
CANADA / JUDGMENT

R. v. Gill

2008 BCSC 96

COURT

Supreme Court of British Columbia

DECIDED

25 January 2008

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2008 BCSC 96 R. v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gill,

2008 BCSC 96

Date: 20080125

Docket: 24322

Registry: Vancouver

Regina

v.

Ramandeep Singh Gill

Before: The Honourable Madam Justice L. Smith

Ruling

Counsel for the Crown:

H.G. Loepky

Counsel for the Accused:

P.J. Wilson, Q.C.

Date and Place of Trial:

December 3, 4, 5, 6, 7, 10, 11, 12 and 13, 2007, and January 24, 2008

Vancouver, B.C.

- [1] Mr. Gill was tried before a jury on one count of sexual assault. He applied for a ruling that all or part of his prior criminal record be excluded as a subject of cross-examination. I considered the authorities and the submissions of counsel and ruled that in the circumstances of this case I would not restrict the Crown in its ability to cross-examine Mr. Gill with respect to his criminal record. I stated that I would give reasons at a later date; these are those reasons.
- [2] The incident leading to the sexual assault charge occurred on October 16, 2005. The complainant was a sex trade worker at the time, and testified that she had agreed to certain sexual activities with Mr. Gill for a fee of \$80 but when he tendered payment of \$20, she refused. Her evidence was that he then physically assaulted and threatened her, and she submitted to sexual activities.
- [3] Mr. Gill is 27 years old. He was convicted of two counts of common assault on November 10, 1999 and was fined \$750 for each, and he was convicted on June 6, 2001 for manslaughter and sentenced to six years imprisonment.
- [4] He was 18 years old at the time of the common assault convictions, 20 years old at the time of the manslaughter conviction and almost 25 years old on October 16, 2005. As of that date he was on parole, having been released from prison in June, 2005.
- [5] The Canada Evidence Act, R.S.C. 1985, c. C-5, provides:
- 12.(1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment.
- [6] Following the advent of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada held in *R. v. Corbett*, [1988] 1 S.C.R. 670, that there is discretion in the trial judge to "exclude evidence of prior convictions in those unusual circumstances where a mechanical application of s. 12 would undermine the right to a fair trial" (per Dickson C.J.C. at 692). An application to exclude evidence of prior convictions is to be made at the close of the Crown's case: *Underwood v. The Queen*, [1998] 1 S.C.R. 77.
- [7] In *Corbett* (where there was an unsuccessful application for a declaration that s. 12 infringed the Charter right to a fair trial), Chief Justice Dickson for the majority discussed the rationale for s. 12 in these passages at 685-686:

The history of the Canada Evidence Act, s. 12 and its predecessors is set out in *La Forest J.'s* reasons and in the judgment of *Martin J.A.* in *R. v. Stratton* (1978), 42 C.C.C. (2d) 449 (Ont. C.A.). Cross-examination of an accused with respect to prior convictions has been permitted in Canada since an accused first became competent to testify on his own behalf in 1893: *R. v. D'Aoust* (1902), 5 C.C.C. 407 (Ont C.A.). What lies behind s. 12 is a legislative judgment that prior convictions do bear upon the credibility of a witness. In deciding whether or not to believe someone who takes the stand, the jury will quite naturally take a variety of factors into account. They will observe the demeanour of the witness as he or she testifies, the witness' appearance, tone of voice, and

general manner. Similarly, the jury will take into account any information it has relating to the witness' habits or mode of life. There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, but it is a fact which a jury might take into account in assessing credibility.

This rationale for s. 12 has been explicit in the case law. See, e.g., *R. v. Stratton*, supra, at p. 461, per Martin J.A., "Unquestionably, the theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial reliability of the witness."

An American court identified the rationale behind a similar rule in the following language:

What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know. So it seems to us in a real sense that when a defendant goes onto a stand, "he takes his character with him...." Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey, as in the case at bar, though the violations are not concerned solely with crimes involving "dishonesty and false statement."

(*State v. Duke*, 123 A.2d 745 (N.H. 1956), at p. 746; quoted with approval in *State v. Ruzicka*, 570 P.2d 1208 (Wash. 1977), at p. 1212).

[8] While prior convictions are ostensibly simply evidence for the jury to consider, along with everything else, in assessing the credibility of the accused, there is a concern that the introduction of evidence of criminal convictions could divert the jury from its task of deciding the case on the basis of admissible evidence. This is because of the risk that the jury would use the criminal conviction evidence for impermissible purposes. Dickson C.J.C. wrote with respect to this at 692:

In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. So long as the jury is given a clear instruction as to how it may and how it may not use evidence of prior convictions put to an accused on cross-examination, it can be argued that the risk of improper use is outweighed by the much more

serious risk of error should the jury be forced to decide the issue in the dark.

[emphasis in original]

- [9] The majority, noting that judicial decisions have carefully circumscribed the extent to which the Crown may use prior convictions, held that s. 12 does not operate in such a way as to deprive the accused of the right to a fair trial. However, it held that the trial judge has a discretion to exclude prejudicial evidence of previous convictions in an appropriate case.
- [10] On the facts in *Corbett*, where the Crown witnesses' credibility had been attacked largely on the basis of their criminal records, the majority held that excluding evidence of Mr. Corbett's prior criminal record would have created a serious imbalance, allowing the jury to be left "with the quite incorrect impression that while all the Crown witnesses were hardened criminals, the accused had an unblemished past" (at 690).
- [11] The majority agreed that the factors identified by La Forest J., dissenting (who would have excluded cross-examination of Corbett on his record), were useful. The same factors have been referred to consistently in the authorities since *Corbett*. Those factors, bearing on the probative value and prejudicial effect of a previous conviction, are:
1. the nature of the previous conviction (La Forest J. referred to *Gordon v. U.S.*, 383 F. 2d 936 at 940 (1967), which states that acts of deceit, fraud, cheating or stealing will reflect adversely on a person's honesty and integrity, while acts of violence generally have little or no direct bearing on honesty and veracity);
 2. the similarity of the previous conviction to the conduct for which the accused is on trial (the more similar the prior offence, the greater the prejudice harboured by its admission);
 3. the remoteness or nearness in time of the previous conviction to the present charge (and whether the accused has led a legally blameless life for a period of time since the conviction); and
 4. the risk of presenting a distorted picture to the jury (which may arise where there has been a deliberate attack upon the credibility of a Crown witness and where the resolution of the case boils down to a credibility contest between the accused and that witness).
- [12] In a recent decision (*R. v. Madrusan*, 2005 BCCA 609, 203 C.C.C. (3d) 513)) Ryan J.A. wrote at paras. 51-53:

In *Corbett*, La Forest J. made this observation at p. 726:

As Ratushny points out, the trier of fact is entitled to infer that because the accused committed criminal acts in the past he or she is now more likely to lie, but that same trier of fact is not entitled to infer therefrom that the accused is also more likely to have committed the evil act for which he is now on trial (*supra*, at pp. 336-37). Ironically, however, as a matter of logic and human experience which are, after all, our touchstones in the present inquiry, the probative value of such evidence to the latter question (of guilt) appears to be far more prepossessing.

This observation is powerful. It lies at the heart of the decision that s. 12 of the Canada Evidence Act must give a trial judge the discretion to exclude portions of an accused's record on the basis of trial fairness. While the majority in Corbett chose to place their faith in the ability of jurors to understand and follow the instructions of a trial judge who will tell them that they must place the common sense inference aside, they recognized that in some cases trial fairness will require that the record, or part of it, not go before the jury.

The discretion given to a trial judge in Corbett is directed not only to determining whether the prosecution should be prohibited from cross-examining the accused on his or her criminal record, but is also directed to whether the record ought to be edited.

- [13] The Court in Madrusan concluded that the trial judge ought to have limited the number of robberies and assaults (in the context of a record of 37 convictions starting in 1986 and ending in 2001) upon which the accused could be cross-examined at his trial for robbery, perhaps to a single conviction for each of the similar offences. The Court said that this approach would have put before the jury a record containing offences of dishonesty that demonstrated a continuing disregard for the law, without overwhelming the jury with similar offences.
- [14] In a useful article on the case law applying the principles enunciated in Corbett, Peter Sankoff summarizes the trends and proposes some guidelines for the exercise of discretion ("Corbett Revisited: A Fairer Approach to the Admission of an Accused's Prior Criminal Record in Cross-Examination" (2006) 51 Criminal Law Quarterly 400.) He argues that in some cases the risk of prejudice through the jury learning of prior convictions is so great that evidence about those convictions should be presumptively inadmissible. He suggests presumptive inadmissibility where the prior convictions are similar in nature to those for which the accused is on trial.
- [15] Mr. Wilson, on behalf of Mr. Gill, argued that Mr. Gill's prior criminal record should be excluded because its probative value is outweighed by its prejudicial effect. Mr. Wilson (in order to give proper context) referred to the evidence that would be led if a defence was called. He referred to the statement that Mr. Gill had given police. In that statement Mr. Gill said that he had picked up the complainant and they had agreed on a price for intercourse, and he said that he and the complainant had consensual sex, but when she demanded more money that he refused to pay, she became upset.
- [16] Counsel for the defence emphasized that all of Mr. Gill's convictions are for violent acts and therefore they do not have the same impact on credibility as would convictions for theft, fraud and other acts involving deceit. Further, he argued, the convictions are all for offences similar to the one with which the accused was charged in that manslaughter, common assault and sexual assault are all species of assault. He referred to the concern expressed by Mr. Justice La Forest in Corbett that the more similar the prior offence to the one for which the accused is on trial, the greater the prejudice harboured by its admission.

- [17] With respect to remoteness, Mr. Wilson submitted, there have been eight years since the assault convictions (nearly a third of Mr. Gill's life) and over six years since the manslaughter conviction (essentially a quarter of his life). He conceded, however, that it is relevant with respect to the "remoteness" factor that the sexual assault alleged in the indictment occurred approximately four months after Mr. Gill's release from prison on the manslaughter conviction.
- [18] Finally, Mr. Wilson suggested that any allegation of sexual assault, if denied, necessarily involves an attack on the credibility of the complainant. He submitted that the complainant in this case was not attacked on the basis of her criminal lifestyle. Mr. Wilson agreed that it is settled law that an attack on the character of a Crown witness, whether or not based upon a prior criminal record, is a factor to consider, referring to *Madrusan* at para. 40.
- [19] Mr. Loeppky for the Crown submitted that there was a concerted attack on the credibility of the two main Crown witnesses, the complainant and her "sister" who worked with her, particularly through attacks on their lifestyle as drug addicts. He argued that if I were to preclude cross-examination on the criminal record of the accused, the jury would have a very skewed picture of the reality of the situation when assessing the complainant's credibility as compared to the accused, since there had been an all out attack on her credibility as a prostitute and a drug addict.
- [20] Mr. Loeppky argued that Mr. Gill's record shows a course of general disrespect for the law, and that the risk of prejudice here is minimal because the previous convictions are not for sexual assault, nor is there a suggestion that the previous victims of the assaults were female or that they had anything to do with the drug business. He submitted that the record is relevant to another factor in the case, which is that the complainant testified that the accused said to her during the incident that he had just got out of jail; thus, the existence of the manslaughter conviction bears on her credibility. I should say that I do not find this ground persuasive and it does not enter into my reasoning.
- [21] Mr. Loeppky referred to a number of authorities: *R v. Charland*, [1997] 3 S.C.R. 1006; *R v. Charland* (1996), 43 Alta. L.R. (3d) 364 (C.A.); *R. v. Dahlbeck* (1994), 45 B.C.A.C. 23; *R. v. Richards* (1997), 87 B.C.A.C. 21; *R. v. Fengstad* (1998), 117 B.C.A.C. 95; *R. v. Gibson*, 2001 BCCA 297, 90 B.C.L.R. (3d) 247; *R. v. Gagnon* (2000), 147 C.C.C. (3d) 193 (Ont. C.A.); *R. v. Peterpaul* (2001), 151 C.C.C. (3d) 193 (Ont. C.A.); *R. v. N.A.P.*, [2002] O.J. No. 4829; *R. v. G.A.F.*, [1999] B.C.J. No. 1782; *R. v. Simmonds*, 2000 BCSC 855, [2000] B.C.J. No. 1316; *R. v. Plasway*, 2004 BCSC 84, [2004] B.C.J. No. 127; and *R. v. Hines*, [2001] O.J. No. 1435.
- [22] In *R. v. Gagnon* (2000), 147 C.C.C. (3d) 193 (Ont. C.A.), the accused and co-accused, who were brothers, were charged with conspiracy to commit robbery. One of the issues was the accused's criminal record, which dated from between 1971 to 1994. An application was brought to edit the record to exclude a 1982 conviction for manslaughter. The trial judge declined to allow that application. He commented that the connection between manslaughter and conspiracy to commit robbery is somewhat tenuous and "to remove this

serious conviction in the middle of an otherwise very minor record, would be to give the jury a completely false impression".

- [23] The Court of Appeal, as had the trial judge, referred to *R. v. Saroya* (1994), 76 O.A.C. 25. There, the Ontario Court of Appeal considered whether a conviction for attempted murder should have been excluded at the appellant's trial for assault and stated (at 28):

A conviction for attempted murder cannot be dismissed as having little probative value on the credibility of the witness. Although it is not a so called offence of dishonesty, which may be probative of deception, attempted murder is such a serious offence that, in itself, it may be taken to indicate that the prospect of a conviction for perjury is unlikely to keep the witness in line. More significantly, it would be open to a jury to find, on all the relevant evidence, that the witness is unlikely to have more respect for the truth than he has shown for human life.

- [24] In *Gagnon*, Weiler J.A. (Catzman J.A. concurring) wrote:

As in *Saroya*, supra, the trial judge was of the opinion that the deletion of the commission of this serious crime from the appellant's record would leave the jury with a misimpression as they weighed his credibility. A conviction for manslaughter, like a conviction for attempted murder, is a very serious offence that, as quoted above, may indicate that the prospect of a conviction for perjury is unlikely to deter the witness from lying under oath. I cannot say the trial judge inappropriately weighed the various factors he was required to consider.

- [25] The Crown's position was that with a careful instruction, the risk that the jury would use the cross examination improperly would be avoided, and the conviction for a serious crime (manslaughter) would have significant probative value with respect to Mr. Gill's credibility.

- [26] I turn to the factors which La Forest J. identified, and which were adopted by the majority in *Corbett*, as they apply to this case.

- [27] With respect to the nature of the convictions, none of the convictions is for an "offence of dishonesty". However, one of them, manslaughter, is very serious. A serious offence such as manslaughter may indicate disregard for the rules of society, including the requirement to give truthful testimony under oath.

- [28] The degree of similarity is a key factor. The allegations against Mr. Gill in this case involve some acts of violence. The previous convictions for common assault and manslaughter both involve some form of violence. However, the previous convictions are not for sexual assault or for sexual offences of any kind.

- [29] I do not believe there is a serious risk that the jury would assume that the previous convictions involved female victims or were committed in a sexual context. I do not think that the degree of similarity is sufficient to create a risk that the jury would use the prior convictions to conclude that Mr. Gill has a propensity to commit sexual assaults.

- [30] The common assault convictions were two years prior to the manslaughter, and the manslaughter was about four and one-half years before the sexual assault on October 15, 2005. Little time passed between Mr. Gill's release from prison and the incident leading to this charge. There was not a lengthy period of crime-free life that would make it unfair to allow Mr. Gill to be cross-examined about the convictions.
- [31] The attack on the credibility of the Crown witnesses in this case, while by no means "over the top", was vigorous. The complainant's "sister" was in custody, incarcerated for two counts of robbery, and the Crown elicited evidence about those convictions from her. Mr. Wilson did not pursue any details of the circumstances of those offences. However, that witness's credibility was attacked with respect to her involvement in the complainant's prostitution, her own drug dealing and her own drug use.
- [32] It appears that the complainant herself does not have a criminal record. However, the complainant's prostitution activities were brought out in some detail, as was her drug addiction. Cross-examination was aimed at showing not only the effect of drug use on her ability to observe and remember, but also at showing her to be motivated by the need to get money for drugs, to be willing to prostitute herself and to be ready to lie.
- [33] I have considered all of the factors described above in assessing whether to exercise my discretion to exclude some or all of the accused's record from cross-examination by the Crown, in order to protect his right to a fair trial.
- [34] I do not consider this to be a case in which the record should be kept from the jury. The convictions are not for sexual assault or for sexual offences. They are not remote in time. One of them is for a very serious offence. The two main Crown witnesses were extensively cross-examined as to credibility, to some extent based on their character.
- [35] As the Supreme Court of Canada held in *Corbett*, the fact of previous criminal convictions has a logical bearing on the assessment of credibility. The legislative judgment embodied in s. 12 is that convictions do bear on credibility. As Professor Sankoff says, at 450, "as a general matter, the prior convictions of an accused person will be more probative in impeaching credibility than they are prejudicial."
- [36] I have considered whether or not the record could be edited, for example, by deleting one or both of the common assault convictions. My conclusion is that it would be misleading to delete both of the common assaults and thus indicate to the jury that Mr. Gill has only one conviction on his record rather than something of a pattern. Deleting one of the common assault convictions would likely make no material difference. As for the other possibility, which would be to edit out the manslaughter conviction, I believe that it would mislead the jury to keep from them the information that Mr. Gill had a serious conviction on his record.

[37] Taking into consideration the overriding requirement that the accused be afforded a fair trial, I have concluded that the defence application should not be allowed and the Crown should be permitted, if the accused takes the stand, to cross-examine him on his previous convictions as permitted by s. 12 of the Canada Evidence Act.

"The Honourable Madam Justice Lynn Smith"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/Jdb-txt/SC/08/00/2008BCSC0096.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-gill-2008-bcsc-96>

Prepared on 29 October 2026 · Esheria