
CANADA / JUDGMENT

R. v. Dempsey

2001 BCSC 371

COURT

Supreme Court of British Columbia

DECIDED

9 March 2001

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IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

AGAINST

PAUL DEMPSEY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE E.R.A. EDWARDS

BAN ON PUBLICATION

RULING ON VOIR DIRE

Counsel for the Crown: Glenn S. Kelt and

Susan M. Rupertus

Counsel for the Accused: James I. Heller and

Ray G. Dieno

Dates and Place of Hearing: February 27 and 28,

March 1 and 2, 5 - 7, 2001

Victoria, BC

- [1] The accused is charged with the first degree murder of a fifteen year old girl. The Crown alleges the homicide took place during the course of a sexual assault.
- [2] This is a retrial following a mistrial. The issue on the voir dire is the admissibility of evidence with respect to the disposition of the deceased "to violence, to a criminal propensity and to her sexual attitudes". This quotation is the characterization placed on this evidence by the judge at the first trial. After a lengthy voir dire at which several witnesses testified and counsel made extensive submissions, this evidence was held "by and large, admissible".
- [3] The judge also held admissible evidence he characterized as "discreditable" of the accused. It was evidence of three teenage girls who said the accused invited them into his car, two of whom said he had "taken liberties" with them. The judge also held admissible evidence of a fellow employee of the accused that he used "scatological and obscene language in connection with young girls". The Crown does not propose to call any of this evidence at this retrial.
- [4] Counsel for the accused seeks to have admitted all the evidence respecting the deceased held admissible at the first trial. The Crown's position is that none of it is admissible.
- [5] By agreement of counsel, this voir dire proceeded on the basis that transcripts of the voir dire at the first trial represented the evidence in question, apart from a "journal" maintained by the deceased which was held admissible in part.
- [6] The law set down in *R. v. Duhamel* (1984), 15 C.C.C. (3d) 491 (S.C.C.) is that the doctrine of issue estoppel per rem judicatum does not apply to a determination on the admissibility of evidence made after a voir dire at a previous criminal trial.
- [7] While the parties, issues and the proposed evidence are the same as those considered on the voir dire at the first trial, I am not bound by the earlier ruling as to admissibility. According to *R. v. Hilson* (1958), 121 C.C.C. 139 (Ont.C.A.) at 142, cited with approval in *Duhamel*, even where an appeal court has ruled evidence was properly admitted at a previous trial that is not "in any sense binding" on the judge at a new trial. Therefore I must consider the question of admissibility afresh in light of my understanding of the Crown and defence theories of the case, the evidence and the applicable law.
- [8] It is common ground that the accused committed the homicide of the deceased. Her semi-nude body was found partly hidden at a remote location. The cause of death was strangulation. The accused's semen was in her body. The accused falsified his log to cover his movements at the time of death and went into hiding after the homicide.

- [9] After his arrest the accused told his wife the deceased propositioned him, and after he had consensual sex with her she attempted to extort \$300 from him by threatening to charge him with rape. He said when he refused to pay she attacked him violently and he responded with a choke hold, accidentally killing her. When he realized what he had done he panicked, hid the body, falsified his log and went into hiding. Defence counsel advised the court the accused would testify to the same effect in his own defence at this trial.
- [10] The Crown theory is that the homicide is first degree murder by virtue of s. 231(5)(b) of the Criminal Code, that is, because it was perpetrated "while committing" a sexual assault. Defence counsel characterized the defence theory as "self-defence leading to accident."
- [11] The Crown must prove the sexual intercourse was non-consensual in order to prove first degree murder. The Crown case in this regard is circumstantial, relying on inferences from the evidence set out above.
- [12] The defence position is that the accused's testimony about the homicide will be implausible to the jury and he will accordingly be unable to make a full answer and defence unless the defence is permitted to lead evidence from which the jury may infer from the character of the deceased that it is at least possible that she consented to the sexual intercourse, attempted to extort money from the accused and attacked him when he refused to pay the \$300. In a rhetorical flourish, defence counsel stated the accused had "no defence" if such evidence is not admitted.
- [13] Defence counsel acknowledged the evidence he seeks to put before the jury amounts to evidence of the deceased's character. The Crown position is that such evidence is irrelevant and therefore inadmissible.
- [14] The evidence can be conveniently divided into three categories for analytical purposes. These are evidence of the deceased's sexual history, evidence of her reputation as a fighter who reacted quickly and violently if she did not get her way, and evidence of a propensity to rash criminal behaviour.
- [15] Although the Crown must prove the elements of a sexual assault under s. 271 of the Criminal Code in order to prove first degree murder, Crown counsel did not assert that made s. 276 applicable in this case. However, Crown counsel took the position that the Supreme Court of Canada in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321, established a common law principle applicable in this case, that evidence a complainant in a sexual assault case was unchaste is not generally admissible. One reason such evidence is not admissible is because "the fact a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused", *Seaboyer*, supra, at p. 386 per McLachlin J. (as she then was). That is, such evidence is not probative.
- [16] However, *Seaboyer* does not go so far as to say that evidence of the sexual history of the complainant could never be probative or relevant. In fact at p. 395 McLachlin J. cites a hypothetical example, involving a contest between a prostitute alleging rape and a "john"

alleging extortion after consensual sex. McLachlin J. posited this as an example where evidence of the complainant's sexual history critical to the defence would have been excluded under what was then s. 276, which was a reason for finding the section unconstitutional. Elements of this example parallel in part the defence theory in this case.

- [17] The evidence of the deceased's past sexual history in this case falls far short of disclosing she was a prostitute. Ignoring the reliability of the evidence, most of it hearsay, and considering only its potential relevance, it could be characterized as evidence of the deceased's precocious promiscuity.
- [18] Is this evidence from which the jury could properly infer that the accused propositioned the accused and had sexual intercourse with him with the intention of then extorting money from him? The most reliable evidence of the deceased's casual attitude toward sex, from which defence counsel argued the jury would be entitled to infer that the deceased offered the accused sex with the intent to extort money, is that the deceased, shortly before her death, engaged in group sex with three other people. The deceased's sister testified she observed this incident.
- [19] The only evidence the deceased used sex to "blackmail" someone is that of J. P. Vienneau, a male about eight years older than the deceased, who said she threatened to charge him with rape more than a year before her death because he called her best friend a "bitch". He said he took the threat seriously enough that he quit associating with the deceased, although he denies having had sex with her at the relevant time. He said he had sex with her only once about a year after her threat. That is the only evidence from a sexual partner of the deceased. All the rest of the evidence of her promiscuity consists of statements she made to others or wrote about her sex life, apart from the incident of group sex which the deceased's sister said she observed.
- [20] If the deceased were alive and the complainant in a sexual assault case arising from the incident which ended in her death, would any of this evidence be admissible? It could only be admissible on the basis "there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case" and is necessary to uphold the right of the "accused to make a full answer and defence". I assume for purposes of this analysis that none of the other criteria for the admission of sexual history evidence under s. 276(3) are applicable where the "complainant" is dead, with the exception of s. 276(3)(d), with which I deal later.
- [21] In *Seaboyer*, supra, at pp. 394-395 McLachlin J. used the prostitution example as one of a "pattern of conduct" observing that if there were such a pattern the evidence still "must be carefully scrutinised" before being admitted for the normally "prohibited use" of inferring subsequent sexual conduct from prior sexual conduct.
- [22] The question of whether the group sex evidence would be admissible to "assist in arriving at a just determination" and to ensure the accused can make a "full answer and defence" were the deceased alive, turns entirely on how probative it is on the issue of consent. It is one

thing for a jury to infer that a prostitute consented to sex with a "john", it is quite another for a jury to infer that a teenager who had group sex in a party atmosphere propositioned the accused and consented to sex with him. This evidence could only lead the jury into the "prohibited use" of reasoning that prior sexual conduct infers similar subsequent conduct. The group sex incident is not evidence of a pattern of conduct.

- [23] The other evidence of precocious promiscuity in this case might be characterized as evidence of a "pattern of conduct", that is, the deceased's casual attitude toward sex. However, this evidence is not direct evidence she had sex with numerous partners, but evidence of what she told people about her sex life or wrote about it in her journal. There is a serious question about the reliability of this evidence as proof the activities the deceased told or wrote about actually occurred.
- [24] One source of this evidence is what the deceased told Audrey Anger, an experienced social worker, who recognized the deceased was an attention-seeker and acknowledged she could not be sure if the deceased was truthful about what she said about her sex life.
- [25] Another source is the deceased's journal written while she was in a youth detention centre. It was not a private journal. It includes contributions from fellow inmates. The tenor of many of the deceased's entries indicates they were intended to impress and even titillate the deceased's peers or other readers. These are the writings of a fifteen year old one centre official characterized as "boy crazy". That impression is reinforced by the journal.
- [26] Apart from the evidence of J. P. Vienneau and the evidence of group sex, Ms. Anger and the journal are the two best sources of evidence about the deceased's sex life. Other witnesses would not apply the same trained and perhaps skeptical scrutiny Ms. Anger did to the deceased's statements. Her journal entries permit consideration of precisely what was written by the deceased without the inevitable distortion of a witness's recall and impression.
- [27] I doubt oral statements attributed to the deceased by various witnesses about her sex life or her writings on that subject were made in circumstances which give them a circumstantial guarantee of reliability so as to permit their admission under the principled exception to the hearsay rule in *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.) and *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.).
- [28] I recognize that the judge at the first trial reached a different conclusion. He did so with respect to the journal entries on the basis they were private and the deceased would have "no reason to lie to herself". I find they were not private and the deceased had a reason to exaggerate or falsify, that is, a desire to impress or outrage, which negates any circumstantial guarantee of their reliability. I have similar misgivings about the deceased's oral statements.

- [29] Assuming, despite my reservations, that the deceased's oral statements and writings are admissible under Khan, supra, and Smith, supra, for the truth of their content, they fall short of demonstrating a pattern of promiscuousness, akin to prostitution, from which the jury might safely infer that the deceased consented to have sex with the accused.
- [30] It cannot be that evidence of the promiscuity of every teenage complainant is to be routinely admitted under s. 276. Likewise in this case, the probative value of such evidence falls far short of the Seaboyer, supra, example. It establishes no pattern of the deceased linking consensual sex to extortion. It is therefore not admissible.
- [31] Defence counsel argued that even if the deceased's statements about her sex life were not true they should be admitted to show that she was knowledgeable about sex and not a demure, inexperienced, ingenue. This evidence he argued would dispel the stereotype the jury can be assumed to have of 15 year old girls, that they would be incapable of even conceiving of propositioning a man and extorting money by claiming they were raped.
- [32] Any such stereotype with respect to the deceased will be dispelled by the evidence of J. P. Vienneau that the deceased threatened to accuse him of rape. This Crown counsel acknowledged was not embraced by the principle in Seaboyer, supra, because it did not involve the deceased's sexual history, since the deceased had not had sex with J. P. Vienneau when she threatened him.
- [33] The evidence of J. P. Vienneau is admissible to show that the deceased made such a threat. The whole of his evidence including the fact he later had sex with the deceased must necessarily be admitted so the jury may properly weigh the seriousness and significance of the threat. The jury will have to be instructed that they may not make the prohibited inference that the deceased consented to sex with the accused from the evidence she once had sex with J. P. Vienneau.
- [34] Defence counsel also argued that because the accused cannot confront his "accuser" and cross-examine her on the issue of consent, evidence of her sexual history should be admitted to provide a means for the accused to dispel the juror's natural sympathy for the deceased and their likely-held stereotype that no girl her age would do what the deceased will testify she did.
- [35] This is equivalent to asserting the criterion in s. 276(3)(d) should be applied. It amounts to an assertion that evidence of sexual history which the deceased could not be cross-examined about if she were alive should be admitted because she is dead, for the prohibited purpose of providing a basis for the inference of consent. I reject this submission.
- [36] In R. v. Darrach (2000), 148 C.C.C. (3d) 117 (S.C.C.) at pp. 121-122 it is stated "[p]rior sexual activity is, like hearsay, character evidence and similar fact evidence, restricted in its admissibility. If the defence seeks to adduce such evidence, it must establish that it supports at least some relevant inference." The court also stated at p. 120 "... evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect".

- [37] The prejudicial effect referred to is not potential embarrassment to a complainant, which is not a consideration in this case, but prejudice "to the proper administration of justice". Such prejudice would be occasioned by the admission of evidence of sexual history for the purpose of supporting the "illegitimate inference" that a woman is "more likely to have consented".
- [38] I conclude that apart from the evidence of J. P. Vienneau to which I referred in paragraph 33, there is no proper basis for the admission of evidence of the deceased's sexual history. It is inadmissible.
- [39] The other categories of evidence the defence seeks to have admitted are both evidence of the deceased's character. There is evidence of her reputation as a fighter quickly stirred to violence, and evidence of her propensity to criminal activity. The two overlap to some extent. As noted in Darrach, *supra*, this evidence must be shown to support some relevant inference in order to be admissible.
- [40] The main evidence of the deceased's reputation as a fighter is that of her friends, relatives and acquaintances, consistent with school and other records, that the deceased was frequently involved in fights. Her opponents were primarily other girls, some bigger and older than her. She administered violent beatings to some opponents and revelled in her reputation as a fighter. The most significant incident was one where the deceased, on the minor provocation of having ketchup flicked at her, leapt onto a dining table at a youth detention centre and kicked another girl in the head. On another occasion she punched an obnoxious drunken man in the face and chased him with a stick.
- [41] Defence counsel argued this evidence could lead the jury to infer the deceased was the sort of person who would have no hesitation attacking and fighting the accused when he rejected her extortion demand.
- [42] The main evidence of the deceased's criminal propensity is that she was referred to a "klepto" by her best friend because of her propensity to shop lift, that she pled guilty to breaking and entering her grandmother's house with her sister and some friends to steal cigarettes, that she was sentenced to six months in detention for stealing and demolishing her foster parents' car, perhaps on a dare and with suicidal intent. There is also evidence she had to be dissuaded from a plan to steal drugs from a drug dealer. The deceased drank alcohol, frequently used marijuana and experimented with other illegal drugs.
- [43] Defence counsel argued all this sort of evidence could lead the jury to infer the deceased was the sort of person who might embark on the rash criminal enterprise of attempting to extort money from the accused without concern about the practical consequences of her actions.

- [44] The primary authority relied on by defence counsel to support the admissibility of this evidence is *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (O.C.A.). That case held that on a charge of murder where self-defence is raised "evidence of the deceased's character or disposition for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased" according to the headnote.
- [45] That is subject to the condition that there must be some "appreciable evidence" of the deceased's aggression on the occasion in question. That evidence may emanate from the accused. In *Scopelliti*, supra, it was the accused's testimony about how he was menaced by the deceased.
- [46] In *Scopelliti*, supra, the accused testified he was very frightened and thought the two deceased might kill him. Here the accused will testify that the deceased attacked him with unexpected violence and he accidentally killed her while attempting to subdue her. There is no suggestion he felt his life was imperilled by the deceased or even that he feared her. He was a security guard, older and considerably bigger than the deceased. There is no evidence he knew her reputation as a fighter. His evidence, as I understand from counsel, will be that he was surprised by the vigour with which the deceased attacked him.
- [47] These are points of distinction between this case and *Scopelliti*, supra, which were not discussed by counsel in their submissions. I assume, in the absence of submissions, they are not germane to the question of whether evidence of the deceased's reputation for violence and of specific acts of violence is admissible in this case as a basis for the inference, potentially corroborative of the accused's testimony, that she was the aggressor. As was noted in *Scopelliti*, supra, great care must be taken to ensure that evidence from which an inference may be drawn that the deceased was the aggressor, if admitted, is not misused by the jury.
- [48] I conclude that evidence of the deceased's reputation for violence and of specific acts of violence perpetrated by her is admissible.
- [49] I am not persuaded that evidence of her criminal behaviour, apart from violence, may properly be admitted under the *Scopelliti*, supra, analysis as probative of the likelihood she was the aggressor. Nor am I persuaded it is probative in the sense that it could properly base an inference that she was likely to have attempted to extort money from the accused. Shoplifting, car theft, and breaking and entering bear little relation to extortion. All are surreptitious not confrontational crimes. In any event, even if this evidence were probative, its potential prejudicial effect of arousing in the jury feelings of hostility against the deceased, as a person of general criminal disposition, militates against its admission.

- [50] I conclude that evidence of the deceased's shoplifting, car theft, breaking and entering and drug use is not admissible as a basis for the inference the deceased might have tried to extort money from the accused. Needless to say, evidence that she discussed but did not follow through with a plan to "rip off" a drug dealer has no probative value on the question of criminal propensity and is not admissible.
- [51] However, evidence of the car theft is admissible so the jury will not be left to speculate how the deceased came to be in the detention centre at the time of the ketchup incident. The jury will have to be instructed the car theft and detention were disclosed for a limited purpose as part of the narrative of the ketchup incident.
- [52] I have issued this ruling in advance of Crown and defence counsel opening in front of the jury so they may do so with an understanding of the scope of the evidence which will be admissible at the trial. I invite them to seek clarification on any specific points I may have overlooked, before opening.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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