

CANADA / JUDGMENT

R. v. Bartkowski

2004 BCSC 321

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 321 R. v. Bartkowski et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bartkowski et al,

2004 BCSC 321

Date: 20040310

Docket: 121105-5

Registry: Victoria

Her Majesty the Queen

AGAINST

Steven Bernd Bartkowski

Bradford David Brown

Grady Lance McLay

Joseph Pogadl

Ban on Publication 648(1) CCC

Before: The Honourable Mr. Justice Macaulay

Voir Dire No. 5

Ruling Re Post-Offence Conduct of Brown

Counsel for the Crown:

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Counsel for the Accused Bartkowski:

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Counsel for the Accused Brown:

P. Firestone, R. Tweedie

Counsel for the Accused McLay:

M.T. Mulligan as Agent for R. Mulligan, Q.C.

Date and Place of Trial:

20040225-20040226

Victoria, B.C.

- [1] The Crown seeks a pre-trial ruling permitting evidence at trial of post-offence conduct by the accused Brown, one of four persons charged with first degree murder. The trial, with a jury, is scheduled to commence March 22, 2004.
- [2] The Crown argued that the evidence of post-offence conduct should be admitted pursuant to the principles set out in *R. v. White* (1998), 125 C.C.C. (3d) 385 (S.C.C.). The defence contended that the prejudicial effect of the proposed evidence outweighs any limited probative value, in light of the alternative explanations for the conduct, and argued that all evidence of post-offence conduct should be excluded.
- [3] Below, I will review the procedure for determining the admissibility of evidence, followed by an explanation of the general evidentiary principles that I had considered. I will then set out the particular evidentiary principles as they apply to post-offence, or after-the-fact, conduct. Finally, I will apply the principles to the circumstances before me.
- [4] Before commencing, it is necessary to emphasize that this is a pre-trial ruling. There was minimal evidence on the voir dire. Instead, counsel mainly relied on assertions respecting the evidence. Counsel submissions are often the preferable means by which to address issues of admissibility (*R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), leave to appeal to S.C.C. refused, (1996) 43 C.R.R.(2d) 187, at para. 17). However, much of what was asserted here respecting the evidence, both generally as to the Crown's case and specifically as to the alleged post-offence conduct, including possible alternative explanations for such conduct, was in dispute.
- [5] In spite of this, both counsel urged me to decide the admissibility of the evidence now. There is a danger in proceeding as urged by counsel. If the evidence at trial develops differently than anticipated, I may have to reconsider. As well, determining admissibility at trial is frequently aided by having heard other evidence. The other admissible evidence may provide necessary context.

- [6] Section 645(5) of the Criminal Code permits the trial judge, before jury selection, "to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn". Issues of admissibility are generally dealt with in the absence of the jury. Absent a statutory procedure for determining the admissibility of a particular type of evidence, there is no specific procedure required to be followed in determining admissibility: see *R. v. Darrach* (1998), 122 C.C.C. (3d) 225 (Ont. C.A. at para. 74). As pointed out in *Watt's Manual of Criminal Evidence* (Toronto: Thompson Canada Ltd., 2002) [Watt] at 37, in practical terms, admissibility is addressed in the absence of the jury "to ensure that jurors hear and see any given evidence which the trial judge decides is admissible, but nothing more".
- [7] The general principles that govern the admissibility of any evidence start with relevance. All evidence must be relevant to an issue. Relevance is a matter of everyday experience and common sense. It is founded in the relationship between facts that makes it possible to infer the existence of one fact from the existence of another. According to Watt, "[Relevance] is not an inherent characteristic of any item of evidence, rather [it] exists as a relation between an item of evidence and a proposition of fact that its proponent seeks to establish by its introduction". The converse of this is, as stated in *Cloutier v. The Queen* (1980), 48 C.C.C. (2d) 1 (S.C.C.) at 28: "One fact is not relevant to another if it does not have real probative value with respect to the latter". Thus, proposed evidence must always be rejected as irrelevant if it is not probative of the fact sought to be established.
- [8] There is no minimum standard to be met before evidence becomes probative. Subject to the exceptions and exclusions discussed in the following paragraphs, any fact, once proven, that has "any tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible ...": *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.) at 417. In other words, as set out earlier in the same decision, admissibility should not be confused with weight.
- [9] In *Corbett*, as well as earlier in *Morris v. R.* (1983), 7 C.C.C. (3d) 97 (S.C.C.) at 106, where Lamer J. (as he then was) spoke on the point for the unanimous Court, the Supreme Court of Canada approved the following extract from Thayer's statement of the law (*A Preliminary Treatise on Evidence at the Common Law* (1898) at p. 530):
- (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and
 - (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.

The court went on to refer to the discretionary power judges have to exclude logically relevant evidence in certain instances, from which rules of exclusion and exceptions to such rules have developed.

- [10] There are many circumstances in which the court is called upon to exclude probative evidence. Well-known categories of exclusion, such as the confessions rule, may lead to the jury never hearing probative evidence because it was found to be inadmissible. Even where the Crown offers evidence that is probative and not subject to any other exclusionary rule, it may still be excluded because the prejudicial effect of the evidence outweighs its probative value. In this way, the law recognizes that some evidence is more or less probative than other evidence, and that some types of evidence have a greater or lesser degree of prejudicial impact.
- [11] Even though the weight, or probative value, of evidence is normally left for the consideration of the jury, there may be circumstances in which the weight is low in contrast to the prejudicial effect. Where the prejudice to the trial process from admitting the evidence would be disproportionate to the value of the evidence, the court has a residual discretion to exclude.
- [12] Prejudice in this context generally refers to the possibility that the jury will misuse the evidence by entering into an improper chain of reasoning, or that the introduction of the evidence will, in some way, subvert the trial process. See for examples: *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.) at 328 and *R. v. Roberts* (2 October 1995), Cranbrook Registry No. 5999. In *R. v. Starr*, [2002] 2 S.C.R. 144, at para. 188, the Court confirmed that the contrast is between the prejudicial effect of the prohibited use of evidence and the probative value of the permitted use.
- [13] There is, however, no discretion to exclude relevant and admissible evidence simply because it tends to properly advance the case for the Crown. See *R. v. Tran* (2001), 150 C.C.C. (3d) 481 (N.S.C.A.). Finally, I point out that where the defence proffers the evidence, it will only be excluded where its probative value is substantially outweighed by its prejudicial effect in the proceedings. See *R. v. B. (S.C.)* (1997), 119 C.C.C. (3d) 530 (Ont. C.A.) at para. 34. It is apparent that the discretion to exclude on the basis that the prejudicial effect outweighs the probative value must be exercised cautiously.
- [14] How do these principles apply with respect to the admissibility of evidence of post-offence conduct? Such evidence is only admissible if relevant to a live issue in the proceedings. Of the many cases illustrative of this narrow but fundamental proposition, I need only refer to two: *R. v. Arcangioli*, [1994] 1 S.C.R. 129 and *R. v. White*, *supra*.
- [15] In *Arcangioli*, the accused was charged with aggravated assault in connection with a stabbing that occurred during a fight. There was evidence that the accused fled the scene but in his testimony at trial, the accused admitted punching the victim several times but stated that another person stabbed the victim. The Supreme Court of Canada held, at para. 34, that the trial judge should have instructed the jury that the evidence of flight had no probative value in the circumstances because it did not relate solely to the particular offence:

Such evidence can serve the function of indicating consciousness of guilt only if it relates to a particular offence. Consequently, where an accused's conduct may be equally explained by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence.

The court went on at para. 44 to say that "[a]ny inference to be drawn from flight disappears when an explanation for such flight is available, as it is here". While this addresses the narrow issue of lack of probative value, it is instructive to note that the court addressed the necessary instruction to be given to the jury which had already heard evidence, both of flight and explanation for flight.

[16] In *White*, the court returned to the question of relevance. At issue was whether the trial judge should have instructed the jury that evidence of flight and other post-offence conduct had no probative value with respect to the alleged offence of murder. On the general question of relevance, the court said this, at para. 19:

Under certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the accused's culpability for that crime. For example, an inference of guilt may be drawn from the fact that the accused fled from the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trial. Such an inference may also arise from acts of concealment, for instance where the accused has lied, assumed a false name, changed his or her appearance, or attempted to hide or dispose of incriminating evidence.

On the question of weight, the court stated, at para. 21:

Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role. Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.

[17] In *White*, the court also described the proposition derived from *Arcangioli* respecting the "no probative value" direction as "essentially a matter of relevance" (para. 23) that will only apply in narrow circumstances, and as "the proposition that a piece of evidence should not be put to the jury unless it is relevant to the determination of a live issue in the case" (para. 26).

[18] Unlike *Arcangioli*, where the participation of the accused in the culpable event was not at issue, the two accused in *White* denied any involvement in the alleged murder. The live issue was their identities as killers and not their degree of guilt. The evidence of post-offence conduct was accordingly "relevant to the question of whether White and Côté had committed Chiu's murder" (para. 35). In the result, there was no requirement for a "no probative value" instruction.

- [19] Neither of these cases directly addressed the question of whether the Crown was entitled to lead the evidence of post-offence conduct at trial as it did. In my view, this is because the evidence was relevant to a live issue at the time of introduction. The evidence only became devoid of probative value in Arcangioli after the accused admitted involvement in the underlying culpable event.
- [20] Absent such an admission, and none is present or anticipated in the present case, the exercise of the court's residual discretion to refuse to admit probative evidence is restricted to the relatively rare circumstance discussed in Corbett where the prejudicial impact of the evidence outweighs its probative value.
- [21] I have also considered the following decisions relating to post-offence conduct that counsel referred to:
- (1) R. v. Charrette (1998), 39 O.R. (3d) 407 (Ont. C.A.);
 - (2) R. v. Yu (2000), 150 C.C.C. (3d) 217, 2000 BCCA 626;
 - (3) R. v. Harrison (2001), 156 C.C.C. (3d) 117, 2001 BCCA 272;
 - (4) R. v. Howie (2003), 179 B.C.A.C. 312, 2003 BCCA 116, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 147 (QL);
 - (5) R. v. Campbell (1998), 122 C.C.C. (3d) 44 (B.C.C.A.), (aff'd 130 C.C.C. (3d) 223);
 - (6) R. v. Dixon (1995), 58 B.C.A.C. 263;
 - (7) R. v. Bisson (1997), 114 C.C.C. (3d) 154 (Que. C.A.), rev'd on other grounds [1998] 1 S.C.R. 306;
 - (8) R. v. Chung (1999), 118 B.C.A.C. 95;
 - (9) R. v. Williams (1998), 98 C.C.C. (3d) 176 (B.C.C.A.), leave to appeal to S.C.C. refused, 101 C.C.C. (3d) vi;
 - (10) R. v. Grewall, 2000 BCSC 784;
 - (11) R. v. Peavoy (1997), 34 O.R. (3d) 620 (C.A.); and
 - (12) R. v. Campbell (3 October 2002), No. S99802 (Ont. S.C.).

Of the cases listed, only two, Grewall and Campbell, (at 10 and 12 above), addressed the question whether the court should exclude evidence of post-offence conduct.

- [22] In Grewall, Romilly J. was concerned with the admissibility of post-offence conduct by an accused charged with the murder of his wife. The Crown sought to rely on evidence of the accused's statements to an undercover operator respecting the proposed contract killing of the brother of the deceased and the killing of a Crown witness; evidence relating to the accused's demeanour and sexual conduct with another woman after the death of the victim; and finally, evidence of the accused counselling the other woman to commit suicide.

[23] Romilly J. found that the first set of statements could not reasonably be linked to "consciousness of guilt" concerning the murder of, or plan to murder, the victim. Similarly, none of the evidence relating to sexual conduct or counselling was capable of being linked to proof of the alleged offence. In the result, the Crown could only demonstrate the necessary nexus in relation to the statement respecting the Crown witness and the demeanour on the part of the accused after he found his wife dead.

[24] Grewall represents, for the most part, a relevance analysis carried out in accord with Arcangioli. In Arcangioli, the Court approved, in relation to evidence of flight, the need to demonstrate relevance by a chain permitting four inferences moving from:

- (1) The particular behaviour of the accused to flight;
- (2) To consciousness of guilt;
- (3) To consciousness of guilt concerning the offence in question; and
- (4) To actual guilt of the offence in question.

Unlike the present case, the court in Grewall was not invited to determine relevance based, in part, on controverted assertions about the evidence to be placed before the jury.

[25] In Campbell [cited earlier in para. 21 at (12)], the court found it unnecessary to analyze the admissibility of the alleged post-offence conduct in those terms. Instead, the specific nature of the evidence permitted the court to analyze it as similar act evidence. The court found that the tenuous probative value of the evidence was outweighed by the significantly high prejudicial effect and excluded it.

[26] I now turn to the general description of the evidence relating to the alleged involvement of Brown, as anticipated by the Crown, as well as the proposed evidence of post-offence conduct. As earlier set out, much of the Crown's case is in dispute. In some instances, further rulings are required as to the admissibility of particular evidence, but I will endeavour to avoid references to such evidence except where noted. I will also set out the additional evidence referred to by the defence as it relates to alternative explanations for the alleged post-offence conduct. The Crown contended that much of that evidence will be inadmissible at the instance of the defence. I will identify and address those issues to the limited extent possible.

[27] According to the Crown, on September 5, 2002, Brown and the co-accused, McLay, stole a vehicle in Victoria and drove to Nanaimo where they abandoned it, then stole a similar vehicle and drove back to the residence of the co-accused, Bartkowski, in Victoria. Bartkowski announced his intention to attend Lorraine Pogadl's residence to beat up the victim, Thibault. The three accused and two women traveled to the Pogadl residence in two vehicles, including the stolen Nanaimo vehicle.

- [28] Upon their arrival at the residence, all five entered the bedroom where both Thibault and Pogadl were present. Bartkowski pulled out a knife. McLay produced what appeared to be a crow bar. Brown had a club. Over the course of the next two hours, the three accused beat the victim. Brown had blood on his clothing.
- [29] At one point, after a private discussion, the three accused returned to the bedroom, used pepper spray on the victim and removed him from the room. The victim was then tied and gagged, apparently by others other than Brown. Bartkowski and McLay carried the victim out of the house and placed him in the trunk of the stolen vehicle after Brown backed it into position. Thibault was still alive at that point.
- [30] Brown then accompanied McLay in the stolen vehicle leaving at about 10:55 p.m. Bartkowski and the two women traveled in the other vehicle. At one point, the vehicle that Brown was in stopped and one of the occupants got out, opened the trunk and struck the victim. All five persons returned to the Bartkowski residence.
- [31] At the residence, the three accused changed their clothing. Bartkowski borrowed a cell phone from one of the women and directed them to stay at the house. As the three accused left the house, one of them had a red plastic gas can. The three accused then traveled in the two cars to the vicinity of Nixon's gravel pit located in the Goldstream Park area.
- [32] According to the interpretation of cell phone records, the admissibility of which is in issue, there is evidence to demonstrate continuing contact between the two vehicles as they traveled to and, later, from the area. The last of those calls occurred at about 12:13 a.m. on September 6, 2002. There are no further calls from the borrowed cell phone after that point. There is no record of any further calls from the other cell phone until 35 minutes later.
- [33] Ultimately, the next morning, the police found the stolen vehicle in a burned state with the body of the victim in the trunk. The police found a black cap of the type commonly associated with plastic gasoline containers in the immediate vicinity and also seized a badly burned cell phone from the vehicle of the same make as the one borrowed earlier by Bartkowski.
- [34] Forensic examination disclosed remnants of rope around the face of the victim and eleven stab wounds to the chest area, sustained while alive and in a supine position. The body was charred.
- [35] All three accused arrived at another woman's home early in the morning on September 6, 2002, about twenty minutes after Bartkowski called her. When they arrived, Brown had significant blood on his hands and face but was apparently uninjured although he said he had cut himself. The three accused discussed the need to buy new shoes. Bartkowski telephoned the other woman from whom he had borrowed the cell phone and told her it had been stolen. She immediately reported the alleged theft. The three accused left the house after a couple of hours.

- [36] The three accused returned to the same house later on September 6, 2002. They were wearing new shoes. The Crown alleges that Brown made direct and adoptive admissions during this period and that he appeared very nervous. At one point that day, he said that "when they come in they're gonna come in hard and they're coming".
- [37] Although some of the foregoing fits within the rubric of post-offence conduct, but is likely also admissible on other grounds, the defence has not specifically challenged it. The challenged evidence is as follows.
- [38] The Crown seeks to lead evidence of Brown's departure from the local area approximately three days after the alleged killing and his travel to Whistler, B.C. and then on to Amherst, Nova Scotia.
- [39] While Brown was in Whistler in the company of Michael Roy, Roy introduced Brown to his step brother, Eric Shestalo. Roy is not expected to testify. Brown and Roy stayed in Whistler for two days. Shestalo, who is expected to testify, provided Brown with his Care Card and an asthma inhaler in his name as partial identification so that Brown could board a bus on a non-transferable pass to Amherst, Nova Scotia. Roy purchased the bus pass in Shestalo's name.
- [40] The Crown does not seek to lead evidence of a conversation between Roy and Shestalo, in the presence of Brown, in which Roy explained that he and Brown had left Victoria because Brown had been contracted to kill Roy by a person described as Sam but could not go through with it. Roy explained to Shestalo that he and Brown became friends and decided to flee together.
- [41] I am not persuaded that the evidence of what Roy said to Shestalo in the presence of Brown is admissible through cross-examination of Shestalo. I doubt that Roy's statement is admissible within the "present intentions" exception to the hearsay rule to infer Brown's intention or, even if admissible for that limited purpose, to provide an explanation for that intention. Nor does the statement appear admissible under the principled exception to the hearsay rule. As these points were not fully argued, I will assume, without deciding, for the present purpose that the Roy statement is admissible through cross-examination of Shestalo.
- [42] On September 15, 2002, shortly after Brown arrived in Amherst, the local police arrested him on a Canada-wide warrant. Brown falsely identified himself as Eric Shestalo, produced the Care Card as identification and stated that he had recently traveled from Whistler.
- [43] Following his arrest and before being returned to Victoria, Brown contacted Roy's telephone number under the ruse of speaking to legal counsel. Brown was overheard to say "if the cops come around, don't tell them nothing".

[44] In addition to the alternative explanation for flight set out in the conversation between Roy and Shestalo described above, the defence contends that there is other admissible evidence of alternate explanations. This includes evidence that:

- (1) Brown told one of the Crown witnesses before the events giving rise to the charge that he wanted to be in Nova Scotia in the next couple of months;
- (2) there were other outstanding warrants (albeit for execution in limited areas) for Brown's arrest respecting other offences issued out of Nova Scotia and Ontario; and
- (3) there was a monitored telephone conversation between Bartkowski and a Crown witness in which Bartkowski offered an unrelated reason for Brown leaving.

I do not understand the basis on which the evidence listed at points (1) and (3) would be admissible for the truth of its content under the principled exception to the hearsay rule. I accept that the evidence of the outstanding warrants referred to at point (2) can be put before the jury.

[45] As to the Roy/Shestalo statement made in the presence of Brown, the Crown conceded that the content is highly prejudicial to the fair trial rights of Brown in that it purports to implicate him in an arrangement to carry out a contract killing of Roy. The defence agrees but goes a step further and says that it would be wrong to permit the other evidence relating to alleged flight, absent the entirety of the alternative explanation facially inconsistent with consciousness of guilt.

[46] I can find no support for the defence contention in my review of the authorities respecting post-offence conduct or any of the others referred to. I do not accept that the Crown is obligated to lead evidence of possible explanations for post-offence conduct. It is, in my respectful view, for the defence to decide if it wishes an explanation put before the jury. The explanation must itself be in admissible form. In this way, the risk of distorting the fact-finding process is avoided.

[47] Assuming there is admissible evidence of an explanation that has a prejudicial effect, it may be necessary to immediately caution the jury about the limited use to which the evidence can be put. Depending on the explanations ultimately disclosed by the evidence, it may also be necessary to give a "no probative value" direction to the jury but that can only be assessed after all the evidence is in.

[48] None of the foregoing renders inadmissible the individual pieces of circumstantial evidence that the Crown seeks to rely upon provided they meet the test of relevance as outlined earlier. In my view, with the exception of Brown's contact with the Roy telephone number, they do meet the test.

- [49] The behaviour of Brown in Whistler and in Amherst is capable of supporting an inference of flight. The particular timing and nature of the flight is capable of supporting an inference of consciousness of guilt generally and specifically concerning the alleged offence of first degree murder. Taken together with all the other circumstantial evidence, the evidence is capable of supporting an inference of actual involvement in the alleged offence.
- [50] Counsel for Brown also contended that the post-offence conduct is consistent with flight after limited involvement in the earlier beating and unlawful confinement but there is no anticipated evidentiary basis for drawing that distinction. As I set out at the beginning of my reasons, Brown does not admit any involvement in the events leading to the death of Thibault nor does he anticipate calling any defence evidence.
- [51] Although the chain of permissible inferences is also possible respecting Brown's telephone call to the Roy number, it is significantly weaker. In Campbell [cited earlier in para. 21 at (5)], Hall, J.A. warned that evidence of post-offence conduct may sometimes be tenuous. This particular evidence may open up unnecessary lines of inquiry to the prejudice of the trial process. I exclude it.
- [52] Otherwise, the Crown is entitled to rely on the proposed evidence of post-offence conduct. Because of the possibility that there may be one or more alternative explanations of the evidence before the end of trial, the Crown should refrain from referring to this particular evidence when opening to the jury.

"M.D. Macaulay, J."

The Honourable Mr. Justice M.D. Macaulay

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