S.C.C. No. 02622

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Jones, and Roscoe, JJ.A.
Cite as: R. v. Johnston, 1992 NSCA 46

BETWEEN:

HER MAJESTY THE QUEEN Appellant	Robert C. Hagell for the Appellant
- and -	W. Blair MacKinnon for the Respondent
MARJORIE JOHNSTON Respondent	Appeal Heard: December 3, 1992 Judgment Delivered: December 30, 1992

THE COURT: Appeal allowed and decision of trial judge restored, per reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. concurring and Jones, J.A., dissenting.

ROSCOE, J.A.:

The respondent was found guilty on two charges of assault before Provincial Court Judge Potts. The respondent appealed that decision to the County Court on the grounds that:

> 1) the trial judge had erred by allowing the Crown to amend the date of the offence on the first charge on two occasions, once at the commencement of the trial and once midway through the Crown's evidence; and
>
> 2) the trial judge had erred in allowing the Crown to present rebuttal evidence of two witnesses who gave similar fact evidence.

The County Court judge in his brief decision concluded by saying:

> " Taken as a whole, the amendments, the decision with regard to the rebuttal evidence, amount in my mind in a splitting of the case, that there was such a prejudice to the accused that I think it warrants a new trial and I am going to so order."

The Crown now appeals that decision.

At the trial, two employees of Ocean View Manor testified that the respondent had assaulted two residents of the Manor in two separate incidents. During each of the incidents it was alleged that the respondent used profane language in a loud voice. The residents were elderly stroke victims who were incapable of testifying at the trial.

The information alleged that the first incident took place on July 9, 1990. At the commencement of the trial, the Crown sought leave to amend the date to July 7, 1990. The defence did not object and the judge amended the date to the 7th.

The chief Crown witness regarding the first count, Ms. Irene Lunn, testified on direct examination that the event took place on July 7, 1990. On cross-examination she said it was Tuesday, July 7, 1990. The Crown sought to clarify the date on re-direct since July 7, 1990 was not a Tuesday. The trial

judge would not allow the questions on re-direct. The next day the Crown sought to recall the witness, who had retrieved her own calendar in which she had noted the days and shifts she had worked. The defence objected, but the judge allowed the witness to be recalled. After referring to her diary to refresh her memory she testified that the incident took place on Tuesday, July 10, 1992. The Crown then asked to amend the information again and over the objection of defence, the amendment was allowed. The trial judge found there would be no prejudice to the accused as a result.

Having read the transcript and considered arguments on this point, I agree with the trial judge that no prejudice to the accused resulted from the amendments. It is clear from the evidence of the accused that she specifically recalled the circumstances of the only shift she and Ms. Lunn worked together.

The second issue concerns the trial judge's decision to allow the Crown to call rebuttal evidence concerning two other incidents in which the respondent assaulted residents while using foul language. The evidence on rebuttal was clearly similar fact evidence as defined by the Supreme Court of Canada in **R. v. Robertson** (1987), 33 C.C.C. (3d) 481. The Crown argued that since the accused presented evidence of good character it was entitled to lead rebuttal evidence. The respondent submits that this allowed the Crown to split its case and that the Crown should have foreseen that the accused would put her character in issue.

The trial judge correctly stated that not only had the accused placed her character in issue by presenting evidence of general reputation in the community, she had also asserted throughout her testimony that there were never any incidents of assaults or use of foul language by her toward any residents at any time.

As authority for the proposition that the Crown can call rebuttal evidence of similar acts when the accused puts her character in issue, this court has been referred to **Guay v. The Queen** (1978), 42 C.C.C. (2d) 536 (S.C.C.)

and **R. v. McNamara** (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.). In **Guay**, Mr. Justice Pigeon stated at p. 547:

> " On the admissibility of similar fact evidence, I think it should be said that it is essentially in the discretion of the trial judge. In exercising this discretion, he must have regard to the general principles established by the cases. There is no closed list of the sort of cases where such evidence is admissible. It is, however, well established that it may be admitted to rebut a defence of legitimate association for honest purposes, as well as to rebut evidence of good character."

Guay was followed in **McNamara** where the judgment of the full court says at p. 348:

> " It was also contended on behalf of the appellant that where evidence of good character, in whatever form, is introduced by the prisoner (whether it be extrinsic evidence or by his own testimony) it cannot be rebutted by evidence of specific acts of bad conduct: rather, the Crown is confined to rebutting the evidence of good character by evidence of general reputation or by proof of a previous conviction pursuant to s. 593 of the ***Criminal Code***. Counsel for the appellant argued that the provisions in s. 593 constitute the only exception to the common law rule that evidence of good character can only be rebutted by evidence of bad reputation. There is at least one additional exception, namely, ***the Crown may adduce similar fact evidence in rebuttal of evidence of good character***."

In **R. v. Tierney** (1982), 70 C.C.C. (2d) 481, Zuber, J.A., says at p. 484:

> " In addition to the evidence of Tierney, the defence evidence included a number of witnesses who were called to testify as to Tierney's good character. This evidence illustrates the difficulty of applying the law of evidence in this area. The law restricts this type of evidence to evidence of reputation for a particular virtue. The evidence adduced was a mixture of personal opinions, specific instances, and evidence of reputation. However, the sum of all this evidence was to show that Tierney was a person of good character, particularly with respect to decency and the absence of violence. The clear purpose of this evidence was to show that Tierney was not the type of man who would commit the offence alleged against him."

After reviewing the evidence the Crown sought to lead in rebuttal, he continues at p. 485:

> " The common law rules of evidence provide that character evidence given in rebuttal (as distinct from cross-examination of defence character witnesses) may not relate to specific instances. For a statutory exception, see s. 593 of the ***Criminal Code***. It is now clear, however, that evidence of a specific instance may be admissible to rebut evidence of good character if it is not simply a specific instance but a similar act: ***Guay v. The Queen*** (1978), 42 C.C.C. (2d) 536, 89 D.L.R. (3d) 532, [1979] 1 S.C.R. 18."

In this case the respondent was cross-examined in respect to the details of the two additional incidents and denied that they took place. The defence did not ask to call surrebuttal evidence after the Crown closed its case in reply, although it would have been entitled to, if there was any new evidence available. (See **R. v. Ewert** (1989), 52 C.C.C. (3d) 280 (B.C.C.A.))

The decisions in **Guay**, **McNamara** and **Tierney** confirm that the admissibility of this type of evidence is essentially in the discretion of the trial judge. I am of the view that the trial judge correctly exercised that discretion in this case and that the judge on appeal erred in finding otherwise.

The appeal is therefore allowed and the decision of the trial judge is restored.

J.A.

Concurred in:

Clarke, C.J.N.S.

JONES, J.A.: (dissenting)

I have read the decision of Madame Justice Roscoe in this case and I agree that with respect to the first ground of appeal the trial judge did not err in allowing the amendments to the information. With respect, in my view, the appeal cannot succeed on the second ground. On the second ground of appeal Anderson, J.C.C. concluded that the trial judge erred in allowing the Crown to call similar fact evidence by way of rebuttal.

There are two issues involved in the second ground of appeal. The first relates to the admissibility of the evidence, the second whether the evidence should have been admitted by way of reply.

The charges related to two assaults alleged to have been committed by the appellant on two residents at the Ocean View Manor in July and September, 1990, while the appellant was employed there as a nursing assistant. The appellant denied the assaults and tendered evidence as to her good character.

In reply the Crown was permitted to call evidence of an incident in 1988 where the appellant swore and struck a patient when he kicked out at her. The second incident happened in 1989 when it was alleged that she grabbed a patient by the hair and shook his head. She also threatened him with her fist.

In **R.** v. **B. (C.R.)** (1990), 55 C.C.C. (3d) the Supreme Court of Canada reviewed the law relating to similar fact evidence. McLachlin, J. in speaking for the majority stated at p. 22:

> "While our courts have affirmed the general exclusionary rule for evidence of disposition and propensity, they have for the most part cast it in terms of **Boardman** rather than **Makin**. It is no longer necessary to hang the evidence tendered on the peg of some issue other than disposition. While the language of some of the assertions of the exclusionary rule admittedly might be taken to suggest that mere disposition evidence can **never** be admissible, the preponderant view prevailing in Canada is the view taken by the majority in **Boardman** -evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice

which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

> The second characteristic of Canadian treatment of the similar fact rule since **Boardman** is a rejection of the category approach in favour of one of general principle. In **Guay** v. **The Queen** (1978), 42 C.C.C. (2d) 536, 89 D.L.R. (3d) 532, [1979] 1 S.C.R. 18, the court, per Pigeon J., held that the admissibility of similar fact evidence is based on 'general principles' and that there is discretionary power in the trial judge to exclude such evidence (p. 547). Citing **Boardman** with approval, he rejected a mechanical, category approach, holding that there is 'no closed list of the sort of cases where such evidence is admissible,' but that it is 'well established that it may be admitted to rebut a defence of legitimate association for honest purposes, as well as to rebut evidence of good character' (p. 547).
>
> In **Sweitzer** v. **The Queen** (1982), 68 C.C.C. (2d) 193 at p. 197, 137 D.L.R. (3d) 702, [1982] 1 S.C.R. 949, McIntyre J., speaking for court, held that [quoting **Boardman**, p. 893] 'it would be an error to attempt to draw up a closed list of the sorts of cases in which the principle operates' concluding (at p. 196), that the admissibility of similar fact evidence 'will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission whatever the purpose of its admission'. Subsequent cases have all affirmed the same approach. In **R.** v. **Robertson** (1987), 33 C.C.C. (3d) 481 at p. 500, 39 D.L.R. (4th) 321, [1987] 1 S.C.R. 918, Wilson J., speaking for the court, affirmed that the analysis must be based on general principle and posited a sliding scale of relevance:
>
> > The degree of probative value required varies with the prejudicial effect of the admission of the evidence. The probative value of evidence may increase if there is a degree of similarity in circumstances and proximity in time and place. However, admissibility does not turn on such a striking similarity.
>
> The old category approach was similarly rejected in **R.** v. **Morin** and **R.** v. **D. (L.E.)**
>
> Catchwords have gone the same way as categories. Just as English courts have expressed doubts about the necessity of showing 'striking similarity' (see **R.** v. **Rance**, **supra; R.** v. **Mansfield** (1977), 65 Cr. App. R. 276; **R.** v. **Scarrott**, [1978] Q.B. 1016), so in **Robertson** Wilson J. rejected the validity of this phrase as a legal test.

A third feature of this court's treatment of the similar fact rule since **Boardman** is the tendency to accord a high degree of respect to the decision of the trial judge, who is charged with the delicate process of balancing the probative value of the evidence against its prejudicial effect. In **Morris**, the court affirmed that the task of determining whether the evidence possessed sufficient probative value is that of the trial judge. Similarly, in **Guay, Robertson, Morin,** and **D. (L.E.)** this court affirmed the decision of the trial judge with respect to similar fact evidence. This deference to the trial judge may in part be seen as a function of the broader, more discretionary nature of the modern rule at the stage where the probative value of the evidence must be weighed against its prejudicial effect. As a consequence of the rejection of the category approach, the admissibility of similar fact evidence since **Boardman** is a matter which effectively involves a certain amount of discretion. As pointed out in **Morris**, the weight to be given to evidence is a question for the trier of fact. Generally, where the law accords a large degree of discretion to a trial judge, courts of appeal are reluctant to interfere with the exercise of that discretion in the absence of demonstrated error of law or jurisdiction.

The difficulty of the trial judge's task and the amount of discretion entrusted to him or her is great. As Forbes, **op cit.**, puts it at pp. 54-5:

> 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 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'. Third, and with due regard to the exclusory presumption, he has to outweigh that probative value, in some rough balance if [sic] imponderables, against any prejudice which the evidence is likely to excite in the jurors' minds.
>
> > The relative weight of proof and prejudice vary infinitely from one case to another and the opinion of a particular judge must depend on the impression the evidence makes upon him in the light of his experience and his own sense of what is fair. It is inevitable that some cases are so close to the borderline that different judges will take different views upon them,

> and it is, therefore the type of case in which this court will hesitate long to disturb a ruling of the trial judge...(T)he matter in issue is to be determined very largely by intuitive means...

Where a trial judge has properly addressed these concerns and, after weighing the evidence and its potential prejudice, arrived at a conclusion as to its admissibility, appellate courts will not lightly intervene.

Other principles of importance emerge in the recent jurisprudence. One is the view taken in **Boardman** (p. 457) that the effect of the similar fact evidence must be considered in the context of other evidence in the case. Thus Sopinka J. writes in **R.** v. **Morin**, at p. 218:

> It is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence. Relevance is very much a function of the other evidence and issues in a case.

See also **Sutton** v. **The Queen** (1984), 152 C.L.R. 528 at p. 532-3 (H.C Aust.).

This review of the jurisprudence leads me to the following conclusions as to the law of similar fact evidence as it now stands in Canada. The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition. As affirmed in **Boardman** and reiterated by this Court in **Guay, Cloutier, Morris, Morin** and **D. (L.E.)**, evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the

> evidence outweighs its potential prejudice and justifies its reception."

That decision is now definitive on the admissibility of similar fact evidence. The similar fact evidence in this case was relevant to prove the acts alleged in the information. It relates not only to character but to credibility. Under the law as stated in **R**. v. **B (C.R.)** it was admissible as part of the Crown's case in the first instance because its probative value clearly outweighed its prejudicial effect.

By allowing the evidence by way of rebuttal the Crown was allowed to split its case. To do so was a fundamental error which prevented the appellant from making full answer and defence and resulted in an unfair trial.

In **John** v. **R.** 49 C.R. (3d) 57 the Supreme Court of Canada enunciated the proper principles relating to rebuttal evidence at p. 59:

> "The issue arising out of the application of s. 613(1)(b)(iii) concerns the Crown's action in calling in reply the complainant and nine other witnesses to introduce evidence concerning the physical characteristics of the accused, particularly his mobility and agility, notwithstanding that he had an artificial limb from the knee down on one leg. The complainant testified in chief and in cross-examination that the accused walked with a limp and had difficulty climbing the two flights of stairs to his dwelling. Indeed, the complainant admitted that in the course of the journey up the stairs there was a possibility that she could have escaped by reason of the accused's difficulty, except that she was frightened, and this was probably due to the possession of a knife by the accused. Against the backdrop of this evidence, the accused elected to testify and he did nothing to disturb the complainant's description of his restricted ability to move about. Indeed, he may have emphasized the complainant's evidence by limping to the witness stand. In reply, other witnesses called by the Crown contradicted the essence of the complainant's testimony as to the difficulties the accused had in walking by reason of his artificial limb. The Crown could not have called these witnesses to contradict its own witness, the complainant, [V.]. To allow the Crown to do so in reply is doubly wrong because the effect was to force the accused to return to the witness box. When the Crown called the complainant in reply, she testified about a new topic which had nothing whatever to do with any evidence entered by the accused or on behalf of the accused in his defence. She

> proceeded to tell the jury about a statement alleged to have been made by the accused to her that he 'had planned [the offence] for a week and it could have been anyone'. The effect of this evidence on a juror's mind would in all likelihood be serious. It is of course impossible to reconstruct this trial by jury so as to determine what the verdict would have been had this evidence not been presented. This information did not fall out of the complainant accidently, as the very form of the Crown's question indicates an awareness of the answer desired. Indeed, counsel for the Crown, in proper frankness, acknowledged that this was the case. Clearly this is the situation referred to in criminal practice as the prosecution splitting its case. The wrongs which flow from such a practice are manifold and the practice has been prohibited from the earliest days of our criminal law.
>
> The effect of this evidence by the complainant also forced the accused to enter the witness box for the second time. He was required so to do first in order to deal with the evidence of his agility or mobility, and secondly to meet the evidence that he had indeed planned the offence in general for some time. The cross-examination of the accused by the Crown centered on his ability to ascend stairs and to play basketball. The first related to evidence led by reply witnesses who contradicted the evidence of the complainant on this subject and the second related to evidence by reply witnesses who introduced a purely collateral matter, namely, the accused's ability to play basketball without using a wheelchair. In the course of this cross-examination the issue was squarely put to the accused that he had been lying in his examination in chief when he said he played basketball only with the aid of a wheelchair. The process reduced itself to a simple sharp attack in front of the jury on the accused's credibility on an issue wholly collateral.
>
> These are the consequences that flow from a violation of one of the fundamental precepts of our criminal process, namely, the dividing of the prosecution's case so as to sandwich the defence. This is a particularly lethal tactic where the evidence in reply raises a new issue and attacks the accused's credibility, for this is the last evidence which the members of the jury hear prior to their deliberations. It also raises the question as to the propriety of the Crown's conduct in the context of the accused's right to elect to remain silent or to elect to enter the witness box in his own defence. He must be given the opportunity of making this decision in the full awareness of the Crown's complete case. This did not occur in these proceedings."

The Crown was fully aware in this case that the defence was a general denial to be coupled with evidence of good character. If the defence had to meet evidence of other

acts then it was imperative that such evidence be adduced before the conclusion of the Crown's case. In the result I would dismiss the Crown's appeal and affirm the judgment and order in the County Court.

J.A.