

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

KELLY OVAYUAK

Transcript of Ruling (re Scopelliti application) delivered
by The Honourable Justice J.E. Richard, in Tuktoyaktuk, in
the Northwest Territories, on the 20th day of April, 2009.

APPEARANCES:

Ms. S. Tkatch: Counsel on behalf of the Crown
Ms. M. Nassar:

Ms. C. Wawzonek: Counsel on behalf of the Accused

Charge under s. 268 C.C.

1 THE COURT: I will now give the Court's
2 ruling on the Scopelliti application.

3 In this jury trial the accused is charged
4 with the crime of aggravated assault. There was
5 a fight between the accused and Andrew Gruben
6 after a drinking party. Andrew Gruben suffered a
7 serious spinal cord injury. He is rendered a
8 quadriplegic, is confined permanently to a long
9 term care facility, and is not a witness at this
10 trial.

11 Crown witnesses testified that the accused
12 was the aggressor in the fight. The accused has
13 testified that Andrew Gruben was the aggressor
14 and that he, the accused, only acted in
15 self-defence.

16 Assessing the credibility of the witnesses
17 will be an important function for this community
18 jury, in particular the lay Crown witnesses Jed
19 Stefure and Warren Steen and of course the
20 accused.

21 In the course of his testimony, the accused
22 stated that he was scared of Andrew Gruben, and,
23 when asked why, he stated that it was because
24 Andrew Gruben had assaulted him on two previous
25 occasions and he related particulars of those two
26 previous assaults.

27 On the present application, the accused

1 seeks to adduce evidence of Andrew Gruben's
2 criminal record, Exhibit A on this voir dire.

3 Defence counsel relies on the Scopelliti
4 line of cases. These cases, which are generally
5 homicide cases, hold that where self-defence is
6 raised, evidence of the deceased person's
7 propensity or disposition for violence may be
8 admissible for the purpose of showing the
9 probability of the deceased person having been
10 the aggressor and to support the accused's
11 testimony that he was attacked by the deceased.

12 It is for the trial judge to exercise
13 discretion in determining whether the proposed
14 evidence has sufficient probative value for the
15 purpose for which it is tendered, balanced
16 against the risk of prejudice in the sense that
17 such evidence could cause within some jurors,
18 feelings of hostility towards the deceased and/or
19 cause jurors to go down a path towards a "just
20 deserts" kind of reasoning.

21 The Crown opposes the admissibility of
22 Andrew Gruben's criminal record, submitting that
23 that record does not have sufficient probative
24 value to justify its admission. In addition, the
25 Crown submits that if Andrew Gruben's criminal
26 record is admitted, then in order that the jury
27 not have a distorted picture of the propensity

1 for violence of each of the fight participants
2 and the probability of each version of
3 aggression, that the court will have to also
4 admit as evidence the accused's criminal record,
5 which is marked as Exhibit B on this voir dire.

6 In the present case, there is eye witness
7 evidence of the fight between the accused and
8 Andrew Gruben. Crown witnesses Jed Stefure and
9 Warren Steen stated that the accused was the
10 aggressor. The accused testified that Andrew
11 Gruben was the aggressor. Each of these three
12 witnesses was examined and cross-examined at
13 length in the presence of the jury. The focus
14 for the jury will be their assessment of the
15 credibility of those three witnesses.

16 In exercising my discretion on the present
17 application, I ask myself: Is there something in
18 the proposed evidence Exhibit A which may
19 reasonably assist the jury in arriving at a just
20 determination with respect to the accused's claim
21 of self-defence? Although Exhibit A discloses
22 ten convictions for assaultive behaviour, there
23 are no details for any of those, for example,
24 whether any of those assaults were provoked, were
25 unprovoked, were acts of aggression, were acts of
26 excessive force in self-defence, et cetera.

27 I contrast this with the evidence which was

1 ruled admissible in the Scopelliti case itself.
2 The trial judge allowed the defence to adduce
3 detailed evidence of three previous incidents of
4 violence committed by the deceased, and in
5 upholding that ruling the Ontario Court of Appeal
6 stated at paragraph 48:

7 ...the impugned evidence discloses
8 serious acts of unprovoked violence
9 and intimidation by both the
10 deceased, acting together, on three
11 occasions which were reasonably
12 proximate in time to the occurrence
13 in question, and, in my view, such
14 evidence had significant probative
15 value on the issue whether the
16 deceased attacked the respondent in
17 the manner that he alleged on the
18 occasion in question.

19 I cannot say the same in the present case.
20 We do have the accused's evidence, his version,
21 of the fight incident of December 15th, 2007, in
22 which he says Andrew Gruben initially assaulted
23 him. However, it cannot be said that any one or
24 more of the bare line entries in Exhibit A has
25 any probative value on the issue whether Andrew
26 Gruben assaulted the accused on December 15th,
27 2007, in the manner that the accused alleges in

1 his testimony. Any theoretical probative value
2 that evidence of Andrew Gruben's history of
3 criminal acts of violence might have, if any, for
4 the purpose intended here, is certainly
5 diminished by the absence of detail of the
6 circumstances of those previous acts.

7 I find that introduction of Andrew Gruben's
8 criminal record will not assist this jury in
9 assessing the accused's claim of self-defence.
10 Indeed, it would be an improper submission, in my
11 view, to the trier of fact that because Andrew
12 Gruben has this criminal record he is more likely
13 to have been the aggressor in the early morning
14 hours of December 15th, 2007, or that the
15 existence of Andrew Gruben's criminal record is
16 supportive of the accused's testimony that he was
17 acting in self-defence. However, there is a
18 clear danger that the introduction of Andrew
19 Gruben's criminal record will distract this jury
20 from their important task of assessing the
21 credibility of the witnesses who testified viva
22 voce before the jury at this trial, eye
23 witnesses, including the accused, who related
24 under oath what they saw, what they heard, what
25 they did, et cetera.

26 There is a general rule that evidence of the
27 bad character of the victim of a crime is

1 inadmissible and the reason is that such evidence
2 is not relevant to the issue of whether the
3 accused person committed the crime. The
4 Scopelliti line of cases sets out an exception to
5 that general rule.

6 For the reasons I have mentioned, I find
7 that the Scopelliti exception is not applicable
8 in this case. The proposed evidence has little
9 or no probative value for the purpose intended
10 and there is a risk of prejudice, that is, a
11 significant risk that the jurors will make
12 improper use of this evidence. Accordingly, I
13 exercise my discretion to exclude the evidence of
14 Andrew Gruben's criminal record.

15 Given this ruling, it is not necessary to
16 give a decision on the Crown's alternate or
17 reactive application to adduce the accused's
18 criminal record, Exhibit B. I will simply note
19 that had that happened, i.e. that both criminal
20 records were before the jury, the jurors would
21 then be in a very difficult position of
22 considering opposing submissions of whether one
23 person's ten convictions for assault versus the
24 other person's ten convictions for assault was
25 more supportive or persuasive regarding the
26 competing versions of aggression in the early
27 morning hours of December 15th, 2007. Such a

1 scenario would even more so and without doubt
2 clearly distract the jurors from their main task
3 of assessing the credibility and/or reliability
4 of the eye witness testimony presented to them at
5 this trial.

6

7

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

11

12

Annette Wright, RPR, CSR(A)
13 Court Reporter

14

15

16

17

18

19

20

21

22

23

24

25

26

27