Date: 2012 06 15
Docket: S 1 CR 2011 000104

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DUNCAN ALEXANDER CANVIN

Ruling on an application to admit similar fact evidence

Heard at Ft. Simpson, NT, on June 11, 12, and 13, 2012

Reasons filed: June 15, 2012.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Crown: M. Lecorre

Counsel for the Defence: B.A. Beresh, Q.C.

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REASONS FOR JUDGMENT

[1] The accused is charged in a four-count indictment as follows:

> Count 1: On or between the 1st day of October 1992 and 30th day of November 1995 at or near the Village of Fort Simpson in the Northwest Territories did commit a sexual assault on G.H. contrary to Section 271 of the *Criminal Code.*
>
> Count 2: On or between the 1st day of October 1992 and 30th day of November 1995 at or near the Village of Fort Simpson in the Northwest Territories being in a position of trust or authority towards G.H., a young person, did for a sexual purpose, touch directly the body of G.H. with a part of his body to wit his mouth and hand contrary to Section 153 of the *Criminal Code.*
>
> Count 3: On or between the 1st day of January 1995 and 31th day of December 1996 at or near the Village of Fort Simpson in the Northwest Territories did commit a sexual assault on R.H. contrary to Section 271 of the *Criminal Code.*

> Count 4: On or between the 1st day of January 1995 and 31th day of December 1996 at or near the Village of Fort Simpson in the Northwest Territories being in a position of trust or authority towards R.H., a young person, did for a sexual purpose, touch directly the body of R.H. with a part of his body to wit his mouth and hand contrary to Section 153 of the *Criminal Code.*

[2] This is a judge-alone trial. At the commencement of the trial the Crown applied to admit similar fact evidence. Crown counsel seeks a ruling that (a) the evidence of each complainant can be considered with respect to all counts, and (b) the evidence of three other witnesses regarding uncharged allegations be admitted as similar fact evidence. The issue in this case is whether the alleged criminal acts occurred and, on that issue, the Crown says that the similar fact evidence is probative as supporting the credibility of the complainants and as demonstrating a *modus operandi* on the part of the accused.

[3] There is no question that similar fact evidence can have probative force in providing corroboration of the complainants' evidence where, as here, the defence contends that their evidence has been manufactured. But the mere fact that the complainants' credibility is in issue does not *per se* render similar fact evidence admissible. After all, credibility is in question in practically every criminal case. The onus is on the prosecution to establish, on a balance of probabilities, that the probative value of the proposed evidence significantly outweighs its prejudice effect.

[4] I heard the evidence of both complainants and the three proposed witnesses in a *voir dire* within the trial. At the conclusion, and after considering the submissions of counsel, I issued my ruling that the Crown failed to satisfy its onus and the similar fact evidence was inadmissible. I said that reasons would follow. These are those reasons.

[5] I will review the evidence in some detail since that is necessary to understand my ruling. In doing so I think it important to bear in mind the fact that the witnesses all testified to events that allegedly occurred 15 to 20 years ago. The witnesses were teenagers or young adults at the time; they are mature men now. But, as is common in these types of cases, the evidence of each witness suffered to a greater or

lesser extent from a lack of memory or uncertainty in recall. In some instances, events were related in remarkable detail while other aspects of the same witness' testimony were less clear. The witnesses appeared sincere in their testimony. But I remind myself that it is the reliability of any witness' testimony that must be assessed, not the witness' apparent sincerity in giving testimony. Experience teaches us that any witness may be telling the whole truth, may be trying to tell the truth as best as he or she can remember it and yet still be mistaken, may have convinced themselves that an inaccurate version of past events is the truth, or may be deliberately lying. A judge does not need to say which it may be; a judge must, however, decide whether what a witness says is reliable before acting on it.

[6] The evidence revealed the following information.

[7] From the early 1990's until mid 1996, the accused, who was then an active R.C.M.P. officer, was stationed in Fort Simpson. Through his activity as a minor hockey coach, he got to know many of the teenage boys in town. He took a number of them into his home to live. Many of them had difficult situations at home and either the boy or his parents would ask the accused to take them in. His residence was an R.C.M.P. staff house located close to the detachment. It had 3 bedrooms on the ground floor (one of which was used by the accused as his bedroom) and some other beds in the basement. At any time there may have been 4 or 5 boys living there. Everybody described it as a "locker room" atmosphere with a lot of roughhousing and other activities typical of a house with a bunch of active and healthy young men. The accused was sometimes one of the guys, like a 'big brother", and other times like a "father" figure. But everybody acknowledged that he emphasized that the boys go to school, do their homework, and take responsibility for chores around the house. Friends and relatives were encouraged to visit. People were coming in and out at all times. Sometimes they stayed overnight.

[8] The complainant G.H., who is now 35 years old, moved into the accused's house in the summer of 1993 (when he was 16 going on 17). He had met the accused earlier when he was caught shoplifting. At that time G.H. was living with his aunt and uncle and stated that he was having problems with alcohol and drugs. The accused encouraged him to talk to him and discuss his problems. G.H. came to trust the accused and eventually asked to move in with him.

[9] G.H. described the "locker room" atmosphere. The boys and the accused would wrestle and play-fight. The boys and the accused would engage in what they called "baggings" where one would slap or flick at another's crotch or genitals in order to humiliate and laugh at the victim. Everybody did it. It was just part of the general horsing around. From my perspective I think it can be described as typical immature jock behaviour.

[10] G.H. also described how the boys would be allowed to drink in the house. He also claimed that the accused often walked around naked and would shower or use the toilet with the bathroom door open. Again, this fits with the locker room type of behaviour described in the evidence.

[11] G.H., however, also testified to a continuous pattern of sexual abuse by the accused. He claimed that at night, when he went to bed, the accused would come in and sit on his bed and wrestle or play-fight with him. G.H. said that this advanced to the point where the accused would pull down his boxer shorts, masturbate him with his hands, and put his mouth on G.H.'s penis. G.H. claimed that this happened every night. Sometimes he would fight him off or tell him to stop.

[12] G.H. lived in the accused's home until November of 1995. He did not tell anyone about what the accused was doing. He said he was ashamed; he did not think anyone would believe him; and, he did not want to lose the freedoms he had at the accused's home. The first time he disclosed the alleged abuse was 4 years ago. G.H. said that by then he finally felt ready to talk about it because he was more mature.

[13] G.H. also acknowledged however that while he was staying at the accused's home his grades improved, his attitude improved, he gained confidence, he was popular and a good athlete, and he even bragged about how he was a role model at school.

[14] It also became clear on cross-examination, however, that G.H. had a lot of opportunity to speak about this abuse. He was interviewed on two occasions in 1996. This was in relation to allegations of sexual assault made by another boy who lived in the house, J.C. These interviews occurred after G.H. had moved out of the accused's home. He was by then 20 years old.

[15] G.H. spoke to his father about J.C.'s allegations. He told his father that nothing like that happened to him. During the years that G.H. lived in the accused's home, his father would visit him, often unannounced, and would ask about his welfare. G.H. would tell him things were good, something he confirmed here as the truth. When G.H. learned that the accused would have to stand trial on the J.C. allegations, he talked to his father and his father wrote a character reference letter for the accused thanking him for the good he did for his son. G.H. said that "at the time" he agreed with the letter.

[16] In his interviews with the police, G.H. told them that he was shocked by J.C.'s allegations. He told the police that nothing untoward ever happened. He also told the police that he had never been touched sexually by the accused. Here, at trial, he said that he lied to the police. He said he was not ready to deal with it then.

[17] Prior to the accused's trial in December 1996 (at which the accused was acquitted), G.H. was interviewed by the accused's then defence counsel. He stated that he was prepared to testify under oath that there had been no sexual contact between him and the accused.

[18] G.H. was again interviewed by the police in 2003 about allegations made by the second complainant in this case, R.H. In that statement he was asked again if anything inappropriate happened between him and the accused, anything that "he would like to get out in the air and tell". He replied that there were some "awkward situations" and then referred to the "bagging". But then he said to the police that overall the accused was a positive influence. He was asked if the accused ever tried to give him a blow job. He said "not that I remember, no". He told the police again that he was never touched in what he thought was a sexual manner. Now he says that was not the truth.

[19] G.H. testified that these incidents occurred while he shared a bedroom with L.N. and that the accused molested him while L.N. was in the next bed. He said that he could hear the accused do the same to L.N. There was no evidence supporting these assertions, not even from L.N. who testified as one of the proposed similar fact witnesses. After a while G.H. moved to a bed in the basement. He stated nothing untoward happened once he moved to the basement.

[20] G.H. also testified, on cross-examination, that in 2006 he was in contact with the accused again. At one point, he asked the accused to co-sign a loan for him so he could buy a truck. The accused did so with no conditions attached. Also in 2006 G.H. approached the accused with a proposal to invest in a plan to open a billiard hall. He had previously asked the accused to help him buy a bar in 2003. Neither of these plans went ahead.

[21] The second complainant, R.H., now 32 years old, moved into the accused's home in 1995 (when he was 15). His father suggested he do so because R.H. was getting into trouble and had been charged with several break and enter offences. He slept in the basement of the accused's home on the top part of a bunk bed. For part of the time, J.C. slept on the bottom bunk and another boy, B.S., slept on another bed in the basement.

[22] R.H. also testified as to the locker room atmosphere in the house. The boys would drink, watch movies (sometimes pornographic ones), and there would be constant play-fighting and wrestling (including with the accused). He also testified about the "bagging". Everybody did it to everybody else and would laugh at each other.

[23] R.H. also acknowledged that the accused imposed rules and discipline in the house. The boys were required to go to school and do their homework. They were introduced to people who came to the house, including other police officers, and were encouraged to socialize and talk with these people. R.H.'s life changed for the better after he moved in.

[24] His father came to visit him on many occasions and the accused encouraged those visits. R.H. even encouraged his younger brother to stay over at the house. His brother did so as well as other friends. He and other boys also had girlfriends come over, some of whom stayed overnight at times. R.H. left the house in mid-June, 1996, when the accused was transferred to Yellowknife.

[25] R.H. described a similar pattern of sexual abuse as that described by G.H. He stated that about a month after he moved in, the accused caught him drinking in the house. He was in bed. The accused allegedly said "you need some mad-dogging". The accused grabbed his privates and then touched and sucked his

penis until he ejaculated. R.H. said he was shocked and did not know what to do. After this he understood the term "mad-dogging" as referring to a blow job.

[26] On this last point, G.H. was also asked, in his 2003 interview with the police, about the expression "mad-dogging". He said that that related to wrestling and biting.

[27] R.H. testified on chief that this pattern of sexual abuse continued while he lived in the accused's home. The accused would either wake him up or tell him to go to his bed in the basement and then he would touch and suck his penis until he ejaculated. On direct examination, R.H. said this happened 4 times a week. At the preliminary hearing however, he said it happened 3 times a week. In a 2002 statement to the police, he said this happened "basically every night".

[28] R.H. claimed that he never told anyone about this because he thought no one would believe him and because he was afraid of the accused since he was a police officer. Yet, in 1996, R.H. followed the accused to Yellowknife and stayed with the accused until June of 1997. He was sentenced to jail at that time for a crime in Yellowknife. After his release, he learned that the accused had left Yellowknife and returned to Fort Simpson where he had bought the local liquor store. In October, 1997, R.H. moved into the accused's apartment above the liquor store. He acknowledged that the accused was not in favour of this but he pleaded with him and the accused relented. R.H. stayed there for the next 2 to 3 years. No further sexual abuse was alleged during this period or the period that R.H. lived with the accused in Yellowknife.

[29] R.H. also talked on numerous occasions with the police without talking about these allegations. In January, 1996, he was interviewed about J.C.'s accusations. He was supportive of the accused at that time and told the police that he did not believe J.C.'s story. He told the police then that he had no concern that anything untoward happened to him. When asked here if he told the police the truth, he responded "yes".

[30] R.H. was interviewed again in March, 1996. He acknowledged that the only complaint he voiced then to the police was about being disciplined by the accused. He confirmed to the police that the accused never touched him sexually. Now he says that was a lie.

[31] In August, 1996, R.H. was investigated by the police for the offence in Yellowknife. He said nothing about the sexual abuse then. Later in 1996, prior to the accused's trial, he was also interviewed by the accused's defence counsel. He was asked if the accused had ever abused him and he replied "no". He agreed to testify to that effect. Here at trial he was asked if that was the truth. He responded that it was.

[32] R.H. testified that he first talked about what the accused had done in 2000 after he met his wife. He first talked with the police shortly after and gave a statement in September 2002.

[33] With respect to each complainant, defence counsel suggested a motive to fabricate.

[34] G.H. acknowledged that in 2008 he and his wife had some difficulty in their relationship. One time when drinking he had locked her out of their home and she reacted violently. Defence counsel suggested to G.H. that his wife had accused him of being abusive and threatened to leave him and that he then made up this allegation about the accused as an explanation for his behaviour. G.H. denied this and said he needed no excuse. Yet it was after this incident that the accused first made this disclosure to the police and, he said, now he and his wife have grown closer.

[35] With respect to R.H., defence counsel suggested that he came up with this allegation in 2000 or 2001 when he assaulted his wife. R.H. admitted the assault, admitted that his wife was pregnant at the time, and acknowledged that he was never charged for that. Defence counsel suggested that R.H. offered up this allegation in a bid to avoid being sent to jail. R.H. denied this.

[36] Both of these witnesses talked about why they waited so long to disclose these allegations and what led them to disclose. They used remarkably similar language (as did the three other witnesses). They said they were not ready to face up to it; they were ashamed; they were afraid; they did not think anyone would believe them; they were cowards; they wanted to remain loyal to their friends and, somewhat surprisingly, to the accused. When they came forward, they were older, more mature, and they had children of their own.

[37] It is not unusual to see cases where disclosure has been delayed for many years, particularly when the victims were young children at the time of the offences. Delay is merely one factor to consider when assessing the credibility of a witness. It is also not unusual for victims not to appreciate for many years the significance of what happened to them when they were young. In this case, however, the complainants (just like the other Crown witnesses) were not young children when the alleged abuse occurred. They were teenagers. They were in constant contact with their families and friends. They had numerous opportunities to speak about what happened to them. In most cases their contacts with the police came when they were no longer living in the accused's home. Even after they left there, and notwithstanding the alleged abuse, they went back to the accused and maintained contact, in some cases even moving back to live with him. They were adults then and these actions belie the current assertions. In these circumstances, the delayed disclosure is significant.

[38] The three similar fact witnesses also talked about the general environment in the accused's home. But they did not relate allegations as serious or morally repugnant as those related by the complainants. Two of the witnesses related relatively isolated acts. One of the witnesses did not live in the accused's home. So there are some dissimilarities to the acts related by the complainants. But the overarching theme of the evidence related by theses witnesses, according to the Crown counsel, reveals a similarity in the pattern of behaviour exhibited by the accused.

[39] The first witness, L.N., is now 34 years old. He started living in the accused's home in the fall of 1994 (when he was 17). He lived there until September 1995, when he went to Edmonton for a year of schooling. He testified that he lived there for a second period from spring of 1996 until sometime in 1997. Yet he also said that at the time of the accused's trial in December, 1996, he was not living in the house. Nor could he explain this second period in the face of the fact that the accused moved to Yellowknife in mid-June, 1996.

[40] L.N. lived in a bedroom on the first floor. At first he shared the room with G.H. and then later with another boy. He testified that the accused's routine was to go around to each boy to say good night. He said that the accused, when doing this, would grab his testicles and say "here's a clitoris rub for you". The accused,

according to L.N., would place his hand under the blanket and grab his penis and testicles over his boxer shorts.

[41] L.N. did not tell anyone about this because he was ashamed. The first time he talked about it was when he gave a statement to the police in February, 2009.

[42] On cross-examination, L.N. acknowledged that he had testified at the accused's trial in December, 1996, on the accused's behalf. Prior to testifying he also spoke with the accused's then defence lawyer who asked him if anything sexual had occurred. He told him "no". Prior to that, he met with the police in March, 1996, concerning J.C.'s allegations. He told the police that he did not believe J.C.'s allegations, that he never saw anything going on, and that the accused was a "great guy". Here at trial he confirmed that what he told the police then was the truth. Furthermore, in that interview the police asked if the accused had ever sexually abused him. He told them "no". When asked if that was true, L.N. responded that "in 1996 I didn't think I was sexually touched."

[43] When cross-examined about his 2009 statement to the police, L.N. acknowledged that he said then that any touching at his bed would last only for seconds and that "it wasn't rubbing". He also said here at trial that he saw another boy (not one of the complainants) get the same treatment but, in his 2009 statement, he said that he did not see this happen to anyone else.

[44] The second witness was R.L., now 37 years old. He lived in the accused's home from August, 1995, to December 1995, when he was 20 years old. He shared a room with someone else but could not remember who. He too described life in the house as a "locker room" environment, a "bachelor's pad", with a lot of horsing around, wrestling and play-fighting.

[45] R.L. described two incidents in his evidence. The first was when he and the accused were wrestling. He claimed that the accused tried to poke him in his genitals. He said that they were just horsing around and other boys were in the room at the time.

[46] R.L. also testified about an incident after that when the accused came into his room to say good night and tried to once again, in his words, "poke" at his genitals over the blanket. He told the accused to stop. R.L. acknowledged, on

cross-examination, that he never mentioned this second incident to the police in his original statement in December, 2009. The first reference to this was in an interview with Crown counsel just before the start of this trial.

[47] R.L. had also been interviewed about the J.C. allegations in January, 1996. He told the police that he did not believe those allegations and that the accused was a good man who helped a lot of kids. He was asked in that interview if he ever saw the accused assault anyone or touch anyone inappropriately. He answered "no". Here he says he lied to the police then. He says he was afraid and ashamed at the time.

[48] The third witness was T.S., now 31 years old. He was not living in the accused's home at the time of the alleged incident he testified about. He used to spend time at the accused's home because he knew the guys who lived there. T.S. testified that one time, likely in the summer of 1995 or 1996 (when he was 15 or 16), he went with the accused and some other boys on a week-end trip to Sandy Lake. He and R.H. were sharing a room. He said that after drinking all day he went to bed and the accused came into the room. He claimed that the accused tried to grab his private area but he prevented it by covering his privates with his own hand. The accused stopped and left. He said he did not say anything about this and nothing ever happened again. Significantly, R.H. was not asked nor did he mention his incident.

[49] In cross-examination, T.S. acknowledged that in 1998 he went to live in the accused's apartment and worked in the accused's liquor store. He stayed there for 2 years.

[50] T.S. did not speak to anyone about this alleged incident until he spoke to the police sometime in late 2008, a few months after G.H. made his disclosure to the police. But T.S. acknowledged that he also spoke to the police in 1996 when they were investigating J.C.'s allegations. At that time he told the police that the accused never hit or touched him. When asked about this inconsistency T.S. said "when you're 15 things are different than when you're an adult".

[51] The applicable principles governing the admissibility of similar fact evidence are well-established.

[52] As outlined by the Supreme Court of Canada in *R.* v. *Handy*, [2002] 2 S.C.R. 908, similar fact evidence is presumptively inadmissible because it depends upon propensity reasoning. Therefore a high degree of probative value is required. And the principal driver of probative value is the connection between the evidence of similar acts to the offences charged, what has been described as the objective improbability of coincidence. This depends on the circumstances of the case, including such factors as the temporal proximity of the similar acts, similarity in detail, the number of similar acts, the circumstances or context in which the similar facts occur and any distinctive features.

[53] Crown counsel submitted that when looking at these factors, the probative value of this evidence should lead to its admission. There is some merit in this submission. But that does not address two fundamental problems with this evidence, and by this I include the evidence of the two complainants as well as the three similar fact witnesses.

[54] The first problem is with the credibility of these witnesses. As the cross-examination repeatedly demonstrated, each of these witnesses made numerous prior statements inconsistent with their present testimony. They often contradicted themselves between their examinations-in-chief and their cross-examinations. Furthermore, the evidence from several of these witnesses that they continued to live with or have contact with the accused, after the alleged incidents of abuse occurred, tends to undermine their assertions that these incidents happened.

[55] I am mindful of the instruction contained in the jurisprudence, including recently from the Northwest Territories Court of Appeal in *R.* v. *Larsen*, 2012 NWTCA 9, that, in a trial where the Crown seeks to admit similar fact evidence, an assessment of credibility must be made at two different stages. The first is when the application to admit is made. The Crown is obligated to establish on a balance of probabilities that the proposed similar fact evidence is capable of belief. The second stage, of course, is at the end of the trial when considering whether the guilt of the accused has been proven beyond a reasonable doubt.

[56] The first stage assessment is part of what has been called the trial judge's "gatekeeper" function. This was explained in *Handy* (at paras. 104 - 105 & 134):

The trial judge's gatekeeper role in this respect was addressed in B.(C.R.) by McLachlin J., at pp. 733-34:

> The difficulty of the trial judge's task and the amount of discretion entrusted to him or her is great. As Forbes, [Similar Facts (1987)], puts it at pp. 54-55:
>
> > A judge presented with similar facts for the prosecution has to exercise an extraordinary complex of duties and powers. First he has to assess not only [page 948] the relevance but also the weight of the disputed evidence although the latter task is normally one for the jury. Second, he must somehow amalgamate relevance and weight to arrive at "probative value". [Emphasis added.].

The gatekeeper function was similarly dealt with by Cory J. in Arp, supra at paras. 47-48:

> ... in determining the admissibility of similar fact evidence the trial judge must, to a certain extent, invade this province [of the jury]. As Professor Smith stated in Case and Comment on R. v. Hurren, [1962] Crim. L. Rev. 770, at p. 771:
>
> > It should be noted that judges commonly distinguish facts as going to weight rather than admissibility (see, e.g., R. v. Wyatt); but it is submitted that, as regards similar fact evidence, no sharp line can be drawn and that admissibility depends on weight.
>
> ...
>
> In the usual course, frailties in the evidence would be left to the trier of fact, in this case the jury. However, where admissibility is bound up with, and dependent upon, probative value, the credibility of the similar fact evidence is a factor that the trial judge, exercising his or her gatekeeper function is, in my view, entitled to take into consideration. Where the ultimate assessment of credibility was for the jury and not the judge to make, this evidence was potentially too prejudicial to be admitted unless the judge was of the view that it met the threshold of being reasonably capable of belief.

[57] In my respectful opinion, the evidence presented by the Crown is not reasonably capable of belief. There are so many frailties that it would be dangerous

to rely on it. Thus its probative value is low and does not overcome its prejudicial effect.

[58] Whether there are two witnesses or five is immaterial. The evidence of an unreliable witness is not made stronger by the evidence of another unreliable witness.

[59] It is tempting to say that in a judge-alone trial the potential prejudice in admitting this evidence is low. After all, I have heard all of the evidence. Judges are expected to be able to compartmentalize evidence and disabuse their minds of inadmissible evidence. The types of prejudice identified that arise with similar fact evidence have been called "reasoning prejudice" (where the trier of fact is distracted from the proper focus of the charge) and "moral prejudice" (where the trier of fact misuses the evidence by inferring guilt based on other bad acts by the accused). Judges are presumed to be able to avoid both of these dangers.

[60] Admissibility is a question of law and the trial judge must still apply the same analytical approach whether there is a jury or not. Prejudice is presumed since similar fact evidence is presumptively inadmissible unless the Crown meets its onus. Also, in this case, as noted by defence counsel, the prejudice arises not from my hearing the evidence but in the fact that, if this evidence is admitted, the accused would be called on to answer uncharged allegations.

[61] The second problem is the possibility of collusion. As explained in the caselaw, where there is some evidence of actual collusion, or at least an air of reality to the allegation of collusion, the Crown bears the onus of satisfying the trial judge, on a balance of probabilities, that the evidence is not tainted by collusion. In this case, the Crown has failed to do that.

[62] In this case there is ample evidence of the opportunity for collusion. G.H. testified that, when he spoke to the police about his allegations in 2008, he telephoned L.N., R.L. and T.S., as well as two other boys who lived in the house at the relevant time, to tell them that the police would be calling them. He claimed that the R.C.M.P. said this was alright (something that defence counsel argued the police would not do specifically because of the danger of collusion). He also claimed that he did not speak about the substance of his allegations.

[63] L.N. testified that before he went to the police in February, 2009, G.H. had called him and told him that he had talked to the police. He acknowledged that G.H. told him about what he had "experienced" with the accused and that he had discussed this with G.H. a few times since 2008.

[64] R.L. testified that he went to the police in December, 2009, after being called by the police and told that charges were being laid against the accused. He claimed that he had no discussions with G.H. prior to this. But this was contradicted by G.H. who said that, after he spoke to the police in 2008, he called R.L.

[65] Furthermore, R.L. acknowledged on cross-examination that during his interview with the police he said to them: "Do you want me to tell you what I heard from the others?" By that he meant R.H., G.H., L.N., and two others. He admitted that "over the years we talked".

[66] T.S. testified that, before he talked to the police in late 2008, he spoke to G.H. who told him about the nature of the charges. He denied that G.H. told him what to say. He also admitted to talking with R.L. about these charges.

[67] R.H. acknowledged that he is a friend of R.L. and an acquaintance of T.S. but claimed that he had no discussion with any of the other witnesses.

[68] Finally, there was evidence that at least for some period of time, during this trial and prior to giving their testimony, at least four of these witnesses (G.H., L.N., R.L., and T.S.) were alone together in a witness holding room. Such an occurrence is dangerous, to say the least, in this type of case.

[69] In my opinion, this is strong evidence of the possibility of collusion. As stated in *Handy*, the existence of collusion rebuts the premise on which the admissibility of similar fact evidence depends, namely that the events described by the witnesses, testifying independently of one another, are too similar to be credibly explained by coincidence. A trial judge cannot assess the objective improbability of coincidence without addressing the issue of whether the apparent coincidence is in fact the product of collusion. And, as also noted in that case, suspected collusion is just as much a crucial factor as evidence of actual collusion.

[70] In this case, as I said previously, there is clear evidence as to the opportunity for collusion. That, together with the evidence that there were discussions between these witnesses, together with the remarkable similarity in much of the language used by the witnesses (particularly in their explanations as to why they did not disclose these allegations earlier), raises this to the level of suspicion giving collusion an air of reality. The Crown has failed to satisfy me that the similar fact evidence is not tainted by collusion.

[71] Hence, I ruled this evidence to be inadmissible as similar fact evidence.

J.Z. Vertes
J.S.C.

Dated this 15th day of June, 2012.

Counsel for the Crown: M. Lecorre
Counsel for the Defence: B.A. Beresh, Q.C.

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