COURT OF APPEAL FOR YUKON TERRITORY

Citation: ***R. v. Atlin***,
2003 YKCA 0005

Date: 20030501
Docket: YU0481

Between:

Regina

Respondent

And

Earl Joseph Atlin

Appellant

BAN ON PUBLICATION s.486(3) C.C.C.

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine

Oral Reasons for Judgment

K.M. Eldred — Counsel for the Appellant

M.W. Cozens — Counsel for the (Crown) Respondent

Place and Date: Vancouver, British Columbia
May 1, 2003

[1] **HALL, J.A.**: This is a conviction appeal in which Mr. Atlin appeals against his conviction for sexual assault of S.J. (the complainant) pronounced on May 8, 2002, after a trial before Hudson J. and a jury at Whitehorse, Yukon. The incidents were alleged to have occurred between December 1986 and January 1988.

[2] The appellant argues that the learned trial judge erred in ruling admissible certain similar fact evidence of one, M.J., and it is additionally argued that the trial judge erred in the way he instructed the jury concerning the use of the similar fact evidence.

[3] The appellant was born in the year 1955 and has resided all his life in either the Carcross area or the Whitehorse area. The complainant, S.J., who is not related to the appellant, was born in 1977. The appellant and the complainant's father were known to each other as youths in Carcross and were friends as adults. The father of S.J., who testified at the trial, said that he and the appellant socialized together from time to time at each other's residence and at times drank together. The individual, who gave similar fact evidence, M.J., was born in 1962 and was thus about seven years younger than the appellant. He was the son of the eldest sister of the appellant and therefore a

nephew of the appellant. He testified that he knew S.J. but there was a considerable age gap between them. He recalled that S.J., the complainant, used to play with his youngest sister. M.J. was asked if he had any discussion with S.J. about anything of a sexual nature involving the appellant and replied in the negative saying that he had been living and working out of the Territory since 1981 or 1982. He had never complained about these events to anyone and he only disclosed these matters to the police when he was contacted by a police officer in November or December of 2001. The complainant S.J. said that as a child he lived some of the time with his mother in the Whitehorse area, on occasion he was with his father in the Carcross area and later he resided with his grandparents in the Tagish area. At the time that S.J. disclosed the assaults for the first time he was living in one area of Whitehorse, Takhini, and the appellant was, he said, residing in the Riverdale area of Whitehorse.

[4] The Crown called a number of witnesses including the father of S.J. and the mother of M.J. to establish that there would have been opportunities for the incidents alleged by both men to have occurred between themselves and the appellant. The Crown also adduced evidence from women whom

the appellant had lived with at times during the 1980s to establish where he was residing at certain relevant times.

[5] A *voir dire* was held by Hudson J. to determine the admissibility of the evidence proposed to be adduced from M.J. concerning the similar acts of sexual assault said to have occurred in the period of approximately.1972 to 1975. This was when M.J. was aged about 10 to 14. He described a number of acts of sexual molestation by the appellant involving fondling and masturbation. He also said on one occasion the appellant allegedly dressed him up in pantyhose and assaulted him. The evidence of S.J. on the *voir dire* was adduced by consent of counsel from the transcript of evidence he had given at the preliminary inquiry. S.J. had testified to two incidents involving fondling and masturbation and attempted anal intercourse by the appellant. M.J. had also mentioned attempted anal sex. Both men suggested that at times the appellant would be under the influence of alcohol, though as I took the evidence of M.J, he said that he was usually sober.

[6] The trial judge ultimately ruled the evidence admissible after hearing from a number of witnesses including the individual M.J. The grandmother of M.J. and the mother of M.J. and the appellant.

[7] The judge ruled that the evidence was admissible and allowed it to go before the jury. He instructed the jury that they could consider it relative to their assessment of the credibility of the complainant. That, as was pointed out in the Supreme Court of Canada case ***R. v. B(C.R.)***, [1990] 1 S.C.R. 717, 55 C.C.C. (3d) 35, is a use to which similar fact evidence can, on the authorities, be put.

[8] The Supreme Court of Canada has had occasion to consider this issue in a number of cases in the recent past including ***R. v. B(C.R.)***. There, the appellant was charged with sexual offences against his natural daughter. He was tried in a case where the Crown at trial was also permitted to adduce evidence of earlier assaults allegedly committed with the teenaged daughter of his common law wife. The Supreme Court of Canada was divided on the issue but, ultimately, by a majority found that the evidence was admissible. McLachlin, J., as she then was, giving judgment for the majority referred to the English case of ***Director of Public Prosecutions v. Boardman***, [1975] A.C. 421. She noted there had been some tendency by courts in recent years to move away from the categorization approach often adopted in cases following from ***Makin v. Attorney-General for New South Wales***, [1894] A.C. 57. The modern tendency was to consider a balanced approach, namely

considering the probative strength of the evidence as against its potential prejudice to an accused. She noted that a feature of the Supreme Court's treatment of similar fact evidence on appeals was to accord a reasonably high measure of deference to decisions of trial judges.

[9] The Supreme Court of Canada recently revisited the issue in two cases but were decided after the trial of the instant case. Those cases were decided in the fall of 2002, whereas the case at bar was decided in the spring of 2002. Those cases are ***R. v. Handy***, [2002] S.C.J. No. 57 and ***R. v. Shearing***, [2002] S.C.J. No. 59. In the ***Handy*** case, there was difficulty with evidence adduced from two female complainants because there was found to be a possibility of collusion. The ex-wife of the appellant, who had been permitted to give similar fact evidence, was found to have had a motive to perhaps be biased against the appellant as well.

[10] One of the problems that, to my perception, governed the result in ***Handy***, resulting in the conclusion that the evidence ought not to have been admitted, was that the evidence from the ex-wife was measurably more repugnant morally and more serious in many ways than the evidence of the complainant in that case. Those circumstances militated against the admissibility of the finding of fact evidence. And also

because the trial judge had failed to address the possibility of a collusive conspiracy between the witnesses, it was held that the ruling admitting the evidence was unsatisfactory and the appeal was allowed.

[11] A different result obtained in the ***Shearing*** case, a case where an individual who was the leader of a religious group had been charged with numerous counts of sexual interference with members of the congregation. Generally speaking the evidence in that case was found to be admissible possibly because the circumstances demonstrated quite striking similarities. The methodology employed in victimizing the victims was often quite similar in approach and *modus operandi*. The case of ***Shearing*** in many ways is quite different from the instant case in that involved, as I said, a case where there existed quite significant similarities in the ways in which the relationships were developed by the appellant and the way in which he took advantage of the victims. In that case the court sustained most of the rulings in favour of admissibility.

[12] In the case of ***R. v. Handy***, a judgment of Mr. Justice Binnie, he noted something I think is worth observing. Mr. Justice Binnie said at para. 47:

> The policy basis for the exception is that the deficit of probative value weighed against prejudice on which the original exclusionary rule is predicated is reversed. Probative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation.

[13] That is, I think, a test that is often used by trial judges in approaching this sort of problem and is a useful statement of principle to keep in mind. As both ***Shearing*** and ***Handy*** point out, one could say the same of the observations of McLachlin, J., as she then was, in ***B(C.R.)***. The general rule is exclusionary in the sense that other instances of misconduct are normally not reckoned to be admissible because of the potential prejudice that could occur to the trial process. However, historically, exceptions developed to that rule. I suppose the most famous authority referred to is the case that underlies the admissibility of this sort of evidence, the case of ***Makin***, which I have referred to earlier in my reasons. ***Makin*** was the case of the baby farmers in New South Wales where the remains of a number of infants were found in premises that the appellant and his wife had occupied. As I see it, the evidence there was admitted to show a course of conduct that made it a likely inference that the appellant and his wife had by some methodology, either by neglect or assault, occasioned the death of these children who

were in their care. This inference would flow from the circumstance that these were young children and that it would not be presumed that so many of them would die unless something wrongful had been done to them.

[14] As the decisions proceeded over the years, various different classes of cases permitted the admission of this type of evidence. It was said the evidence would tend to disprove accident or coincidence. In the end it really comes down to a consideration of whether the evidence is probative or not probative of guilt. The danger, of course, that always must be guarded against is that, having regard to the fact that jurors are not trained lawyers, there is a considerable capacity for prejudice in that they might leap to the conclusion that the individual is a bad person and that if several people say something against him, then that is indicative of the fact that he is guilty of the crime with which he is charged if they accept that similar fact evidence. It is a form of reasoning that I suppose has some similarities to the danger that can arise from the admission of evidence of a criminal record. People may jump to the conclusion that this shows the accused is a person who is by reason of his character likely to have committed the crime charged in the indictment. The parameters of the admissibility of this

evidence have been considered in a number of cases in the Supreme Court of Canada and in provincial appellate courts including cases in this Court. The cases include ***R. v. Pierre*** (1995) 61 B.C.A.C. 99 and the Supreme Court of Canada cases referred to supra. The Ontario Court of Appeal recently considered the issue in the case of ***R. v. C.B.*** C37093, a judgment of that court of January 9, 2003.

[15] In the instant case, counsel for the appellant submitted to us that the learned trial judge had erred in his analysis of admissibility. Particular reference made to the circumstance that the similar act evidence involving M.J. had occurred in the early 70s at a time when the appellant would have been a late teenager. The incidents involving the complainant S.J., who alleged two acts of sexual assault in the period of around 1987, occurred when the appellant would have been in his early thirties.

[16] This question of temporal connection between events was stressed by Mr. Justice Binnie giving judgment in the case of ***Handy***, that I have referred to above. He noted that in circumstances where there is a significant time gap between the evidence that is sought to be adduced as similar fact evidence, the Court has to be cautious in the way it

approaches the question of admissibility. His Lordship said this:

> [82] The trial judge was called on to consider the congency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:
>
> (1) proximity in time of the similar acts (D.(L.E.), supra, at p. 125; R. v. Simpson (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), at p. 345; R. v. Huot (1993), 16 O.R. (3d) 214 (C.A.), at p. 220
>
> (2) extent to which the other acts are similar in detail to the charged conduct; Huot, supra, at p. 218; R. v. Rulli (1999), 134 C.C.C. (3d) 465 (Ont. C.A.), at p. 471; C.(M.H.), supra, at p. 772;
>
> (3) number of occurrences of the similar acts: Batte, supra, at p. 227-28;
>
> (4) circumstances surrounding or relating to the similar acts (Litchfield, supra, at p. 358);
>
> (5) any distinctive feature(s) unifying the incidents:
>
> Arp, supra, at paras. 43-45; R. v. Fleming (1999), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.), at paras. 104-5; Rulli, supra, at p. 472.
>
> (6) intervening events: R. v. Dupras, [2000] B.C.J. No. 1513 (QL) (S.C.), at para. 12;

> (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.
>
> [83] On the other hand, countervailing factors which have been found helpful in assessing prejudice include the inflammatory nature of the similar acts (D.(L.E.), at p. 124) and whether the Crown can prove its point with less prejudicial evidence. In addition, as stated, the court was required to take into account the potential distraction of the trier of fact from its proper focus on the facts charged, and the potential for undue time consumption. These were collectively described earlier as more prejudice and reasoning prejudice.

[17] The factors that His Lordship notes there are ones that are considered matters that a trial judge should consider when deciding on the often difficult question of admissibility in this class of case. As His Lordship pointed out the list is intended to be helpful rather than exhaustive. Not all factors will obviously exist or be necessary to be considered in every case. He pointed out that a similar approach is utilized in other common law jurisdictions including England, citing ***Director of Public Prosecutions v. Kilbourne*** [1973] A.C. 729 and making reference to United States publications on evidence.

[18] The instant case, was decided, as I observed, in the spring of 2002, at a time when the trial judge did not have the benefit of the judgments of the Supreme Court of Canada in

Handy and ***Shearing.*** These cases are useful authorities for a trial judge considering this sort of issue. The trial judge of course necessarily had to deal with the matter on the basis of the authorities that had been decided up to that time. One matter that seems to me troubling in the instant case is the temporal aspect. By that I mean that the incidents involving M.J. occurred at a time when the appellant was quite a young person and the incidents involving S.J. occurred when he was an adult. It is entirely possible that as an individual matures there can be a change in their attitude, way of life and such. While it is not always going to be a conclusive fact where there are other very cogent badges or indicia of similarity, it seems to me that in general the greater the temporal space between the alleged similar acts and the acts that are alleged in the counts before the Court in the indictment, the more care or caution that will have to be exercised by the trier of fact in analyzing the question of how that circumstance will impact on admissibility. It is fair to say that this will often be a very salient factor in the analysis concerning admissibility.

[19] In the instant case the trial judge adverted to this consideration but he appears to have laid stress on the factor that the considerable elapsed time between the events might

favour admissibility. I should think that generally the inference would run the other way. Here, in a case where there was not what I would characterize as particularly distinctive conduct linking the series of acts sought to be linked, the incidents involving M.J. and S.J. respectively, I believe that temporal distance factor became a very salient factor that would have to be considered. As I said I would consider a significant passage of time would probably militate against admissibility.

[20] If the trial judge had had the benefit of the reasoning of the Supreme Court of Canada in the ***Shearing*** case and in the H***andy*** case, I think he might well have taken a quite different view of the matter in his analysis. I consider that there was a failure to closely and carefully analyze this particular factor. I, of course, recognize that His Lordship did not have the benefit of the subsequent authorities at the time when he made his ruling on admissibility. We now have had the benefit of those cases and we have had the benefit of full argument based on the analysis in these subsequent cases. The Crown acknowledges the existence of the issue but submits that nonetheless the trial judge's analysis was not inappropriate and says that his decision to admit the evidence should be sustained.

[21] I consider that, having regard to the recent authorities in the matter, that submission cannot be accepted. I am persuaded here that the relatively long time period intervening between the similar act evidence and the acts charged in the count involving S.J. was a very salient factor that had to be carefully analyzed. As I said, I would think such circumstances would militate against admissibility here having regard not only to that factor but to the factor that the acts under consideration were not acts that had what I might call any unusual or unique features. Neither was there the sort of unity that sometimes exists when you are dealing with children in the same family or children in the same school, and there is a fairly close connection in time. See, for example, ***R. v. J.A.H.*** (1998) 124 C.C.C. (3d) 221. A close connection in time does not have to be a matter of weeks or months but I would note that in the present case the time gap was significant, 12 to 15 years. Perhaps more significantly the similar act evidence related to a time when the appellant was a very young person. The incidents were alleged to have occurred in the 1970s. I consider that the trial judge would have to carefully consider the relevance of that long time separation between the incidents.

[22] I consider that in light of the recent authorities, it would not be proper to sustain the decision on admissibility made by the learned trial judge. His conclusion might well have been different if he had the benefit of the reasoning in those decisions, particularly the case of ***Handy***

[23] In the result, because this evidence was, of course, evidence that could potentially have a significant effect on the decision of the jury, I consider that the appropriate disposition is for this Court to allow the appeal and to order a new trial.

[24] **SAUNDERS, J.A.**: I agree.

[25] **LEVINE, J.A.**: I agree.

[26] **HALL, J.A.**: The appeal is allowed and a new trial is ordered.

”The Honourable Mr. Justice Hall”