**IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA**

**Citation:** *R. v.N.W.*, 2017 NSPC 36

**Date:** June 30, 2017
**Docket:** 3015277
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

W.(N.)

**RESTRICTION ON PUBLICATION: sections 110 and 111 YCJA**

# DECISION ON CROSS-EXAMINATION AND BAD CHARACTER EVIDENCE ISSUE

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| Judge: | The Honourable Judge Anne S. Derrick |
| Heard: | June 29, 2017 |
| Decision: | June 30, 2017 |
| Charges: | section 235, *Criminal Code* |
| Counsel: | Terry Nickerson and James Giacomantonio, for the Crown |
| | Roger Burrill and Anna Mancini, for W. (N.) |

**By the Court:**

[1] N.W. is on trial for the first-degree murder of J.C. The Crown alleges that N.W., aided and abetted by M.B., fatally shot J.C. in the early morning hours of March 29, 2016.

[2] M.B. was arrested on April 1, 2016, and has pleaded guilty to second-degree murder in the death of J.C. He has testified on direct and under cross-examination about events he says he witnessed and participated in on March 28 and 29, 2016, including the shooting of J.C.

[3] The Crown has applied for the right, on re-examination, to ask M.B. questions about N.W.'s character. It is the Crown's submission that the cross-examination of M.B. by the Defence, specifically the eliciting from M.B. of evidence that shows him as a discreditable person, has put N.W.'s character in issue.

[4] N.W. opposes this application and submits that the door to evidence about his character has not been opened.

[5] This is my decision on whether the Crown can inquire into evidence that is typically prohibited. Before I go further I want to thank Mr. Giacomantonio and Ms. Mancini for their very helpful written and oral submissions, and for preparing them under such tight time constraints.

*The Alternate Suspect*

[6] The Crown's application arises in the context of the Defence pointing to an alternate suspect, that is, M.B., as the person who shot J.C., not N.W. Pointing to an alternate suspect can open the door to the Crown being able to inquire into the

accused's character. That is what happened in *R. v. Sipes*, 2012 BCSC 351, a decision provided by the Crown to support its application.

[7] In *Sipes* it was Smart, J.'s view of the cross-examination as an exercise in getting the jury to accept that the witness and not the accused – Sipes and O'Donnell – was more likely to have murdered the victims that led to him to conclude that the accused had put their characters in issue. Smart, J. had this to say on the issue:

> **46** ...In my view, Sipes' and O'Donnell's cross-examinations of the witness were conducted in the manner they were for the purpose of inviting the jury to infer that the witness is the more likely perpetrator. In fact, in his submissions on this application, Mr. Orris stated that one of the reasons he brought out the witness's violent nature "was to give the jury an impression of the kind of person [the witness] is". Consequently, the jury will be invited to consider evidence demonstrating that the witness is the type of person who would commit the offences in deciding whether it has a reasonable doubt about whether Sipes and O'Donnell committed the Marnuik and Thom murders.
>
> **47** Thus, I am satisfied that Sipes and O'Donnell: (i) led evidence of the witness's general propensity; and (ii) did so for the purpose of demonstrating that the witness is the type of person who would likely commit the Marnuik and Thom murders. For these reasons, I find that Sipes and O'Donnell

> have put their respective characters or dispositions in issue by making them relevant.
>
> **48** Evidence that Sipes and O'Donnell are the types of persons who would likely commit the offences is now relevant to the jury's assessment of evidence of the witness's disposition. In my view, unless the jury is entitled to consider evidence of Sipes' and O'Donnell's respective dispositions alongside evidence of the witness's disposition, there is a real risk of a misleading impression.

[8] It is this "misleading impression" concern that underpins why, in the alternate suspect context, an accused may be found to have opened the door to evidence about his or her character being brought into the evidentiary mix at trial. Where the alternate suspect defence characterizes a Crown witness as being the type of person more likely to have committed the crime than the accused, legal principle operates to re-balance the scales. Of the cases that discuss this, one of the clearest explanations for why an accused's character may become a focus of admissible evidence is found in *R. v. McMillan*, [1975] O.J. No. 2247, a decision of the Ontario Court of Appeal:

> **62**…The position taken by defence counsel in his address to the jury was that there were two people in the house in which the child received the injuries from which she died. One of those persons, the wife, was a psychopathic personality with a disposition or tendency toward violence. The other occupant of the house, the respondent, was a person of good reputation for honesty and responsibility, and of a gentle nature. In those

> circumstances, the jury was asked to say whether it was more probable that the wife inflicted the injuries or that the respondent had inflicted them. It was implicit in the defence advanced that there were two people in the house who could have inflicted the injuries which caused the baby's death, one was a psychopath (the wife), the other was a normal person of good character (the respondent). In my view, the entire nature of the defence involved an assertion that the respondent was a person of normal mental make-up. In those circumstances, Crown counsel was entitled to show, if he could, that there were two persons present in the house who were psychopaths, not one. Any other conclusion would permit an accused to present an entirely distorted picture to the jury. The respondent, having introduced psychiatric evidence to show that it was more probable that his wife had caused the injuries to the child than that he had caused them, because he lacked her dangerous characteristics, lost his protection, in the circumstances of this case, against having his own mental make-up revealed to the jury.

[9] The Ontario Court of Appeal in *R. v. Parson*, [1993] O.J. No. 1937 held that if propensity evidence is introduced into evidence by the Defence in relation to a Crown witness, "fairness dictated that the very similar evidence that the Crown possessed relating to [the accused] could also be introduced." (*para. 25*)

*The Type of Person versus the Person In Fact*

[10] Ms. Mancini submits that an inquiry into N.W.'s character through re-examination of M.B. has not been triggered by the cross-examination of M.B. because the cross-examination was focused on the issue of M.B.'s credibility. It is Ms. Mancini's submission that the cross-examination was not aimed at showing that M.B. is the *type of person* that would kill J.C. but rather that he is *in fact* the person who killed J.C. This is a crucial distinction.

[11] In *R. v. M.A.*, [2015] O.J. No. 5873, Fragomeni, J. of the Ontario Superior Court of Justice found that the Defence in that case had not suggested that the Crown witness was

> **73**…the type of person to commit this offence. Rather the defence suggested it was Mr. Morrone who in fact organized and planned this robbery. The cross-examination was not designed to establish that he is the type of person to do this, it was designed to establish that he is the person who did this robbery. Mr. Morrone clearly acknowledged early on in his examination in-chief that he organized this robbery.

[12] The Court in *M.A.* recognized the critical responsibility that rests on the shoulders of Defence counsel to challenge the version of events advanced by the Crown witness, especially where the Crown witness will be subject to a Vetrovec warning. (*para. 74*) In *M.A.* the Court noted as "proper and necessary" the attack by Defence counsel on "this critical Crown witness as to his criminal lifestyle, Criminal Record, entering into an Immunity Agreement, entering into the Witness Protection Program…" (*para. 76*) It was observed by the Court that the Defence had "at no time" put it to the Crown witness that the accused was not the type of

person to have committed the offence or that the accused was "a person of good character who would never do this." (*para. 76*)

[13] Ms. Mancini has emphasized the danger of permitting the Crown to bring in bad character evidence relating to the accused when the Defence has mounted a forceful attack on an unsavoury Crown witness. She provided *R. v. Magno*, 2012 ONSC 4014, a decision that illustrates her point with a quote from the Supreme Court of Canada's decision in *R. v. Khela*, [2009] 1 S.C.R. 104 at para. 2 where the Court said: "Where the guilt of an accused is made to rest exclusively or substantially on the testimony of a single witness of doubtful credit or veracity, the danger of wrongful conviction is particularly acute." Ducharme, J. in *Magno* followed this by saying: "This is precisely why our adversarial process demands that the defence thoroughly and carefully test and challenge such witnesses. But if I were to accept the Crown's submission [that is should be permitted to lead evidence of bad character about the accused], it would create a powerful disincentive for the defence to perform this essential role." (*para. 36*)

*Prior Criminality and Credibility*

[14] Prior criminality is relevant to the issue of a witness's credibility. This has been most recently observed by our Court of Appeal in *R. v. Borden*, 2017 NSCA 45 from which I take the following excerpts:

> **169** Evidence of prior criminality is circumstantial evidence about character that bears on credibility. It may lead to inferences that because a witness is not a law-abiding individual, his or her conscience may not be engaged by the oath to tell the truth, or possess fear of criminal consequences should they lie under oath. The fact, number and type of

> convictions may bear on the willingness of a jury to draw the inference that the witness may not be trustworthy.

[15] *Borden* notes that "This recognition of how proof of prior criminality can impact credibility" was discussed by the Supreme Court of Canada in *R. v. Corbett*, [1988] S.C.J. No. 40, where Dickson, C.J.C. said, about cross-examination in relation to prior convictions:

> …In deciding whether or not to believe someone who takes the stand, the jury will quite naturally take a variety of factors into account. They will observe the demeanour of the witness as he or she testifies, the witness' appearance, tone of voice, and general manner. Similarly, the jury will take into account any information it has relating to the witness' habits or mode of life. There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, but it is a fact which a jury might take into account in assessing credibility. (*Borden, para.171 citing R. v. Corbett, [1988] S.C.J No. 40*)

[16] The *Borden* Court also referenced a quote from an American case that includes this statement about the broad application that criminality has to the question of credibility: "… Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey, as in the case at bar, though the violations are not concerned solely with crimes involving "dishonesty and false statement." (*State v. Duke*, 123 A.2d 745 (N.H.

1956), at p. 746; quoted with approval in *State v. Ruzicka*, 570 P.2d 1208 (Wash. 1977), at p. 1212) (*Borden, para. 171, citing R. v. Corbett*)

[17] These principles illustrate how significant prior criminality is as a focus in the cross-examination of a Crown witness whose credibility is central to the case against the accused. And *Borden* also reminds us that:

> **114** Cross-examination is of fundamental importance. It is recognized as a component of the right to make full answer and defence, protected by ss. 7 and 11(d) of the *Charter*. (See *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Lyttle*, [2004] 1 S.C.R. 193).

*Assessing Whether the Bad Character Door Has Been Opened*

[18] In *M.A.* the point is made that the question of whether a cross-examination has put an accused's character in issue has to be assessed by considering the cross-examination as a whole. (*para. 72*)

[19] With this in mind, and in order to provide a complete context, I have reviewed both Mr. Giacomantonio's direct examination and Mr. Burrill's cross-examination of M.B.

*The Direct Examination of M.B.*

[20] M.B. turned 16 in August 2016. He has a lengthy criminal record of 23 prior convictions. He identifies as a member of a "group" – on cross-examination he rejected the term "gang" – called the Jack Boys. He did not specifically identify N.W. as a Jack Boys member. However, when asked if N.W. was a member of the Jack Boys in the summer of 2015, M.B. said he was not a member "then" and neither was L.C.

[21] On March 29, M.B. was in the company of L.D. and J.C., both of whom he identified as Jack Boys members, and L.C. and N.W.

[22] In the hours before J.C. was shot, M.B. and three other young men drove around in a stolen car, planned but failed to effectively execute various robberies, and smoked marijuana. M.B. says that he and his associates were joined by N.W. around 3 a.m. M.B. alleges that N.W. suggested killing someone in an apartment on Lakecrest Drive. M.B. testified that L.C. fired into the apartment N.W. identified with N.W. assisting him. M.B. says the shot was fired from a sawed-off 30-30 rifle which he brought along and which he says was later used by N.W. to kill J.C.

[23] M.B. testified that N.W. took a disliking to J.C. and, after J.C. decided to leave the group to go home, began talking about wanting to kill him. M.B. says he facilitated the killing by driving N.W. to where J.C. was walking so that N.W. could shoot him, which, according to M.B., he did. M.B. testified in considerable detail about witnessing the shooting.

[24] M.B. gave evidence about the sawed-off 30-30 rifle, identifying it in court and testifying that he had obtained it in a robbery about a month to a month and a half before the murder.

[25] It was M.B.'s evidence that N.W. was in a murderous frame of mind on March 29. M.B. testified that N.W. identified the target for the Lakecrest Drive shooting. M.B. says that when L.C., who fired the shot into the Lakecrest Drive apartment, was later agitated about possibly having shot someone, N.W. told him to shut up and stop worrying.

[26] M.B. testified that N.W. referred to the murder of J.C. on April 1 when he and M.B. were planning to rob someone of a gun at a meeting N.W. had arranged.

M.B. says N.W. told him that now he had killed someone, M.B. should too – "I caught a body, you got to get one too."

[27] The gun-robbery was successful. According to M.B. it was facilitated with the sawed-off rifle. The shotgun he and N.W. got in the robbery was stashed under M.B.'s mattress. He stowed the rifle there too at N.W.'s request because there was a police presence in the neighbourhood.

*The Cross-Examination of M.B.*

[28] Mr. Burrill conducted the cross-examination of M.B. He explored in considerable detail M.B.'s criminal record and the details of the offences for which he has been convicted. Other areas of cross-examination were:

1) Details about the Jack Boys. What the members do ("We rob people" was M.B.'s response), was there a leader, was J.C. a member (he was), whose idea it was for J.C. to join (M.B. doesn't recall), whether M.B. had opposed J.C. joining the Jack Boys (he didn't), who were members in the summer of 2015 (there was an incident in July 2015 in which M.B. felt J.C. had not backed him up), whether N.W. was a member of the Jack Boys in the summer of 2015 (no), how old were the members of the Jack Boys (M.B. was the youngest), where and why the Jack Boys did their robberies, whether they had weapons (yes), and whether they used guns (yes).

2) Details about M.B.'s indifference to court conditions – curfews, house arrest, conditions in probation orders, and weapons prohibitions.

3) Details about the March 6, 2016, shooting in Clayton Park that gave rise to charges M.B. has not yet entered a plea to. Mr. Burrill's

questions of M.B. about the March 6 shooting included: whether the rifle he used was the same one that he had had with him on March 29 when he and N.W. and the others were driving around in the stolen car (it was), whether this was a Jack Boys enterprise (it wasn't – M.B. was with a different group for the March 6 incident.)

4) M.B.'s guilty plea to second-degree murder in the death of J.C. M.B. testified that he expects to get a youth sentence and knows that the adult sentence for a young person convicted of murder is life with 7 to 10 years' parole ineligibility.

5) M.B.'s relationship with J.C. and his feelings toward him. (It bothered M.B. and made him angry that J.C. "dissed some of my people, said we were no good at making money.") M.B. said he wanted to get even but a more senior member of the Jack Boys told him to let it go.

6) M.B.'s relationship with L.D. (L.D. was a member of the Jack Boys and used to be M.B.'s best friend but isn't anymore.)

7) M.B.'s creation of a profile on Facebook and the images he posted of himself.

8) The Facebook Messenger messages M.B. received after J.C. was killed and how he lied in his responses to inquiries about what he knew. (He said he was home all night and knew nothing.) In this context, M.B. acknowledged his loyalty at that time to L.D. and how he "was family to me."

9) M.B.'s lies to, and actively misleading of, the police investigating the shooting of J.C. In this context, M.B. agreed with Mr. Burrill that if he

had admitted to police that he had had possession of the rifle before March 31, the date he told police he had bought it and the shotgun, it would have implicated him in the March 6 and March 29 shootings. M.B. agreed he lied to the police to protect himself.

10) Details about M.B.'s May 6, 2016, interview by police investigators and, after being provided with the phone number for the major unsolved crimes rewards program, his call to the program to inquire about the reward.

11) Details about M.B. giving a "without prejudice" statement to police and naming N.W. as J.C.'s killer. M.B. was also cross-examined by Mr. Burrill about giving police a video-taped statement and agreeing to work as an agent to gather incriminating information about the young men he was with on the night of March 29, including N.W.

12) Details about the events of March 29, 2016, including M.B. retaining primary control of the rifle during the night, the Lakecrest shooting M.B. says was N.W.'s idea, and the lack of respect he felt for J.C. and L.C. Mr. Burrill challenged M.B.'s claim that he was able to see the shooting of J.C. and put it to him that M.B. was able to describe what happened not because he witnessed the shooting but because he did the shooting. M.B. denied this accusation.

13) M.B. was asked to identify and did identify photographs of his bedroom at […Drive] and items found in it by police such as the keys for the stolen car, shotgun shells, the backpack he had carried the rifle in on March 29, the cartridge from the Lakecrest shooting, and bullets for the rifle.

14) Mr. Burrill's final question on cross-examination was about the sawed-off 30-30 rifle and whether M.B. could have got access to the gun anytime he wanted (he said he could have) and whether he would have been prepared to use it had there been a confrontation with J.C.'s brother, whose March 31 Facebook messages had had an accusatory tone. M.B. said he would have. The messages are in Exhibit 30 and include, for example, three successive messages to M.B. from someone identifying himself as J.C.'s brother: "I'll find who pulled the trigger on my brother my fam aint letting this down whoever this is won't see daylight (March 31, 2016 8:48:00 a.m.); "Your getting some defensive for not knowing anything" (March 31, 2016 8:48:27 a.m.); "I just wanna know who the fuck shot my brother" (March 31, 2016 8:50:18 a.m.)

*The Crown's Position*

[29] Mr. Giacomantonio has identified a constellation of subjects explored in cross-examination that he says open the door to asking M.B., on re-examination, about N.W.'s character. These subject areas and the Crown's submissions in relation to them are:

1) The March 6, 2016, shooting in Clayton Park. The cross-examination of M.B. in relation to this incident raises propensity because Mr. Burrill elicited from M.B. the evidence that the same 30-30 rifle was used to kill J.C. just three weeks later. M.B. testified on cross-examination that this was not a Jack Boys "job" which amplifies the criminality to be inferred about M.B. It leads to the inference that M.B. is capable of shooting someone.

2) The Jack Boys. Mr. Giacomantonio acknowledged in his oral submissions that the Jack Boys was a legitimate area of inquiry on cross-examination. However he says the evidence about the use of guns in the robberies committed by the Jack Boys goes to propensity – that M.B. as a member of the Jack Boys has been shown to have no problem using a firearm.

3) The cross-examination about M.B.'s indifference about court orders and how he wasn't deterred by a curfew from going out and doing robberies with weapons.

4) M.B.'s lifestyle as illustrated by his Facebook profiles showing drug use, possession of a firearm and hostility to police. (The "Fuck the Police" posting.)

5) The evidence elicited on cross-examination that M.B. maintained control of the 30-30 rifle after J.C. was killed and was prepared to use it on J.C.'s brother if he came to confront him.

[30] Mr. Giacomantonio has indicated that he is seeking to explore through M.B. the following aspects of N.W.'s character:

1) His involvement with the Jack Boys;

2) Whether M.B. and N.W., in addition to the robbery on April 1, 2016, did other robberies with or without guns;

3) Whether M.B. has been with N.W. on any other occasions when N.W. was in possession of a firearm; and

4) A full exploration of the April 1, 2016, robbery.

[31] Mr. Giacomantonio submits that his re-examination of M.B. on these areas is relevant and appropriate because:

1) It will "neutralize propensity evidence against M.B." that has been elicited by the Defence;

2) It will explain the motivation to kill someone so as to enhance reputation;

3) It will explain the role of the criminal subculture in the commission of a "capricious" crime;

4) It will establish that N.W. and not just M.B. uses guns instrumentally;

5) It will establish that N.W. and not just M.B. is involved in a criminal lifestyle.

*Analysis*

[32] M.B. is a critical witness for the Crown and therefore, for the Defence. His credibility is central to the Crown's case against N.W. of first-degree murder. He provides evidence on every element of the offence. And he does so as an unsavoury witness whose evidence must be approached with the utmost caution.

[33] Mr. Burrill has sought through his cross-examination to attack M.B.'s credibility on a variety of fronts. It is not enough in these circumstances to simply put to the unsavoury Crown witness the proposition that he is in fact the perpetrator not the accused and get, as Mr. Burrill did in this case, a flat denial. Our Court of Appeal in *Borden* talks about the purpose of cross-examination being so much more than just asking,

> **115**….random questions or hav[ing] a witness repeat what they said in direct examination. Rather, it is to weaken the evidence given on direct, support the cross-examiner's case or to discredit a witness…

[34] Mr. Burrill had to advance an attack on a witness such as M.B. from various directions. Attacking M.B.'s credibility by excavating his criminality, drawing out his disregard for his legal and moral obligations and showing him to be committed to an anti-social lifestyle that does not value truth-telling and honesty is legitimate and necessary in exercising the right of a full answer and defence.

[35] I have carefully considered Mr. Burrill's cross-examination. It is essential to consider it as a whole and not in pieces. Isolating fragments of a cross-examination can lead to a distortion of its overall purpose and thrust. In this case, I find the overall purpose and thrust of Mr. Burrill's cross-examination was aimed squarely at M.B.'s credibility. It was not intended to invite an inference that M.B.'s is the type of person who would be likely to kill someone, it was directed at raising a doubt about M.B.'s claim that N.W. pulled the trigger on J.C. And if not N.W., then who? The Defence has put it plainly before me that, in fact, it was M.B. who fired the bullets into J.C. Mr. Burrill put that to M.B. directly: the reason he could describe what the Defence says was too dark to see was because it was him who did what he described.

[36] I do not find that Mr. Burrill's questioning of M.B. about the March 6 shooting was intended to invite propensity reasoning. Mr. Burrill later in his cross-examination ties credibility back to that shooting. Having established that M.B. used the 30-30 rifle on March 6 that he says was used to kill J.C. on March 29, Mr. Burrill put it to M.B. that the reason he told the police on April 1 that he had just

acquired the gun – a lie – was because the truth would have implicated him in both crimes. It is another example, drawn out by Mr. Burrill, of M.B.'s willingness to lie to protect himself. It is clear that will be a central theme in N.W.'s full answer and defence to the charge.

[37] Mr. Burrill's cross-examination of M.B. sought to serve a defence that says: "It was not me that shot and killed J.C., it was M.B. and he is lying when he says it wasn't." I find that Mr. Burrill's cross-examination was not seeking to cast M.B. as the type of person who would kill. Mr. Burrill's cross-examination was seeking to establish that M.B. is in fact the person who killed. This is not like *Sipes* where defence counsel was described as having stated that one of the reasons he brought out the witness's violent disposition "was to give the jury an impression of the kind of person [the witness] is." (*para. 46*)

[38] Having reviewed Mr. Burrill's cross-examination in its entirety and as a whole I am satisfied it has not opened the door to N.W.'s character. I find the cross-examination meshes together a multi-pronged attack on M.B.'s credibility. There was only question that I thought fell outside that coordinated attack and that, ironically, was Mr. Burrill's final question when he asked M.B. if he would have used the 30-30 rifle in the event J.C.'s brother had come to confront him. That question did stray toward portraying M.B. as the type of person who would shoot someone. But I find that question to have been an outlier. It does not characterize the cross-examination and cannot pry open the bad character door in relation to N.W. It does illustrate that Defence counsel have to be careful to stay on the credibility-attack side of the cross-examination line.

[39] Finally, I will note that there is no distortion or unfairness operating against the Crown as a result of Mr. Burrill's cross-examination of M.B. The evidence

obtained from M.B. includes evidence about N.W.'s participation in the activities of March 29 involving the stolen car and the shooting at Lakecrest, and the robbery of the shotgun on April 1. My point is that direct examination brought out evidence that N.W. directed a shooting into the Lakecrest apartment just hours before J.C. was killed and cross-examination brought out evidence that M.B. had shot into an apartment on March 6.

[40] I note that in *Sipes* the Court had this to say about bad character evidence having already been received in evidence: "…the fact there is already evidence of an accused's bad character before the jury cannot operate as an automatic bar to admitting further bad character evidence. Rather, it is a factor to consider when determining the probative value and prejudicial effect of admitting further evidence." (*para. 35*) I point this passage out merely to note that the fact that bad character evidence has been adduced in relation to the accused is not determinative of whether more bad character evidence should be allowed, but it is not irrelevant.

*Conclusion*

[41] I do not find there has been any unfairness occasioned to the Crown by Mr. Burrill's cross-examination of M.B. This is not a case where a re-balancing to correct a misleading impression is required. Mr. Burrill's cross-examination has not tripped the wire of bad character evidence. I will not permit the re-examination of M.B. to explore N.W.'s character. The Crown's application is dismissed.