

S-1-CR2012000104

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

PATRICK JOHN NADLI

Transcript of the Ruling by the Honourable Justice L. A. Charbonneau, on an Application to prevent cross-examination on the Accused's criminal record, at Hay River in the Northwest Territories, on November 27th A.D., 2013.

APPEARANCES:

Mr. A. Godfrey: Counsel for the Crown

Mr. T. Boyd: Counsel for the Accused

An order has been made banning publication of the identity of the Complainant/Witness pursuant to Section 486.4 of the Criminal Code of Canada

1 THE COURT: Earlier in this trial,
2 before the close of the Crown's case, defence
3 applied to prevent the Crown from
4 cross-examining Mr. Nadli on his criminal
5 record. That record was filed as Exhibit A on
6 the application. It is a six page document
7 that includes entries starting in 1990 and
8 continuing on in a regular pattern up until
9 the last entries in September 2011. I gave my
10 ruling yesterday and permitted the
11 cross-examination only on an edited version of
12 the record. Specifically, I edited out the
13 convictions for crimes of violence, for
14 assault and assault causing bodily harm, a
15 conviction for uttering threats, as well as
16 convictions for being unlawfully in a dwelling
17 house, and a conviction for forcible entry.

18 In my consideration of this matter I have
19 applied the principles set out by the Supreme
20 Court of Canada in its landmark decision of
21 R. v. Corbett [1988] 1 S.C.R. 670, and I have
22 reviewed some of the cases that have applied
23 the principles that are set out in that
24 decision. There are many cases to choose from
25 because this issue comes up fairly regularly
26 in criminal trials. I have reviewed
27 specifically cases from this jurisdiction,

1 R. v. Gargan 2012 NWTSC 42 and R. v. Lepine
2 [2012] NWTJ No. 101; and cases from other
3 jurisdictions, more specifically, R. v.
4 Tremblay [2006] J.Q. No. 433, R. v. Madrusan
5 [2005] B.C.J. No. 2658, and R. v. Charland
6 [1996] A.J. No. 819, affd [1997] 3 S.C.R.
7 1006; some of these cases were referred to
8 during submissions.

9 Decisions about whether cross-examination
10 of an accused on his or her criminal record
11 should be permitted are always ones that
12 require a balancing of competing
13 considerations. The law, more specifically
14 the Canada Evidence Act, permits
15 cross-examination of a witness on a criminal
16 record and recognizes that it is relevant to
17 the assessment of the credibility of the
18 accused as a witness. The Act applies to the
19 accused person who testifies. Until
20 Parliament changes this provision, or until a
21 Court finds that it violates the Charter
22 (something that the Supreme Court of Canada
23 expressly refused to do in the Corbett case),
24 the fact that this is what this provision
25 states cannot be ignored and has to be the
26 starting point of the analysis.

27 However, an important consideration is

1 also that trial fairness must be preserved and
2 steps must be taken to avoid the risks that a
3 criminal record may be used by the trier of
4 fact not just for the assessment of
5 credibility, which is proper, but as evidence
6 of propensity to commit crimes and the
7 likelihood that the accused committed the
8 crime charged, which is not a proper use of a
9 criminal record. This is why the Corbett
10 decision recognized that trial Judges have a
11 discretion to prevent completely, or limit,
12 cross-examination on a criminal record if
13 allowing the cross-examination would
14 compromise trial fairness.

15 The concern about the misuse of a record,
16 while it is present also in Judge alone
17 trials, is more pressing when, as in this
18 case, the trier of fact is a jury. This is
19 because juries are composed of citizens who
20 are not trained in the law and arguably may
21 have more difficulty distinguishing between
22 the permitted use of a record and the
23 non-permitted use of a record. And that they
24 may, even if properly instructed, engage in
25 improper reasoning and use the criminal record
26 for an improper purpose.

27 At the same time, generally speaking, we

1 cannot operate on the basis that juries will
2 not follow instructions by the trial Judge.
3 The whole Judge and jury system is premised on
4 the fact that on very important legal issues,
5 such as the presumption of innocence and the
6 standard of proof beyond a reasonable doubt,
7 juries will follow and understand the special
8 rules that apply to criminal cases, and that
9 they will follow the Judge's instructions.
10 Arguments along the lines that the jury will
11 not or cannot follow the instructions of the
12 trial Judge must always, in my view, be
13 approached with some caution.

14 Still, there are areas, and this is one of
15 these areas, where trial Judges must recognize
16 situations where the risks of compromising
17 trial fairness are such that relying simply on
18 instructions to the jury is not enough.

19 In these applications, there are things
20 that have to be balanced - on the one hand,
21 seeking not to withhold from the jury
22 information that is relevant and could be
23 helpful in making their decision, not
24 distorting the truth-seeking objectives of the
25 criminal justice system, not misleading juries
26 and, on the other hand, ensuring that trial
27 fairness is not compromised. It is a delicate

1 exercise and many factors must be considered.

2 I have summarized those factors in
3 R. v. Gargan in paragraphs 10 to 12. I am not
4 going to quote from that decision but I adopt
5 what I said in that case about the principles
6 that apply, and I have applied them here.

7 Gargan was decided in the context of a Judge
8 alone trial whereas this case is a Judge and
9 jury trial. And, of course, each decision is
10 very fact specific and driven by the
11 circumstances of the case.

12 Here the criminal record is lengthy and
13 spans over many years and includes a variety
14 of offences.

15 In Charland, the Court recognized that a
16 pattern of repeated breaches of the law on a
17 person's part is something that a jury should
18 be aware of and could assist in assessing the
19 credibility of that person, even if it is the
20 accused. Even if individual convictions are
21 not for crimes of dishonesty, the pattern of
22 lack of respect for the law, is what the trier
23 of fact may consider relevant to the person's
24 credibility. And this is the type of criminal
25 record that we have here.

26 There are no convictions on it for fraud,
27 perjury, public mischief, giving contradictory

1 evidence or things of that nature, but there
2 is a steady and persistent pattern of
3 noncompliance with the rules of society, as
4 well as numerous convictions for not complying
5 with orders of the court. The lack of respect
6 for the rules of society and the lack of
7 respect for court orders is something which I
8 think is relevant to Mr. Nadli's credibility
9 as a witness, and for that reason I did not
10 think that preventing the cross-examination
11 completely would achieve the balance that a
12 Court must strive for in these matters.

13 However, I concluded that allowing
14 cross-examination on the whole of the record
15 would not achieve that balance either.

16 Given the number of convictions for crimes
17 of violence, I think there would be a real
18 risk that the record could overwhelm this jury
19 and could lead them to propensity reasoning.
20 There are no convictions for sexual offences
21 on this record so the risk or propensity
22 reasoning did not relate to that. But the
23 allegations here are a sexual assault
24 accompanied by a violent beating resulting in
25 bodily harm. In that sense, the convictions
26 for crimes of violence, even nonsexual
27 violence, creates, in my view, a real risk of

1 improper propensity reasoning on the jury's
2 part. By my count, there is a total of 13
3 convictions for assault, including two for
4 assault causing bodily harm. There is also a
5 conviction for uttering threats, a conviction
6 for forcible entry, and a conviction for being
7 unlawfully in a dwelling house. Together
8 those convictions account for about a third of
9 Mr. Nadli's criminal record.

10 The Crown's position was to concede that
11 the convictions for the assault causing bodily
12 harm, forcible entry, and unlawfully in a
13 dwelling house could be edited out. But Crown
14 argued that the assault convictions should not
15 be edited out for fear that doing so may
16 create an artificial gap in the criminal
17 record. I disagree: there are sufficient
18 other types of convictions to not create such
19 an artificial gap.

20 The probative value of the convictions for
21 violent crimes, in my view, is outweighed by
22 their potential prejudicial effect. Leaving
23 the balance of the convictions available for
24 cross-examination would ensure that the jury
25 would have this relevant information for the
26 purpose of assessing Mr. Nadli's credibility
27 as a witness but without bringing in the risk

1 of propensity reasoning.

2 I would add that although one of the
3 counts here in this trial is for break and
4 enter, the substance of that offence really is
5 not the property offence. The core of the
6 offence is the sexual assault causing bodily
7 harm that he is alleged to have committed once
8 inside the complainant's residence. For that
9 reason I do not think that the potential
10 prejudicial effect of the property-related
11 crimes warrants editing them out of the
12 criminal record.

13 Those are the reasons why I permitted the
14 cross-examination of Mr. Nadli on his criminal
15 record to the extent that I did, and why I
16 edited the convictions that I enumerated in my
17 ruling from yesterday.

18 In addition, to ensure that the jury is
19 aware of the limited use that they could make
20 of this evidence, I gave them a mid-trial
21 instruction at the point in the evidence where
22 Mr. Nadli's record was put to him, and I
23 reiterated those instructions this morning in
24 my final charge; hopefully, this will have
25 conveyed to them in clear and no uncertain
26 terms how they can and cannot use this
27 evidence in their deliberations.

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So those are my reasons on the Corbett application and, as I said, a transcript will be prepared of this ruling and Exhibit A will be appended to it to provide context.

RULING CONCLUDED

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

Lois Hewitt,
Court Reporter