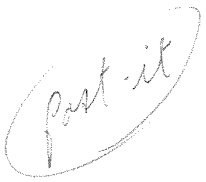
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:



HER MAJESTY THE QUEEN

- v -

JAMIE KERRY MARTENS

Transcript of a Ruling **(Re: Application by Crown to call Rebuttal Evidence)** delivered by The Honourable Justice L. A. Beaulieu, in Yellowknife, in the Northwest Territories, On the 22nd day of November, A.D. 2005.

APPEARANCES:

Ms. L. Colton: Counsel on behalf of the Crown
Mr. D. Mahoney:

Mr. J. Brydon: Counsel on behalf of the Accused

Charge under s. 268 C.C.

(EXCERPT FROM PROCEEDINGS - NOVEMBER 22, 2005)

THE COURT: The application before the court is by the Crown seeking leave to call reply or rebuttal evidence. The proposed evidence would be from the mother of the complainant testifying that the complainant lived with his parents at all times and left the city only to attend follow-up treatment in Edmonton. The defence, in the Crown's view, has placed Mr. Shannon's character in issue with regard to his activities, including damaged vehicles and the treatment of others, and the last witness' evidence regarding him being in Vancouver, that goes directly to the issue of Mr. Shannon's alleged continued attempt to intimidate Mr. Martens and his fiancee, the witness. The defence opposed the application essentially on the basis that it is collateral evidence and not permissible.

The Crown says that by bringing the application for rebuttal or reply evidence, it is neither splitting its case nor does the proposed evidence amount to collateral evidence. Further, that it relates to a fact put in issue over the course of the trial, that is the character of the complainant Levi Shannon. The Crown says the

defence has led evidence and cross-examined the Crown witnesses focussed on the position that Jamie Martens and Coreena Brown were frightened of Levi Shannon, the two persons had prior encounters with him including an assault on the accused Jamie Martens, and the conduct of intimidation and harassment.

The witness Coreena Brown, the last witness of the defence, alleges that Levi Shannon's conduct persisted after the September 30th incident which forms the basis of the charges before the court and that she saw him outside of their house in Vancouver attempting to get in the yard.

The Crown says that the evidence will impact on Ms. Brown's credibility but that the real test is whether it is relevant to other issues in addition to her credibility.

While the issue of character is not new, what is new is the evidence that suggests that Mr. Shannon is so determined in his efforts to intimidate and harass these people that he actually went to Vancouver to pursue that form of conduct. The Crown says that it could not have known this before the defence opened in both cross-examination, more specifically in the testimony of Ms. Brown. While conceding that

Mr. Shannon was the aggressor in the September 30th confrontation, they did not thereby concede that Levi Shannon had embarked upon a campaign of intimidation and harassment from a matter weeks prior to the incident which continued until as recently as a month or so ago.

The defence opposes the application and says that the Crown wishes to call evidence on the issue of credibility. The defence's position is that the Crown has known through statements of the accused witness, Ms. Brown, and the preliminary hearing that the character of the complainant was a central issue or central matter. This is no more, no less, than an attempt to rectify a strategic decision gone awry. Basically the defence says this is oath helping, the evidence is not germane necessarily to the question of credibility, and is no more or less germane to the issue of the character of the complainant. Furthermore, that it is proffered solely to discredit the evidence of Coreena Brown and does not attach the materiality of any issue before the court.

The defence says that whether Ms. Brown was mistaken, whether she may have seen Mr. Shannon or whether she may not have seen him, it is, as I understand the defence position, that this is

reducing the issue to one aspect of credibility between the witness for the defence and the other witness for the Crown. The Crown is thereby, according to the defence, trying to destroy the defence witness' credibility in its totality. This evidence, he says, does not bear on the fundamental issue of whether Mr. Martens stabbed one Mr. Shannon and if so, did he do so in the context of a reasonable apprehension of harm? The defence says that the issue of this case is not the character of the complainant, rather it is how did the accused perceive the character of the complainant? The evidence, he says, is of no assistance in answering that question and is therefore immaterial, irrelevant and collateral in its nature.

The Crown in support of its application relied on the decisions of *Krause v. The Queen*, 29 C.C.C. (3d), 385; *Regina v. P.(G.)*, 112 C.C.C. (3d), 263; and *Regina v. Armstrong*. The defence relied as well on the *Krause* case; *Regina v. Crane*, 69 C.C.C. 3(d), 300; *Regina v. Edwards*, 199 N.W.T.J. No. 198; and an extract from McWilliams on Evidence, Second Edition. I should say - and this is not pejorative criticism - but the references in McWilliams not mentioned were the exceptions to the collateral rule, including

page 1059 where it says,

"In the case of contradiction of defence witnesses, there is the added question whether contradictory evidence is admissible in rebuttal. This is, and has been seen, not always easy to answer. See Chapter 31."

That last statement is probably an understatement on this issue, and nonetheless I did not, in light of the cases put forth and the other *jurisprudence* that I pursued, did not proceed to examine Chapter 31.

I am grateful to both counsel for their materials provided. That, and my own review of the *jurisprudence*, including the Manual of Criminal Evidence by Justice Watt, the case of *Simard*, 1978, 4 C.C.C. (2d), 474, Quebec Court of Appeal; *Regina v. M.(F.S.)*, 1996, 111 C.C.C. (3d), 90, Ontario Court of Appeal; *Regina v. Kuyan*, 339, Ontario Court of Appeal; all of which informs me that fundamentally the rule regarding collateral facts prohibits evidence being introduced for the sole purpose of contradicting a witness' testimony concerning a collateral fact. The rule basically seeks to avoid confusion and proliferation of issues, wasting

time, and introductions of evidence of negligible assistance to the trier of fact in determining the real issues of the case. One legal authority has indicated that the rule endeavours to ensure that the side show does not take over the circus.

Generally, matters that relate wholly or exclusively to the credibility of a non-accused witness are collateral hence beyond the reach of contradictory evidence. A collateral fact is one that is not connected with the issue in the case. It is a fact that the party would not be entitled to prove as part of its case because it lacks relevance or connection to it. It is one that is neither material or relevant to a material fact. If the answer of the witness that a party seeks to contradict is a matter that the opponent could prove in evidence as part of its case independent of the contradiction, the matter is not collateral, contradictory evidence may be elicited.

Now with regard to the principles as they relate to reply evidence, the Crown, as a general rule, is required to present its case in its entirety before the defence is called upon to choose whether to elicit and introduce evidence. This is based on the fundamental principles of basic fairness and the notion of a case to meet.

But there is a confined area within which the trial judge may permit reply or rebuttal evidence after the defence has completed its case. The Crown can be permitted to adduce reply evidence that:

(1) becomes relevant to the Crown's case due to evidence that the Crown could not reasonably have anticipated;

2) responds to issues enlarged by the defence evidence in a manner that the Crown could not reasonably have foreseen;

3) establishes matters of form inadvertently omitted during the Crown's case in-chief.

There are other areas but these are the three main ones that may be germane to the issue before this court.

Reply or rebuttal evidence is not permitted if it is unrelated to the defence case. Reply evidence takes its significance from something tendered during the defendant's case, and reply evidence is restricted or limited to evidence to meet new facts introduced by the defence. Whether or not to permit rebuttal evidence is a matter left to the trial judge's discretion. However, there is an obligation upon the Crown to present a complete and accurate picture to the trial judge in support of its application in

order to permit the opportunity of exercising that discretion in a meaningful fashion.

After due consideration and deliberation upon the facts of this case and the relevant *jurisprudence*, I have concluded that the Crown's application should be granted. The Crown in my view has satisfied me that the threshold picture in support of its application has been met. The defence cross-examined Mr. Shannon on whether he had been to Vancouver. He then asked whether his brother had been there. Both questions were answered in the negative. That would effectively, in the normal course of events, close the matter with the defence being bound by those answers. However, while the matter may have been foreshadowed in such cross-examination, it really was resurrected or raised anew in Ms. Brown's evidence. As such, I am of the view that the defence raised a new matter and the Crown had no opportunity to deal with it earlier and could not anticipate it. This was not a "live issue" at the end of the Crown's case.

In the particular circumstances of this case, the central theory of the defence is that Mr. Shannon possessed an innate character of aggression, intimidation and violence toward others. The theory of the defence was that the

traits induced a degree of fear and apprehension in Mr. Martens such that he could justify his reliance on self-defence when charged with the offence of aggravated assault. The Crown is in my view not seeking to introduce evidence it had decided not to advance earlier. It is new evidence or sufficiently different or unexpected evidence or circumstances that warrant it being allowed in at this stage.

The Crown could prepare for evidence regarding Mr. Shannon's propensity for aggressive, intimidating conduct prior to and at the time of the confrontation and in relation to the issue of self-defence. Indeed, the Crown conceded that the complainant was the initial aggressor but that was the extent of the concession. The Crown had no reason to prepare for defence evidence regarding the alleged persistence of intimidating and harassing conduct directed at Ms. Brown and Mr. Martens some weeks after this incident as is alleged occurred in Vancouver, an allegation that could apparently be construed as bolstering the defence position that this young man is an incurable bully. In my view, the proposed evidence does not go merely to the issue of credibility of the witness. In view of the central thesis of the alleged perceived

fear in Mr. Martens engendered by Mr. Shannon's conduct and reputation, evidence contradicting Mr. Shannon's presence in Mr. Martens' and Ms. Brown's back yard in Vancouver weeks after the incident that resulted in the charges before the court would not work an unfairness to the accused and relate to truthfulness of the testimony on the issue before the court. Whether Levi Shannon was exhibiting persistent, aggressive and intimidating behaviour toward the witness and Mr. Martens months after the initial incident may be of limited or tenuous value, but it was raised by the defence and in my view the triers of fact, in fairness, are entitled to all the evidence in this regard.

Therefore, in my view the evidence proffered for the introduction is not in the nature of collateral evidence, and when so considered I exercise my discretion by granting the application. The Crown may proceed with proposed reply evidence. Ruling will go accordingly.

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Certified to be a true and accurate transcript pursuant to Rule 723 and 724 of the Supreme Court Rules of Court.

Annette Wright, RPR, CSR(A)
Court Reporter