IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Boucher and Lange*,
2006 YKSC 36

Date: 20060621
Docket No.: S.C. No.: 05-01508
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

DEAN ERNEST BOUCHER (a.k.a. JOHNS)
AND
MARK LEWIS LANGE

Before: Mr. Justice L.F. Gower

Appearances:

Keith Parkkari	Representing Dean Boucher
Andre Roothman	Representing Mark Lange
John Phelps and Edith Campbell	For the Crown

MEMORANDUM OF RULING

INTRODUCTION

[1] This is a mid-trial ruling on the admissibility of evidence. Dean Boucher and Mark Lange are being jointly tried for second degree murder. A number of warned statements from both accused have been entered into evidence as part of the Crown's case, which is now closed. In those warned statements, each accused says the other is responsible for the death of the deceased, Robert Olson.

[2] Counsel for each of the accused have informed me that they anticipate calling evidence on behalf of their respective clients. However, before doing so, they seek direction from the Court on whether there will be any limitation upon the evidence they respectively intend to adduce going to the bad character of the other co-accused. Counsel rely primarily on the case of *R. v. Pollock* (2004), 187 C.C.C. (3d) 213 (Ont. C.A.) in seeking this ruling.

[3] In particular, counsel for Mr. Boucher anticipates calling the following evidence on behalf of his client. He expects to call one Pamela Jim, who will say that Mr. Lange is dishonest and that he made a statement to her that he killed someone. Counsel also intends to call an independent witness to rebut the statement made by Mr. Lange to the RCMP to the effect that he could not punch very hard, or not hard enough to hurt someone. This witness will say that Mr. Lange is trained in the marshal art of Ninjitsu. This witness will also say that Mr. Lange has a propensity to commit acts of violence.

[4] Counsel for Mr. Lange has indicated that he expects to cross-examine Mr. Boucher, assuming he testifies, on his criminal history, which will include not only offences for which he has been convicted, but also matters where he was the subject of a complaint, or was arrested or charged, but neither convicted nor acquitted. He does not intend to cross-examine Mr. Boucher on matters for which he has been acquitted.

[5] I provided my preliminary ruling to counsel at the time this application was made during the trial, with an indication that my written reasons would follow. I ruled that both accused could adduce the above-referenced evidence under the general line of authority that each is entitled to introduce evidence of the bad character of the other,

providing that the probative value of the evidence is not outweighed by its prejudicial effect.

LAW

[6] In *R.* v. *Kendall and McKay* (1987), 35 C.C.C. (3d) 105, the Ontario Court of Appeal noted the distinction between the Crown attempting to adduce evidence of an accused's disposition and a co-accused wishing to do so. Whereas the former is generally inadmissible, the latter is generally admissible. Goodman J.A., speaking for the Court, said at page 120:

> "The prosecution is not allowed to adduce evidence against an accused as to disposition as a matter of policy. With the exception of possible prejudice to a co-accused, of which more will be said later, there does not appear to be any policy reason for preventing an accused from adducing evidence to show the disposition of another person to commit the crime where such evidence is relevant. On the contrary, absent any compelling reason to the contrary, it is essential that as a matter of policy an accused be permitted to adduce by way of defence any relevant evidence unless it is excluded by some evidentiary rule." (emphasis added)

At page 124, Goodman J.A. also suggested that evidence of "prior [and] specific acts" of a co-accused can be used to prove the propensity or disposition of that co-accused.

[7] Later, in *R.* v. *Valentini* (1999), 132 C.C.C. (3d) 262, the Ontario Court of Appeal confirmed the rule of evidence regarding bad character, as summarized in *R.* v. *Kendall and McKay*. In applying that rule, the Court continued, at para. 22, that there was no dispute that the evidence of the "prior acts of violence" by the accused V. was admissible on behalf of the co-accused B. At para. 24, the Court said as follows:

> ". . . The policy rule that prevents the Crown from leading evidence of an accused's propensity for violence for the sole purpose of proving that he is the type of person likely to have committed the offence has no application when the evidence is adduced by a co-accused. . . ."

[8] In *R.* v. *Akins* (2002), 164 C.C.C. (3d) 289, the Ontario Court of Appeal again confirmed that in a joint trial, one accused may cross-examine the other on his or her disposition or propensity to commit the offence charged, even though the co-accused who is cross-examined has not put his or her character in issue. That case also dealt with the issue of whether an accused in a joint trial could, for the purpose of demonstrating the propensity of the co-accused for committing a particular criminal act, cross-examine that co-accused on past criminal charges which were outstanding, those which were withdrawn or those which resulted in verdicts of acquittal. At paras. 13 and 14, the Court of Appeal said as follows:

> "As confirmed by the Supreme Court of Canada in R. v. Crawford (1995), 96 C.C.C. (3d) 481 (S.C.C.), the constitutionally protected right of a co-accused to make full answer and defence permits cross-examination on the disposition or propensity of an accused to commit the offence even where the accused has not put his character in issue. In this respect, cross-examination restrictions that apply to the Crown do not restrict a co-accused, and an accused who testifies against a co-accused is obliged to accept "that his credibility can be fully attacked by the latter" (R. v. Crawford, at pp. 495 and 498, per Sopinka J., for the majority of the court; R. v. Valentini (1999), 132 C.C.C. (3d) 262 (Ont. C.A.), at p. 279, per Rosenberg J.A.; and R. v. Kendall and McKay (1987), 35 C.C.C. (3d) 105 (Ont. C.A.)). [page295]
>
> That does not mean, however, that the right to make full answer and defence, protected by s. 7 of the Canadian Charter of Rights and Freedoms, is absolute. When the right is asserted by a co-accused in a joint trial, it must be balanced against the fair trial right of the accused. . . ." (emphasis added)

[9] Interestingly, the Court of Appeal in *Akins* held, at para. 12, that it was an error to permit cross-examination of the co-accused on the facts underlying past charges for which he was acquitted, but said virtually nothing about such cross-examination on charges which were outstanding or which were withdrawn.

[10] At para. 16, the Court held that "an acquittal is the equivalent to a finding of innocence" and that:

> "When a verdict of acquittal is entered, it has the effect in a subsequent criminal proceeding of rendering entirely innocent the accused's connection to the conduct underlying the charge for which the accused was acquitted."

Thus, the highly prejudicial effect of cross-examination on charges that led to acquittals could not be said to be outweighed by the probative value of that evidence.

[11] Curiously, the Court of Appeal did not expressly say that an accused in a joint trial could cross-examine a co-accused on outstanding charges or charges which were withdrawn. However, it is clearly implicit that the Court concluded as such. For example, at para. 19, the Court looked at the charge to the jury by the trial judge, who said as follows:

> "You will recall that Mr. Marko, counsel for Mr. Ferraro, cross-examined Mr. Akins on a criminal record <u>and on other matters where Mr. Akins was arrested but those charges did not result in any convictions against him</u>." (emphasis added)

The Court of Appeal then commented, at para. 20 immediately following, that there was no doubt that where bad character evidence is adduced by a co-accused to show propensity by an accused, a special instruction regarding the use of such evidence must be included in the charge to the jury. However, the

Court did not criticize the trial judge for having allowed the cross-examination of Mr. Akins on matters which did not result in convictions against him.

[12] In *Watt's Manual of Criminal Evidence* (Toronto: Thomson Carswell, 2005), Justice David Watt says, at page 491, that in a joint trial, evidence that shows or tends to show the bad character of a co-accused may include "specific acts of extrinsic misconduct, which need not qualify as evidence of similar acts" (emphasis already added).

[13] It seems to me that there is little or no distinction to be made between eliciting evidence of bad character through prior "specific acts" of other misconduct (*R.* v. *Kendall and McKay*, cited above) or through "prior acts of violence" (*R.* v. *Valentini*), and evidence that complaints were made to the police, or charges laid, in relation to such acts of misconduct or violence. Therefore, all such evidence is capable of proving propensity or disposition, except those instances where charges have been tried and acquittals entered.

[14] Returning to *R.* v. *Pollock*, cited above, Rosenberg J.A., speaking for the Ontario Court of Appeal, noted at para. 100 that while evidence of an accused's disposition may be relevant, it may also capture the attention of the trier of fact to an unwarranted degree, creating a potential for prejudice, distraction and time consumption, which outweighs its probative value. Hence, when an accused is tried alone, such evidence is presumptively inadmissible. However, as Rosenberg J.A. pointed out at para. 108, where two accused are tried jointly, their right to make full answer and defence means they are not entitled to exactly the same trial as each would have had if he had been tried alone. In joint trials, one accused may call evidence in his own defence which is

prejudicial to the other and which the Crown could not have called against that other accused. Nevertheless, because propensity or bad character evidence can carry a very grave risk of prejudice to the fair trial of the accused against whom the evidence is led, the Court of Appeal directed that it is incumbent upon trial judges to examine closely the probative value of the evidence and the purposes for which it is tendered in order to balance the fair trial rights of the two accused. Rosenberg J.A. put it this way, at para. 110:

> "Where the Crown seeks to adduce character evidence of an accused, as with similar fact evidence, the probative value of the evidence must outweigh its prejudicial effect. The balancing is different where one accused seeks to introduce character evidence of a co-accused. The power to exclude relevant evidence adduced by an accused is narrower: R. v. Seaboyer, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321. It would seem that the evidence is admissible unless its prejudicial effect substantially outweighs its probative value." (emphasis added)

I interpret this last sentence to mean that evidence of the bad character of an accused is presumptively admissible in the defence of the co-accused, where the two are tried together.

[15] *Pollock* was subsequently considered in *R.* v. *Jacobson*, (2004) CanLII 30297 (Ont. S.C.). In that case, D.S. Ferguson J., at para. 19, set out the general approach directed by the Ontario Court of Appeal in *Pollock*. Borrowing liberally from that paragraph, I suggest that in this approach the trial judge must:

1. Be satisfied that the proposed evidence relates to a "live issue", which has an air of reality, at that point in the trial. The court should not simply rely on counsel's assertion to that effect. There must be some evidentiary foundation

to assess whether the proposed evidence is necessary to enable the accused to make full answer and defence.

2. Consider the possible prejudice to the co-accused, by looking at the risk of:
    a) whether the co-accused will be unfairly surprised by the evidence;
    b) whether the evidence will unduly distract the jurors from the issues;
    c) whether the evidence would be too time-consuming relative to its probative value;
    d) whether a wrongful conviction of the co-accused could result from the forbidden chain of reasoning, by inferring guilt from general disposition or propensity.
3. Carefully assess whether the evidence has “sufficient probative value” to counter its potential prejudicial effect. There must be some “legitimate and reasonable nexus” between the evidence and the inference sought to be drawn. It may be that only some of the proffered evidence is necessary to accomplish the defence purpose.
4. Balance the fair trial rights of both accused, recognizing that the right to a fair trial, where the accused is being tried jointly with another, does not entitle him or her to exactly the same trial as if he or she were tried alone. Here it is also important to note that a jury charge on the limited use of the proffered evidence may prevent or limit the prejudice.

5. If the evidence is admitted, instruct the jury that it cannot be relied on as evidence of guilt of the co-accused against whom the evidence is directed, but only to raise a reasonable doubt about the guilt of the accused tendering that evidence.

CONCLUSION

Mr. Boucher's Defence

[16] As I said, counsel for Mr. Boucher seeks to call Pamela Jim as a witness to say that Mr. Lange is dishonest and that he made a statement to her that he killed someone. He also plans to call an independent witness to say that Mr. Lange has a propensity to commit acts of violence. All of this evidence could show that Mr. Lange is a person of bad character and that he has a propensity to be violent. The statement that he allegedly made to Ms. Jim that he "killed someone" may also be an admission.

[17] I am satisfied that the proposed evidence relates to a live issue at this point in the trial, which is Mr. Lange's propensity for violence. Based on the admissible evidence against Mr. Boucher to this point in the trial, which includes Mr. Boucher's own warned statements, there is evidence that Mr. Lange was present in the Caribou Hotel with Mr. Boucher and that it was Mr. Lange who was fighting with Mr. Olson, to the point where Mr. Olson was knocked unconscious. Mr. Boucher denied being violent in any way with Mr. Olson.

[18] Considering the possible prejudice to Mr. Lange, I am satisfied that:

a) Mr. Lange is not unfairly surprised by this evidence, as his counsel made no submission to that effect;

b) It will not lead to an unfocused trial;

c) The evidence should not take a great deal of time in the trial; and

d) With a proper jury charge on the limited use of proffered evidence, it is unlikely that the jury will infer that Mr. Lange is guilty of the second degree murder of Robert Olson as a result of this disposition evidence.

[19] I am also satisfied that the proposed evidence going to Mr. Lange's propensity for violence has sufficient probative value to counter its potential prejudicial effect to Mr. Lange. Of course, it relates only to Mr. Boucher's opportunity to make full answer and defence by establishing that it was more likely that Mr. Lange killed Mr. Olson, which in turn is capable of raising a reasonable doubt about whether Mr. Boucher is guilty of second degree murder. The jury will have to be instructed accordingly.

Mr. Lange's Defence

[20] Counsel for Mr. Lange seeks to cross-examine Mr. Boucher on his criminal history. He does not intend to cross-examine Mr. Boucher on matters where he was charged but acquitted. However, he does seek to ask Mr. Boucher not only about offences for which he has been convicted, but also matters where he was the subject of complaints, or was arrested or charged, but neither convicted nor acquitted. In particular, Mr. Lange's counsel says that he anticipates this evidence will demonstrate that Mr. Boucher has a propensity towards violence. Therefore, I assume that the incidents and convictions which he seeks to cross-examine about will be for offences and complaints of assaults, threats and other forms of violence.

[21] I agree with Mr. Lange's counsel that the proposed evidence relates to two live issues at this point in the trial. First, it relates to Mr. Lange's intention to raise the defence of duress, as his counsel claims that he was acting out of fear of Mr. Boucher.

According to the evidence against Mr. Lange, which is principally comprised of his own warned statements, Mr. Boucher was the main actor in the beating of Mr. Olson and Mr. Boucher threatened Mr. Lange a number of times throughout that evening, including a threat to kill Mr. Lange. Second, it relates to Mr. Lange's ability to make full answer and defence by establishing that it was more likely that Mr. Boucher killed Mr. Olson, which is capable of raising a reasonable doubt about Mr. Lange's guilt.

[22] I am also satisfied that:

a) Mr. Boucher will not be unfairly surprised by this evidence, as it has previously been disclosed to him;

b) It will not lead to an unfocused trial;

c) It will not likely take a great deal of time in the trial; and

d) That with a proper jury charge, it is unlikely that the jury will make an inference that Mr. Boucher is guilty of second degree murder based upon this disposition evidence.

[23] I am further satisfied that the proposed evidence has sufficient probative value to counter its potential prejudicial effect upon Mr. Boucher. Thus, Mr. Lange is entitled to cross-examine Mr. Boucher about prior acts of violence which resulted in complaints or arrests or charges, but for which Mr. Boucher was neither convicted nor acquitted.

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GOWER J.