SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Clarke, 2009 NSSC 146

Date: 20090407
Docket: CRK282550
Registry: Kentville

Between:

Her Majesty the Queen

v.

William Clarke

Judge:	The Honourable Justice Felix A. Cacchione
Heard:	April 7, 2009, in Kentville, Nova Scotia
Written Release of Oral Decision:	April 30, 2009
Counsel:	Ingrid Brodie & Diane McGraw, for the Crown Robert Stewart, Q.C., for the accused

By the Court:

[1] This *voir dire* was held at the request of the defence to determine the admissibility of certain items found, but not seized, at the residence of the deceased. The only evidence presented on the *voir dire* was that of Constable Kellock.

[2] Mr. Coleman's residence was searched by the police on December 8, 2006 with the consent of the Coleman family. In that residence Constable Kellock of the RCMP noted three or four DVD's whose covers showed nude men or in the officer's words, portrayed homosexuality. Also seen by Constable Kellock, but not seized, was a book or booklet with photos of young boys. The young boys were naked and the setting for the photos was nature. These photos did not depict the genitalia but rather were taken from the rear, showing the buttocks of the young men. Constable Kellock a peace officer for 28 years with the RCMP did not deem the booklet to be child pornography. The officer did not view the DVD's. No evidence was presented that the DVD covers seen by Constable Kellock even contained DVD's. The officer could not testify as to how these

items came to be in Mr. Coleman's residence or that they even belonged to Mr. Coleman.

[3] No further evidence was taken on the *voir dire*. Mr. Stewart on behalf of the accused in arguing for the admission of this evidence stated that the present case is not one of self-defence. His position is that while this evidence may reflect on the character of the deceased it is relevant evidence because it may shed light on the probability that the deceased acted in a certain way to comments allegedly made to him by the accused. It is submitted that this evidence would allow for an inference to be drawn concerning the deceased's reaction to being called a derogatory name by the accused referencing his sexuality. As stated previously Constable Kellock's evidence was the only evidence called on this *voir dire*. The accused did not testify. There is no evidence that the accused called the deceased a derogatory name or of the deceased's reaction if any to being called such a name. The defence argues that this evidence is relevant and ought to be admitted.

[4] The Crown's position is that the evidence is irrelevant and inadmissible. It argues that the deceased's sexuality is not an issue at trial and that this evidence has no probative value in relation to any issue which the jury has to determine.

[5] The evidence in question is in my opinion probative of nothing in this case. The deceased's sexual orientation is not in issue nor should it be in issue at trial. Even if there was evidence before me that the deceased reacted violently to being called a derogatory name by the accused, the proposed evidence could not reasonably support an inference of the deceased's disposition for violence when being called such a name. As stated by Trafford J. In R. v. Smith April 27, 2007 - 2007 Carswell Ont. 4158 citing the Ont. C.A. in R. v. B(L) (1997), 116 C.C.C. (3d) 481. "In determining the probative value of the evidence the court must consider 'the strength of the evidence' to the extent to which it supports the inferences sought to be drawn from it and the extent to which the matters it tends to prove are at issue in the proceedings."

[6] In the present case the evidence sought to be admitted is weak. There is no evidence that DVD's were in fact in the DVD cases seen by the police, nor is there evidence of the content of the DVD should any have been in the cases. The inferences sought to be drawn by the accused that the deceased was a homosexual who reacted violently when being called a name by the accused are not supported by the evidence which is the subject matter of this *voir dire*.

[7] To allow this evidence to go before the jury would in my view increase the risk that the jury would engage in impermissible propensity reasoning such as that the deceased was a homosexual and as such he would react violently to being labelled as one.

[8] The proffered evidence does not reasonably support an inference that because the deceased may have been gay he therefore had a disposition for violence or aggression and was on the occasion the aggressor.

[9] As I have stated previously this evidence is not probative of an issue at trial. The evidence is also highly prejudicial. There is no question that the probative value, if any, of this evidence is far outweighed by its prejudicial effect. There is a real concern that this evidence will not only arouse the jury's emotions of prejudice, hostility or sympathy but also create a side issue which will distract the jury from the main issues in the case.

[10] Not allowing this evidence to be lead will avoid the risk that the jury will unduly focus on the character or disposition of the deceased when there is no

probative evidence of his character or disposition concerning anger and aggressions.

[11] I am mindful that defence evidence ought not to be lightly excluded however in the present case the proposed evidence does nothing to advance the inquiry and is highly prejudicial.

[12] Accordingly the evidence concerning the DVD's and book found in the deceased's apartment is not admissible and will not be referred to.

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Cacchione, J.