by the person charged, that the evidence of such aberrant conduct as the complainant described in *B.(C.R.)* (fellatio, cunnilingus, vaginal intercourse and buggery) actually occurred. This reluctance to believe the complainant can be offset by a second youthful witness who testifies to similar conduct at a time when she too was a young girl and in similar circumstances. McLachlin J. demonstrated that she was fully cognisant of this problem when she held that the evidence had probative value in connection with the credibility of the young complainant. She stated at p. 27-8:
>
> > In cases such as the present, which pit the word of the child alleged to have been sexually assaulted against the word of the accused, similar fact evidence may be useful on the central issue of credibility.
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> It seems to me, however, that in cases where the purpose of the similar fact evidence is solely or primarily to enhance the credibility of an adult complainant, we should be hesitant to depart from the common law's traditional rejection of evidence that illustrates that the accused is the sort of person who is likely to have committed these offences.

[18] In this case, to allow one complainant's evidence to confirm another complainant's evidence, when each offence relates to a distinct act, would increase the potential

danger that the trier of fact would resort to propensity reasoning. As I noted before, there is nothing particularly distinctive about the specific acts alleged against the accused by each complainant. This is not to impose a requirement of "striking similarity", as that term was used in older cases, but simply a recognition that the greater degree of similarity there is then the more probative the evidence is to support the credibility of the complainants. The various allegations have some similarities and some dissimilarities but certainly nothing like a pattern of behaviour or a consistent context so as to overcome the high degree of prejudice associated with the evidence of propensity.

[19] For these reasons the Crown's application to use evidence with respect to each count as similar fact evidence is dismissed.

[20] Turning now to the accused's application for severance, defence counsel's request was for a severance of the counts by complainant. The basic thrust of counsel's submission is that combining all of the charges in one trial, especially historical charges, would overwhelm the trier of fact by the cumulative effect of the evidence of propensity. Alternatively, counsel requests that the charges relating to the complainants J.T. and B.T., since those will involve the issue of the accused's statement, be severed from the other charges. Counsel referred me to a passage from The Honourable R.E. Salhany's text, Canadian Criminal Procedure (6th ed.), quoted by the Manitoba Court of Appeal in *R. v. Khan* (1996), 108 C.C.C. (3d) 108 (at 124):

> Probably the greatest risk of prejudice and embarrassment to an accused who is compelled to face a numerous array of counts will arise in a jury trial. It is obvious that a jury may tend to regard him with suspicion and infer his guilt from the excessive number of counts alone. Where there are several counts, the jury may find it difficult to determine what evidence is relevant to each count and may mistakenly supplement the evidence on any particular count by looking at all of the evidence as a whole.

[21] There are a number of factors to consider on a severance application. These were itemized in *R. v. Cuthbert* (1996), 106 C.C.C. (3d) 28 (B.C.C.A.), affirmed [1997] 1 S.C.R. 8, as follows:

(1) The factual and legal nexus between the counts;
(2) general prejudice to the Appellant;
(3) the undue complexity of the evidence;
(4) whether the accused wishes to testify on some counts, but not others;

(5) the possibility of inconsistent verdicts; and
(6) the desire to avoid a multiplicity of proceedings.

[22] In this case there is a factual and legal nexus between the counts in that all offences allege sexual assaults and threats on children. The question on all of them will be did they happen. There is no issue as to consent, innocent association, or lack of intent; the sole issue will be credibility. There is nothing unduly complex about the evidence. And, while there may be different verdicts with respect to different complainants, that would not necessarily mean that the verdicts were inconsistent. It would simply mean that the jury was convinced by the evidence on some counts but not on others (exactly the type of independent analysis we expect from juries in trials of multi-count indictments).

[23] I have already ruled that evidence on each count is not admissible as similar fact evidence. The fact that the evidence lacks sufficient probative force and has sufficient prejudicial value so that the similar fact rule does not apply is one reason in favour of severing counts: *R. v. Ryman* (1995), 178 A.R. 94 (C.A.). But it is certainly not determinative. There are numerous examples in the case law of situations where, on multi-count indictments, use of the evidence as similar facts was not allowed (for reasons similar to the ones I discussed above) but yet the counts were not severed: *R. v. Foster* (1993), 115 Sask. R. 318 (Q.B.), appeal dismissed (1995), 128 Sask. R. 292 (C.A.), leave to appeal to S.C.C. denied July 4, 1996; *R. v. E.S.*, [2000] O.J. No. 405 (C.A.); and see *R. v. Christou*, [1996] 2 All E.R. 927 (H.L.). A material risk of prejudice to the accused is not thought to arise merely because the charges relate to different kinds of crimes committed at different times under different circumstances against different complainants. Experience has shown that under proper directions juries are able to consider each charge in an indictment separately.

[24] That being said I do think that there is potential prejudice to the accused from the introduction (if ruled admissible) of the warned statement obtained by the police. The Crown will argue that, in that statement, the accused made certain admissions in respect of sexual misconduct towards the complainants J.T. and B.T. There is a real risk that the jury, if the statement is admitted, could think that any admissions made in that statement apply as well to the other complainants. The accused's defence strategy may well have to be different with respect to these counts. I do not, however, put this on the basis of the accused wishing to testify on some counts but not on others since that is not the way the defence position was presented. The defence is a denial that these things happened. Therefore the

defence may take different approaches if, on the one hand, it is simply the accused's word against that of a complainant and, on the other hand, there are also words from the accused pitted against what he may say at trial.

[25] For this reason I have concluded that the interests of justice require severance. Counts 2, 3, 4, 5 ,6 and 7 (the counts naming the complainants J.T. and B.T.) will be tried as one Indictment in one trial; counts 1, 8 and 9 (the counts naming the complainants C.V. and C.L.) will be tried as one Indictment in a separate trial. If further directions are required, counsel may speak to me.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 15th day of September, 2000

Counsel for the Crown: John O'Halloran
Counsel for the Accused: Hugh R. Latimer

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