

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

RUSSELL MICHAEL SIKYEA

Transcript of the Ruling on the Corbett Application by
The Honourable Justice L. A. Charbonneau, sitting in Hay
River, in the Northwest Territories, on the 20th day of
February, A.D., 2013.

APPEARANCES:

Ms. D. Vaillancourt: Counsel for the Crown
Mr. T. Boyd: Counsel for the Defence

Charge under s. 348(1)(b) Criminal Code of Canada

There is a Publication Ban pursuant to s. 486.4 of the Criminal Code

1 THE COURT: This ruling occurred during
2 the course of the trial where Mr. Sikyea was
3 facing a charge of break and enter and commit
4 sexual assault. The Crown called its case on
5 February 18th, 2013, earlier this week, and
6 at the end of that evidence the defence made
7 an application for a ruling preventing the
8 Crown from cross-examining Mr. Sikyea on
9 his criminal record if he chose to testify.
10 Earlier this week I advised counsel of my
11 decision on the application, but these are
12 the more detailed reasons that I indicated
13 at the time that I would provide later.

14 The record of criminal convictions was
15 entered as Exhibit B at this trial. I am not
16 going to refer to the various entries in detail,
17 but if for whatever reason a transcript of this
18 ruling is prepared then I am going to direct that
19 a copy of Exhibit B be appended to the decision
20 so that it can be easily referred to.

21 Generally speaking, the record includes
22 several entries for a variety of criminal
23 offences. The first are for convictions in
24 the Youth Court in the year 2000, and the most
25 recent entries are for convictions in early 2010.
26 They include convictions for dangerous driving,
27 a variety of breaches of court orders, escape

1 lawful custody, property offences, drug offences,
2 sexual assault and perjury.

3 The Crown argued that it should be
4 permitted to cross-examine Mr. Sikyea on the
5 entirety of the record, arguing that the record
6 shows a pattern of disregard for the law that
7 is relevant to Mr. Sikyea's credibility as a
8 witness. The Crown conceded that especially
9 with respect to the conviction for sexual assault
10 the cross-examination on the record raised the
11 risk of improper reasoning, but that this risk
12 was reduced in a case where the trial was
13 proceeding with a judge sitting alone as
14 opposed to a jury trial.

15 The Crown also argued that editing the
16 record was not an option here because that
17 would result in a distortion of the truth.
18 Specifically, the Crown was concerned that
19 editing the conviction for sexual assault
20 from 2005, which resulted in the imposition
21 of a significant jail term, would create an
22 artificial gap in the criminal record leading
23 to the impression that there was a long period
24 of time during which Mr. Sikyea was a law-abiding
25 citizen when in fact he would have been in
26 custody for most of that time.

27 Defence counsel initially argued that the

1 cross-examination should be completely prevented
2 on the record because of the risk that it could
3 be improperly used as evidence of bad character
4 showing Mr. Sikyea's propensity to commit crimes.
5 Later in his submissions defence counsel conceded
6 that cross-examination should be permitted on the
7 conviction for perjury because that is the type
8 of conviction that is relevant to credibility
9 and less likely to bring in improper propensity
10 reasoning.

11 Defence counsel brought to my attention two
12 recent cases from the Nunavut Court of Appeal.
13 In both of these cases new trials were ordered
14 because trial judges had allowed the Crown to
15 adduce evidence of conduct on the part of the
16 accused showing a propensity to commit offences.
17 The issue in those cases was not whether the
18 accused should be cross-examined on his criminal
19 record, but it was whether the Crown should have
20 been permitted as part of its case to introduce
21 what was essentially bad character evidence.

22 I agree with defence counsel that the
23 strict limitations that the law places on
24 the Crown's ability to adduce similar fact
25 evidence, or evidence of propensity, are rooted
26 in the same concerns that are at the root of
27 the jurisprudence that has developed to allow

1 judges the discretion to limit the Crown's
2 ability to cross-examine an accused on his
3 record.

4 Both areas of the law are rooted in the
5 notion that generally speaking our law does
6 not permit people who face criminal charges
7 to be tried on their reputation or propensity
8 to commit offences. Rather, they are to be
9 tried on the strength of the evidence relating
10 to the events forming the subject matter of
11 the charge. There is a firm foundation in
12 our law rooted in the presumption of innocence,
13 among others things, that does not tolerate
14 people facing criminal charges being tried
15 on their character.

16 But as I said during the submissions, the
17 rules governing the admissibility of similar
18 fact evidence are very different from the ones
19 that govern the question of whether an accused
20 can be cross-examined on his or her criminal
21 record. The analysis to be undertaken is
22 completely different even though both analyses
23 require balancing competing factors and an
24 overarching concern for preserving trial
25 fairness.

26 As far as cross-examination of an accused
27 person on his or her criminal record, the legal

1 framework that governs is relatively clear.
2 The starting point is Section 12 of the Canada
3 Evidence Act, which says that a witness can be
4 cross-examined on his criminal record. Nothing
5 in that provision exempts an accused person from
6 its purview. The starting point, therefore, is
7 that an accused who chooses to testify is subject
8 to cross-examination on his criminal record.

9 Many years ago already, in the case
10 of R. v. Corbett [1988] 1 S.C.R. 670, the
11 Supreme Court of Canada was asked to examine
12 the constitutional validity of that provision.
13 It was argued by some that to cross-examine an
14 accused on a criminal record offends certain
15 rights protected by the Canadian Charter of
16 Rights and Freedoms. In the end the majority
17 of the Supreme Court upheld the provision, but
18 concluded that in order to protect trial fairness
19 the trial judge retained a discretion to prevent
20 cross-examination on a criminal record in certain
21 circumstances. The possibility that in some
22 cases editing the record might be the best way
23 to balance the various competing factors was
24 also referred to.

25 Since Corbett was decided it has been
26 applied many many times by trial Courts in
27 this jurisdiction and others across the country.

1 Each time what is required is a weighing of two
2 competing factors: The fact that the Evidence
3 Act gives the Crown the right to cross-examine
4 an accused on the criminal record as part of
5 the credibility testing process, and the risk
6 that the use of the record might compromise
7 trial fairness by leading the trier of fact
8 into impermissible propensity reasoning instead
9 of using the record to only assess credibility.

10 As I noted in the case of R. v. Gargan
11 2012 NWTSC 42 there are a number of factors
12 that have to be considered in this weighing
13 process. The first is the types of convictions
14 that are on the record. Some offences are more
15 relevant to credibility than others. There are
16 varying views as to the use of a criminal record
17 in assessing credibility and whether it actually
18 says anything about credibility, but there is
19 the general agreement that certain types of
20 convictions are more relevant and probative
21 on credibility issues than others.

22 There is also an agreement that the more
23 similar the prior convictions are to the offence
24 forming the subject matter of the trial the
25 greater the risk that they might be used for an
26 improper purpose. So the types of convictions
27 are one of the considerations to look at.

1 Another consideration is the remoteness or
2 nearness of the convictions in time compared to
3 the time of the trial. More dated convictions
4 may be less probative of a person's current
5 credibility as a witness than more recent
6 convictions.

7 Another factor is whether preventing
8 cross-examination on the record will create
9 an imbalance because Crown witnesses were
10 the subject of attack based on their character
11 and criminal record. That was in fact one
12 of the reasons why, in the Corbett case
13 itself, ultimately it was found that the
14 cross-examination of the accused on a serious
15 criminal record was permissible, because Crown
16 witnesses had been attacked on the basis of
17 their records.

18 The whole issue of editing can be a
19 thorny one. There are cases such as the
20 case of R. v. Teemotee [1991] N.W.T.J. no
21 101 referred to by the Crown where a judge
22 of this Court indicated great reluctance to
23 edit a criminal record. At the other end of
24 the spectrum some Courts have gone very far
25 in editing, suggesting for example that a
26 solution might be if an accused is tried on
27 a case of sexual assault and has a sexual

1 assault conviction on his record, to have
2 the cross-examination refer to that conviction
3 as a conviction for assault only. So there is
4 a broad range of views about the appropriateness
5 and the extent to which editing should take
6 place.

7 With all respect for other views, my own
8 view is that editing must be approached with
9 caution, but should also not be discarded as
10 an option in appropriate cases. As I indicated
11 earlier this week, when I gave the brief version
12 of this decision, in this case I decided that
13 editing was the proper way to strike the balance,
14 which was also the conclusion that I had reached
15 in Gargan.

16 Defence has conceded that the conviction
17 for perjury is relevant to credibility and that
18 cross-examination on that conviction should be
19 permitted. In my view, the pattern of criminal
20 conduct disclosed by some of Mr. Sikyea's other
21 convictions is also relevant to his credibility
22 as a witness. If only the perjury conviction
23 could be put to him it would paint a very
24 distorted picture that up to 2009 he was a
25 law-abiding citizen. But his record includes
26 several entries for breaches of court orders,
27 two convictions for escaping lawful custody,

1 drug offences, and those convictions are
2 scattered over a period of time.

3 If that type of pattern of convictions
4 were to be deemed irrelevant to his credibility
5 or too prejudicial it would essentially mean
6 that cross-examination on a criminal record would
7 rarely, if ever, be permitted. The jurisprudence
8 recognizes a discretion to trial judges, but in
9 my view that discretion should not be interpreted
10 in such a way as to completely eliminate Section
11 12 from the Evidence Act when an accused takes
12 the stand.

13 Subject to constitutional compliance, it is
14 the role of Parliament to change and enact laws,
15 it is not the role of the Courts. Parliament
16 has not removed or amended Section 12 to make it
17 inapplicable to accused persons who testify, and
18 in my respectful view it is not for the Court to
19 use its discretion in such a way as to get the
20 same result as if the section had been amended.

21 On the other hand, Mr. Sikyea's conviction
22 for sexual assault would be of little assistance
23 in assessing his credibility and it has the
24 potential of being highly prejudicial because
25 that is the same offence as the one that he is on
26 trial for or certainly very similar. Similarly,
27 because the allegations at trial here involve

1 breaking and entering into a house, I think that
2 the convictions for break and enter, for being
3 unlawfully in a dwelling-house, bring a similar
4 risk of improper reasoning.

5 Each case must be assessed on its own
6 facts. Here I am concluding that editing those
7 convictions out of the record would not distort
8 the picture too much. The remaining convictions
9 would show that Mr. Sikyea's involvement with the
10 criminal justice system arose over a period of
11 a number of years, and while the removal of the
12 sexual assault conviction has the potential of
13 creating somewhat of an artificial gap in the
14 record, any potential distorting impact of that
15 is greatly reduced by the fact that there were
16 subsequent convictions for other charges.

17 Those were the reasons why I decided to
18 exercise my discretion to limit the Crown's
19 ability to cross-examine Mr. Sikyea on his
20 criminal record and edited out the convictions
21 for break and enter and commit from April, 2002;
22 unlawfully in dwelling-house and break and enter
23 from March, 2003; unlawfully in dwelling-house
24 from January, 2004; and a sexual assault
25 conviction from August, 2005.

26 I reiterate again the comment I made,
27 which I am happy to see was acted upon by the

1 time we proceeded to the sentencing, that in
2 the new format in which the criminal records
3 are presented attention be paid by counsel
4 that nothing finds its way in the notes on
5 the right-hand side column of the document
6 that should not be there.

7 -----

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

13 _____
14 Joel Bowker
15 Court Reporter

16
17
18
19
20
21
22
23
24
25
26
27

RCMP-GRC/G Division

2011/09/12 01:05 by 000137545

2011/09/12 01:05

SIKYEA. RUSSELL MICHAEL

*CRIMINAL CONVICTIONS CONDITIONAL AND ABSOLUTE DISCHARGES
*AND RELATED INFORMATION

0000-00-00 ***** THIS CRIMINAL HISTORY CONTAINS YOUTH COURT ENTRIES
WHICH ARE RETAINABLE AS PER SECTION 45.01 OF THE
YOUNG OFFENDER'S ACT (1996) ** *****

2000-05-03 (1) DANGEROUS OPERATION OF (1) 90 DAYS INTERMITTENT
FORT SMITH NWT MOTOR VEHICLE & PROBATION 1 YR
(YOUTH COURT) SEC 249(1)(A) CC
(2) FAIL TO COMPLY WITH (2) \$100
DISPOSITION
SEC 26 YO ACT
(RCMP FORT SMITH)

2002-04-10 BREAK ENTER & COMMIT 2 MOS
FORT SMITH NWT SEC 348(1)(B) CC
(RCMP FORT SMITH
02-327)

2003-03-06 (1) FAIL TO COMPLY WITH (1-2) 6 MOS
FORT SMITH NWT UNDERTAKING ON EACH CHG
SEC 145(3) CC
(2 CHGS)
(2) ESCAPE LAWFUL CUSTODY
SEC 145(1)(A) CC
(3) MISCHIEF
SEC 430(1)(C) CC
(4) UNLAWFULLY IN DWELLING
HOUSE SEC 349(1) CC
(RCMP FORT SMITH
2003-085, -110, -114, 2002-1677
02-1036)

2004-01-06 (1) MISCHIEF UNDER \$5000 (1-2) 3 MOS ON EACH CHG CONSEC
YELLOWKNIFE NWT SEC 430(4) CC
(2) ESCAPE LAWFUL CUSTODY
SEC 145(1)(A) CC
(3) BREAK ENTER & THEFT (3-4) 6 MOS ON EACH CHG CONC
SEC 348(1)(B) CC & CONC
(4) UNLAWFULLY IN DWELLING & PROBATION 2 YRS
HOUSE SEC 349(1) CC
(RCMP FORT SMITH
2003-1115 2003-1104 2003-1105
2003-1106)

2005-08-11 SEXUAL ASSAULT 3 YRS 4 MOS
HAY RIVER NWT SEC 271 CC & DISCRETIONARY
PROHIBITION ORDER
SEC 110 CC FOR 10 YRS

(RCMP FORT SMITH
2004-0991)

This record may or may not pertain to the subject
of your inquiry. Positive identification can only be
confirmed through the submission of fingerprints.
Page 1

2005-09-15
FORT SMITH NWT

FAIL TO COMPLY WITH
UNDERTAKING
SEC 145(3) CC
(RCMP FORT SMITH
2005-1117)

30 DAYS CONC WITH SENT SERVING

*END OF CONVICTIONS AND DISCHARGES

This record may or may not pertain to the subject
of your inquiry. Positive identification can only be
confirmed through the submission of fingerprints.

**Convictions Offences/charges -- Protected B: Person: SIKYEA, RUSSELL MICHAEL / 1983/05/20
(28) M / RCMP / 280577E / 5317 46 STREET, CAMROSE, AB Canada (Dist: EPPA, Det: Camrose AB
PS, Zone: B, Atom: 2) (Voice) (780) 678-3275**

Occ #	Charge Section	Description	Charge/div date	Status	Disp/court date	Notes
1)	2009714375 CC 145(3)	Adult Failure to comply with condition of undertaking or recognizance / direction in remand order	2009/06/28	Conviction	2009/10/06	[Custody] 1d Time served (Time served - 4.5 months.)
2)	2009714375 CDSA 4 (1)	Adult Possession - Schedule VIII: Cannabis Marihuana - 30 grams or less	2009/06/28	Conviction	2009/10/06	[Fine] \$500.00 fine default 4mo (VCS \$75)
3)	2009774987 CC 145(3)	Adult Failure to comply with condition of undertaking or recognizance / direction in remand order	2009/07/13	Conviction	2009/10/06	[Pre-sentence custody] 1d (Pled guilty. Was in pre-sentence custody, for 4.5 months for a number of other charges.) (Adjourned to 2009/10/06 for plea)
4)	20091093067 CDSA 4 (1)	Adult Possession - Schedule VIII: Cannabis Marihuana - 30 grams or less	2009/09/15	Conviction	2009/10/06	[Custody] 1d Concurrent (global with other charges) / [Fine] \$575.00 (inc \$75 VCS, 4 months to pay.)
5)	2009987903 CC 132	Adult Perjury	2009/09/16	Conviction	2010/01/22	[Custody] 1y 364d Consecutive (2 years less a day)
6)	2009987903 CC 145(2) (b)	Adult Fail to attend court - Undertaking/recognizance justice or judge - thereafter	2009/11/26	Conviction	2010/01/22	[Custody] 3mo Concurrent (taken together with perjury conviction)