**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** R. v. Bennett, 2002 NSSC 271

**Date:** 20021210
**Docket:** CR 114851
**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

Christopher Bennett

**Restriction on publication:** Limited publication on reproduction of trial evidence.

**Judge:** The Honourable Justice A. David MacAdam

**Heard:** November 25 to December 10, 2002 in Sydney, Nova Scotia

**Written Decision:** December 20, 2002

**Counsel:** **E. Ann Marie MacInnes** and
**John W. MacDonald** for the Crown

**Arthur J. Mollon, Q.C.** and
**Allan F. Nicholson** for the accused

**By the Court**:

[1] The accused, Christopher Bennett, was on trial for second degree murder. At the trial, following the close of the Crown's case, the accused testified in his defence. He said, although acknowledging he was present, one of the Crown witnesses, who has also been charged with second degree murder in the victim's death, had done the killing. He then described his activities and conduct during the remainder of the day following the death of the victim until his arrest in the early evening. The Crown chose not to cross-examine him.

[2] Defence counsel submits the Crown is not now permitted to challenge the version of events testified to by the accused, citing *Browne v. Dunn* (1893), 6 R. 67 at pp. 76-77:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

[3] In her closing address, Crown counsel suggested to the jury a number of inconsistencies in the evidence of Mr. Bennett saying his evidence is contradicted by the evidence of other civilian and police witnesses as well as the other accused person.

[4] Defence counsel's submission is that because of her failure to challenge the accused on cross-examination, the Crown is effectively prohibited from doing so during her closing address. Defence submits the address amounted to the cross-examination the Crown had failed to conduct while the accused was on the stand. Defence says, pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms*, there is a remedial jurisdiction to redress this unfairness in the trial process, referencing ss. 7 and 11(d).

[5] In the majority of cases referenced by Defence counsel, the issue of failure to cross-examine arose in the context of a Defence counsel not putting to a complainant the accused's version of events and then calling evidence to support the contrary version. In most cases, applying *Browne v. Dunn, supra,* and subsequent supporting authorities, it was held that failure to put the accused's version to the complainant made the tendered evidence challenging their testimony inadmissible or resulted in a declaration of a mis-trial or entry of a not guilty verdict when testimony challenging the evidence was improperly admitted.

[6] On the other hand, Justice Oppal, in *R. v. Christensen*, [2001], B.C.J. No. 1697, set aside a conviction where the trial judge had convicted the accused of having the care and control of a motor vehicle while his ability to do so was impaired by alcohol or a drug contrary to s.253(a) of the *Criminal Code* and where the accused had not been cross-examined on his evidence contradicting the Crown's evidence. Justice Oppal accepted the appellant's argument:

...that since his evidence was completely unchallenged, it was improper for the trial judge to reject his evidence, and that his evidence, together with the evidence of Mr. Samilla and the testimony of the remaining defence witnesses, created a reasonable doubt with respect to his guilt."

[7] He referred to the judgment of Stewart, J. in *R. v. Tyrell*, 20 February 1991, C.C. 90194 Vancouver Registry (B.C.S.C.) at paras. 21 and 22:

> ... It is common ground between counsel that at no point during the cross-examination of the accused was a pointed question put to him to the effect that even looking upon the times he had given as mere estimates, there was a 'missing' (as I put it) hour and just what did he have to say about that? the Crown never cross-examined the accused in such a way as to give him an opportunity to wrestle with the problem and, perhaps, overcome it. The Crown just did not do it.
>
> Putting the circumstances of this particular case and the proceedings in this particular trial, together with the Supreme Court of Canada's observations in *Palmer v. The Queen* set out above, the test to be applied by me as the appellate court as set out in *Harper v. The Queen* (supra), and *Regina v. Chin* (supra), I am satisfied that in convicting this accused the trial court judge either lost sight of the fact that there had been no pointed cross-examination of the "missing hour" or was aware of the absence of pointed cross-examination on that point but failed to take into account the significance of the fact that there was no specific pointed cross-examination on that problem. And in the "circumstances of (this particular) case (Palmer v. The Queen (supra) page 210, line 23), absent pointed cross-examination which gave the accused a chance to wrestle with the problem, it would be wrong to ground a decision to reject the accused's evidence on the question of the "missing hour"....

[8] Justice Oppal, at para. 21 in *R. v. Christensen, supra,* then continued:

> It is important to note that the criminal trial process operates in an adversarial system, wherein the prosecution and the defence more often than not produce contradictory evidence. It has often been said that cross-examination is the most effect *(sic)* tool to test the truthfulness or the reliability of contradictory evidence. Thus, cross-examination is really at the heart of the adversarial system. In some cases counsel for tactical reasons may refrain from cross-examining an adverse witness. In those circumstances counsel must live with the consequences."

[9] Also cited by Justice Oppal was the decision of the British Columbia Court of Appeal in *R. v. Dyck* (1970), 2 C.C.C. (2d) 283. Justice Oppal, at para. 17, said:

> That case states that where counsel in cross-examination intends to contradict or challenge the credibility of an opposing witness by calling independent evidence, that witness must be given notice of that contradictory evidence so that the witness may have an opportunity to explain his or her testimony. The facts in that

case are worth noting. The accused was charged with rape. The complainant testified that the accused had forcible intercourse with her. Defence counsel cross-examined the complainant on her character and reputation but did not challenge her on her version of the events that led to the charge. The accused then testified that the intercourse was by consent. The defence of consent was never put to the complainant. Robertson, J.A. in approving Lord Herschell's statement in Browne, supra, and in relying on Phipson on Evidence (10th ed.), made the following comments:

> ... the cross-examination of the complainant, ... was confined almost entirely to the matter of her character and reputation, and counsel for the accused made no attempt to shake the complainant on the details of her evidence and made no suggestions to her with respect to the version of the events of May 30th, that the accused ultimately gave in evidence. This omission was of course, tantamount to an acceptance of the complainant's version and was wrong, if the defence intended to call evidence to contradict the complainant. The practice is stated thus in Phipson on Evidence, [supra] at para. 1541:
>
> Notice to witness: Omission to cross-examine. As a rule a party should be put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g., if the witness has deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one. If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witnesses' account.
>
> Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all such cases in which it is proposed to impeach the witnesses' credit. Such questions are rendered by statute a condition precedent of proof of a previous contradictory statement by the witness. Failure to cross-examine, however, will not always amount to an acceptance of the witness' testimony, e.g., if the witness had had notice to the contrary beforehand, or the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, e.g., to save time..

[10] It is noteworthy that in the foregoing excerpt the author acknowledges that "failure to cross-examine, however, will not always amount to an

acceptance of the witnesses' testimony, e.g., if the witness had had notice to the contrary before- hand...".

[11] In his reasons, Justice Oppal, at para. 13 and 14, in *R. v. Christensen*, *supra,* cited the observation by Lord Herschell, L.C. at pp.70-71 in *Browne v. Dunn*, *supra*:

> ... it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit...
>
> ... Having regard to the conduct of the case, it was not open to the learned counsel to ask the jury to disbelieve all their stories, and to come to the conclusion that nothing of the kind had passed....

[12] He then acknowledges that Lord Morris, at p.79, "appeared to adopt a somewhat more flexible or even contradictory approach" when he stated:

> My Lords, there is another point upon which I wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit....I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness' credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit.

[13] He then continued at para. 15:

> The English courts have generally followed the rule set out by Lord Herschell. In *R. v. Hart*, (1932), 23 C.R. App. R. 203 (C.A.), the Court held that if the prosecution intends to ask the jury to disbelieve a crucial part of the case, it is right and proper that the witness should be challenged on that evidence (see p.207). In that case, since no questions were asked in cross-examination of the accused, the Court of Appeal allowed the appeal and set aside the conviction.

[14] Justice Oppal citing *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193 observes that the rule in Canada "is somewhat more flexible". In *Palmer, supra,* at p. 210, J. McIntyre, in the judgment of the court said he was "in full agreement" with the words used by Justice McFarlane of the British Columbia Court of Appeal:

> The second ground of appeal argued was that the trial judge should have found that the evidence of Douglas Palmer raised at least a reasonable doubt of his guilt. With particular reference to the three occasions to which I have just referred, it

was said that Palmer's evidence was not shaken in cross-examination and it is suggested he was not specifically questioned about one or two of them. Reference was made to *Browne v. Dunn* (1894) The Reports 67, and to *R. v. Hart* (1932), 23 Cr. App. R. 202. I respectfully agree with the observation of Lord Morris in the former case at p.79:

> I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witnesses' credit, that you should take him through the story which he had told, giving him notice by questions that you impeached his credit.

In my opinion, the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a mater of weight to be decided by the tribunal of fact. vide: Sam v. Canadian Pacific Limited (1976) 63 D.L.R. (3d) 294, and cases cited there by Robertson, J.A., at pp. 315-7. In the present case Douglas Palmer was cross-examined extensively. It seems to me the circumstances are such that it must have been foreseen his credit would be attacked if he testified to his innocence. In any event, this was made plain when he was cross-examined. The trial Judge gave a careful explanation for his acceptance of the story of Ford and rejecting that of Douglas Palmer. I cannot give effect to this ground of appeal.

[15] Justice Oppal acknowledged the British Columbia Court of Appeal in *R. v. MacKinnon* (1992), 72 C.C.C. (3d) 113 adopted the flexible approach recognized in *Palmer*, *supra*. In *MacKinnon*, the court distinguished the *Dyck* decision by stating there had been no cross-examination of the complainant, while in *MacKinnon*, there was some. In applying the reasoning in *Palmer*, *supra*, the court held at p. 120:

> ... there is no absolute or general rule with respect to the significance of a failure of defence counsel to put to a complainant in a case such as this the version of what happened as testified to by the accused. It is a matter of weight to be decided by the trier of fact.

[16] Another authority referenced in *R. v. Christenson*, *supra*, is *R. v. Karlsen*, [1994] B.C.J. No. 116 (B.C.C.A.) where the court concluded a trial judge erred, when apparently he was of the opinion he was obliged, as a matter of law, to weigh the failure of the defence to cross-examine the complainant, and ordered a new trial.

[17] Justice Southin, dissenting in part, observed at para. 20:

> It is not fair to a witness to adduce evidence which casts doubt upon his veracity when he has not been given an opportunity to deal with that evidence.

[18] Even in the circumstances where defence counsel has not cross-examined a complainant on evidence intended to be later contradicted by evidence on behalf of the defendant, the flexible approach outlined in *Palmer* has not always precluded the defendant from

introducing the contrary evidence, although entitling the complainant to be recalled on rebuttal.

[19] In *R. v. MacDonald*, [1989] N.S.J. No. 144,(N.S.C.A.), leave to appeal to the Supreme Court of Canada dismissed, (1989), 94 N.S.R.(2d) 55, the trial judge had curtailed cross-examination of a police officer as to the nature of the sex act described by the complainant in two statements she had provided to the police. Justice Macdonald, in delivering the reasons of the Court, and referring among other authorities to the excerpts from Phipson on Evidence, op. Cit. and *Palmer and Palmer v. The Queen*, *supra*, previously noted, at p. 15, stated:

> Normally if it is sought to impeach a witness's credibility by the introduction of a prior inconsistent statement, then such should normally be put to the witness in cross-examination.

[20] Although finding that authority existed for the ruling by the trial judge, he also stated he personally favoured the approach outlined in Canadian Criminal Evidence (second edition) by P. K. McWilliams, at p. 1049:

> . . . That there will be contradictions as between the accused and the complainant is inherent in a criminal trial. This is not to say that defence counsel should not endeavour to cross-examine a complainant or other Crown witness fully as to any statement to which he is briefed by the accused. If defence counsel fails to cross-examine in such a situation, the preferable course would be to permit the prosecution to recall the complainant in rebuttal as to the alleged statement made by her.

[21] Admittedly, in both *R. v. Tyrell, supra,* and *R. v. Christenson, supra,* the failure of the Crown to cross-examine the accused or, at least in *R. v. Tyrell, supra,* to cross-examine on an issue relating to time estimates he had given, led to a determination the accused's conviction could not stand.

[22] On the other hand, the court in *R. v. Khuc* (2000), 142 C.C.C. 276 (B.C.C.A.), at paras. 43-45, commented:

> At trial, there were a number of issues affecting the appellant Tran, including her identification and her ability to speak English. After leading the evidence against Ms. Tran, Crown counsel did not cross-examine her. He also declined to cross-examine some of her witnesses. In his address to the jury, he invited them to disbelieve her evidence, and explained that he did not cross-examine her because there was no point asking her if she was going to tell the truth. He stated that she said she was not present on the occasion in question and he added: '...What am I going to say to her?' I suggest to you, you were there on the 28th and she's going to say, 'No, I wasn't'. I'm going to say, 'Yes, you were'. She's going to say, 'No, I wasn't'. How is that going to help you in assessing her credibility?

> Crown counsel's point is well taken. There can be no doubt that the general rule is that counsel must confront a witness with any new material he or she intends to adduce or rely on after the witness has left the box. However, the rule does not go so far as to require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she is very unlikely to change. Judges tell juries that they may accept or disbelieve all or any part of the evidence of a witness. That instruction does not depend upon opposing counsel asking unnecessary questions. With respect, I believe the law is correctly stated in the case of *R. v. Mete*, [1973], 3 W.W.R. 709 (B.C.C.A.), particularly at p.713. I do not believe the rule is any different if the evidence on which there is no cross-examination directly contradicts the evidence of the Crown or merely supports a fact inconsistent with the Crown's theory of the case. Counsel who does not cross-examine takes the chance that the evidence will be accepted; but rather than embark upon a futile cross-examination, counsel is entitled, as Crown counsel did in the case, to rely on the judgment of the jury as to what evidence it will accept.
>
> I would not give effect to this submission.

[23] Mr. Bennett, by the time he testified knew the evidence offered by the Crown. Unlike in many of the authorities cited this is not a circumstance of the Crown failing to challenge his version of events where it intended to call evidence to contradict his version. The Crown 's contradictory evidence was called in advance of his testifying. He has not been subjected to evidence being adduced that casts doubt on his veracity or challenged his version of events without his having been given the opportunity to deal with that evidence. He, and his counsel, knew the version of events together with the supporting evidence being advanced by the Crown, before Mr. Bennett ever took the witness box. There were no surprises, except perhaps the obvious surprise to Defence counsel when Crown counsel announced she had no questions for Mr. Bennett.

[24] Defence counsel says the Crown has a duty to cross-examine the accused or otherwise is to be deemed to have accepted his version of events. Crown says the challenge to his version is the evidence of the Crown witnesses who testified prior to the accused.

[25] No authority has been cited suggesting any onus on the Crown to present the accused's evidence. If that be the case, then the adversary system has indeed undergone a marked transformation. The Crown would, in addition to presenting its own evidence, have to ensure it canvasses with an accused person all his evidence that is at variance with any of the evidence of the Crown witnesses. That is not, in my view, the obligation as outlined by the Supreme Court of Canada in *Palmer and Palmer v. The Queen*, *supra,* nor in accordance with the principles outlined by the British Columbia Court of Appeal in *R. v. Khuc, supra*.

[26] It was up to the accused, having taken the witness box, to testify in such detail he wished, as to his version of events and to respond, again in as much detail as he wished, to the evidence presented by the Crown. If, for any reason, he failed to testify in sufficient

detail as to his version of events or in response to the evidence presented by the Crown, that was his failure, not any failure on the part of the Crown.

[27] The evidence having been concluded, each counsel was entitled to, and in fact they did, address the jury as the trier of fact, and to suggest what they surmised to be inconsistencies in the evidence of the principal witness called by the opposing party. They put to the jury, as they were entitled to, for their consideration in assessing the credibility of the key witnesses in the trial, possible inconsistencies in the evidence of the accused (in the case of the Crown) and the evidence of the co-accused (in the case of the defence).

[28] The motion for a directed verdict of not guilty is denied.

[29] Personal criticism, by one of the counsel on behalf of the defendant, of Crown counsel and her decision not to cross-examine the accused and to have then addressed the jury suggesting possible inconsistencies in his evidence, was both unwarranted and uncalled for. I have absolutely no criticism of the way in which Crown Counsel conducted herself. Crown Counsel, in my opinion, acted professionally throughout this trial.

[30] Following oral release of this decision and reasons, the jury returned a verdict of "not guilty" on the charge of second degree murder against the accused.

MacAdam, J.