

CANADA / JUDGMENT

R. v. Wareing

2024 BCSC 2502

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Supreme Court of British Columbia

DECIDED

23 April 2024

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2024 BCSC 2502 R. v. Wareing

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wareing,

2024 BCSC 2502

Date: 20240423

Docket: X084860

Registry: New Westminster

Rex

v.

Justin Michael Wareing

Before: The Honourable Justice Blok

Oral Ruling on Defence Corbett Application

Counsel for the Crown:

J.-B. Deschamps

B. Israel

Counsel for the Accused:

S. Buck, K.C.

S. Hiscock

Place and Date of Hearing:

New Westminster, B.C.

April 22, 2024

Place and Date of Judgment:

New Westminster, B.C.

April 23, 2024

- [1] THE COURT: This is my ruling on the defence Corbett application. I will be referring to some extracts from some of the cases. It may be that I do not quote those extracts in full, given the fact that we are a bit short of time this morning, but should a transcript be ordered, I will be putting the full extracts into the transcript when edited.
- [2] The defence has brought a so-called Corbett application for an order that limits the Crown's cross-examination of the accused on his criminal record.
- [3] The accused, Mr. Wareing, is charged with the second-degree murder of Cashmere Ali and the attempted murder of Matthew Whitty. The offences are alleged to have occurred on July 15, 2022, in Maple Ridge.
- [4] The evidence at trial indicates that the residence where the offences are said to have taken place is a hangout for users of illicit drugs. It appears that some people resided there, more or less, others stayed over, and others visited but did not stay over.
- [5] What is now reasonably clear at this stage of the trial is that at around 8:30 a.m. that morning, Mr. Wareing opened fire on Ms. Ali and Mr. Whitty with a .22-calibre 3D-printed handgun. What is not clear is why that happened or what actions, if any, preceded that shooting.
- [6] Evidence has been led at this trial that two days prior, Mr. Whitty and Mr. Wareing and others attended at another residence to carry out robbery of a drug dealer. Both of them were armed with handguns. It is expected that the accused will say that, on the morning of the shooting, he confronted Mr. Whitty with his suspicion or accusation that Mr. Whitty had diverted some of the robbery proceeds without Mr. Wareing's knowledge. He is expected to say that Mr. Whitty then shot at him and Mr. Wareing responded by firing back. Ms. Ali, who was sitting on a couch next to Mr. Whitty, was shot in the course of that return fire.
- [7] Mr. Whitty has testified that at the time of these events, he did not have a gun, as he had discarded his gun from two days prior. He denied shooting that or any gun. He says Mr. Wareing did confront him or at least expressed displeasure with him, although not for any issue concerning robbery proceeds. He says Mr. Wareing simply shot him without warning, first in the knee and then repeatedly thereafter, but not before he also shot Ms. Ali in the head.

- [8] There was a witness to these events, Max Duschl, who was in or near the room where the shooting occurred. His version of events does not align fully with that of Mr. Whitty, but it does align insofar as he said only one person shot a firearm and that person was Mr. Wareing.
- [9] The further context necessary for the Corbett application is that the criminal records of Mr. Whitty and Mr. Duschl have been placed before the jury. The Crown led these criminal records in direct examination and the defence cross-examined on those records. In addition, the defence cross-examined Mr. Whitty on outstanding firearms charges that he currently faces.
- [10] Mr. Whitty's criminal record includes convictions for theft, breach of an undertaking, obstructing a peace officer, unlawful confinement, and assault with a weapon.
- [11] Mr. Duschl's criminal record includes convictions starting in 2010 for obstructing a peace officer, mischief over \$5,000, and a further conviction for driving while over .08. In September 2023, Mr. Duschl was convicted of failing to appear in court. In April 2024, he pleaded guilty to four firearms offences, and in February 2024, he was convicted of breaching a release order.
- [12] Mr. Wareing has 14 convictions, with his criminal record commencing in April 2017, referencing the offence date, and ending in December 2018. His earlier convictions are for assaulting a police officer, breach of an undertaking or recognizance, and assault. He then has a group of 11 convictions that were all resolved in July 2020. These are five robbery convictions, four convictions for using an imitation firearm while committing an indictable offence, and convictions for flight from police and theft over \$5,000.
- [13] With that backdrop, I now turn to the application and the positions of defence and Crown. Firstly, the defence.
- [14] The defence submits that the crimes of violence in Mr. Wareing's record add nothing in terms of probative value, but carry with them the potential for substantial prejudice. The defence referred to *R. v. Corbett*, [1988] 1 S.C.R. 670, at paras. 35-37, and emphasized the balance that must be struck between leading impermissible bad character evidence and appropriate attacks on credibility.
- [15] *Corbett*, at paras. 153-161, provides the factors that ought to be taken into consideration when making that balancing assessment, and the defence addressed those factors.
- [16] The defence proposes that the Crown be limited to cross-examining on the robbery convictions by referring to the theft component only, which maintains a crime of dishonesty - theft - while eliminating the propensity reasoning that would or could be associated with the violence inherent in the offence of robbery. The defence also proposes that the use of imitation firearm convictions be eliminated entirely. Finally, the defence argues that the assault of a police officer and flight from police convictions also be eliminated.

- [17] I digress for a moment to note that Crown and defence agree that the March 2017 assault conviction ought to be eliminated.
- [18] The defence referred to a number of authorities, in addition to Corbett, starting with *R. v. Madrusan*, 2005 BCCA 609, where the accused, facing a charge of robbery, was cross-examined on the entirety of his lengthy record which had 37 convictions described as being "primarily for theft and violence or both": para. 11. Convictions for aggravated assault, assault, assault with a weapon, and four convictions for robbery, including armed robbery, were included in that list.
- [19] The court in *Madrusan* focused on the fact that the trial judge failed to consider the intermediate step of editing the criminal record to limit the record for robbery and assaults in order to reduce the prospect that the jury might tend to use his many convictions for crimes of violence to infer, despite any direct caution from the trial judge, that he was more likely to have committed the robbery with which he was charged.
- [20] At this point, I refer to paras. 51 to 53 of *Madrusan*:
- [51] 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.

- [52] 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.
- [53] 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. In the case under appeal, in my view, the trial judge did not give proper consideration to editing the record. Given the nature of the offence with which the appellant was charged, the nature of the defence put forward, and the sheer size of the criminal record, I am of the view that the trial judge erred in failing to consider whether she ought to edit the record to remove some of the offences which, by their nature, touched on the issues the jury had to decide. In my view, had the trial judge turned her mind to the question whether trial fairness would have been compromised by placing the entire record before the jury, she would have been driven to the conclusion that the number of robberies and assaults should have been limited in

number, perhaps, as the court in Gordon, supra, suggested, to a single conviction for each of the similar offences. This approach would have left for the jury a record which demonstrated a continuing disregard for the law, a record which contained offences of dishonesty while at the same time not overwhelming the jury with similar offences to the one before them.

- [21] The defence also referred to R. v. Talbot, 2007 ONCA 81, where on a Corbett application a trial judge allowed robbery convictions to be referred to as theft convictions. Talbot involved an altercation between strangers outside a restaurant which resulted in the death of one of the individuals. The accused testified and claimed he acted in self-defence. The accused in that case had a record of 25 convictions, including six robbery convictions and six assault-related convictions.
- [22] In Talbot, the court noted at para. 28:
- [28] The trial judge acceded to most of the submissions made on behalf of the respondent [the accused]. She held that the Crown could not cross-examine the respondent on the six assault related convictions and that cross-examination on the two robbery convictions should refer to the convictions as theft convictions. As a result of the trial judge's ruling, Crown counsel was permitted to cross-examine the respondent on nineteen prior convictions extending over the sixteen years prior to this homicide.
- [23] The Crown appealed, arguing that the courts had strayed from the Corbett principles which recognized a limited discretion to exclude cross-examination on a criminal record. The court found no merit on those submissions, stating:
- [34] I see no error in the trial judge's identification of potential prejudice. Nor do I regard her frank acknowledgement of that potential prejudice as inconsistent with a recognition of the ability of juries to follow instructions. Acknowledging the risk of prejudice is not tantamount to suggesting that juries will ignore what they are told by trial judges. Rather, acknowledging the prejudice recognizes that despite proper instructions and the best of intentions by juries, faulty propensity based reasoning can infect a jury's deliberations. This is particularly so where an accused's criminal record lends considerable credence to propensity based reasoning.
- [36] It was open to the trial judge to conclude that cross-examination on those additional crimes would add very little, if anything, to the jury's ability to assess the respondent's credibility. The crimes of violence could, however, provide real insight into the respondent's propensity for violence. That insight could taint the jury's ability to properly try the case.
- [24] The defence also referred to R. v. Farrell, 2011 ONCA 572; R. v. N.A.P., [2002] O.J. No. 4829 (C.A.); and R. v. W.B., [2000] O.J. No. 2186 (C.A.).
- [25] Briefly, in N.A.P., the Ontario Court of Appeal noted that the expunging of an accused's prior conviction for attempted murder would not leave the jury liable to assume he had an unblemished record, as there was a large body of evidence demonstrating years of domestic

abuse. Here the defence similarly argues that there is already evidence before the court of Mr. Wareing's participation in a robbery two days prior to the shooting, and so here the jury will not be left with the impression Mr. Wareing would not carry out a robbery should his robbery convictions be edited down to thefts.

- [26] Finally to W.B., a decision of the Ontario Court of Appeal, a case where an accused was charged with indecent assault, and a question arose about cross-examination on the accused's dated criminal record, which included convictions for sexual assault. The Crown argued that the defence cross-examination of the Crown witnesses had amounted to an attack on their character, thus calling for the right to cross-examine the accused on his record, albeit on a limited basis by referring to the sexual assaults as assaults only. The court said at para. 43:
- [43] In my view, the trial judge erred in permitting cross-examination of the appellant on the prior record, even in the sanitized version. As indicated, Crown counsel at trial sought to justify the cross-examination on the basis that an imbalance would have been created. This was an attempt to bring the appellant's case within the holding in Corbett.
- [45] The facts in Corbett are far removed from the facts in this case. The attack on credibility of the Crown witnesses in Corbett was on the basis of their character especially as disclosed in the criminal record. These were matters not directly connected with the offence itself.
- [46] There is a distinction between an attack on the character of Crown witnesses initiated by the defence and attempts by the defence to meet the prosecution's evidence that incidentally impacts on character
- [27] Here the defence says that similarly the cross-examination of Mr. Whitty and Mr. Duschl was cross-examination on the event itself, not on their character as such. Accordingly, the defence submits, there is no need to address an imbalance in accordance with the fourth factor in Corbett. The defence also emphasizes that it was the Crown that led the criminal records of these witnesses, not the defence.
- [28] Now to the Crown's submissions.
- [29] The Crown submits that it should be entitled to cross-examine on the entirety of the accused's criminal record. The Crown emphasizes that Corbett itself says admission of the entire record is the norm and exclusion is the exception. Corbett also makes clear that the burden is on the accused to demonstrate that exclusion is warranted.
- [30] The Crown says this is a credibility case in which the defence has mounted a credibility attack on the Crown witnesses. For that reason, the jury should have all the information relating to the accused's record. Propensity reasoning, the Crown says, can be curtailed through proper judicial instruction.

- [331] The Crown says the offence of robbery includes elements of dishonesty which is a material factor in assessing credibility. Excising the use of imitation firearm convictions would leave a notable gap in the accused's record and generate confusion when attempting to refer to the sentences imposed.
- [332] The Crown went through the cases cited by the defence and noted features that distinguish them from the present case.
- [333] For its part, the Crown cited the following cases: *R. v. Singh*, 2022 BCSC 1645; *R. v. Laing*, 2016 ONCA 184; *R. v. Hussein*, 2023 ONCA 253; and *R. v. Pepin*, 2021 QCCS 4116.
- [334] Briefly, *Singh* involved a charge of aggravated assault. The accused had a record of 11 convictions, including one for robbery, one for unlawful confinement, and two assaults.
- [335] The court held that editing or excluding these convictions would leave the jury with a completely distorted view of the prior convictions. The Crown in this case argues that editing or excluding convictions here would result in a similarly-distorted view.
- [336] In *Laing*, the accused was charged with two counts of possession of a loaded firearm plus related firearms counts. The accused had a 2009 conviction for possessing a firearm and sought its exclusion. The trial court declined to excise that conviction and that decision was upheld by the Ontario Court of Appeal.
- [337] In *Hussein*, the accused was charged with second degree murder. The issue was one of identity. The accused had a record of 16 convictions. The trial judge noted that in addition to the offences of dishonesty in the accused's record, which of course speak directly to the question of honesty or dishonesty of the accused, his record showed:
- [338] an ongoing approach to the law that could be described as disregard or disdain," and evidenced "a pattern of persistent and regular disregard for the law that would be probative of whether [Mr. Hussein] would approach his oath with proper regard or be dissuaded from the prospect of a perjury conviction." He found that the youth convictions were not "remote" because they form part of this "cohesive whole".

The court went on at para. 40 to say:

- [40] After commenting that "[t]he entries in the record are nowhere near to the nature of the [alleged] homicide", he concluded that, in the context of the case, the record speaks to the credibility of Mr. Hussein, and not to the central issues in the case.
- [38] The Crown in this case emphasizes the Ontario Court of Appeal's further endorsement of the presumptive admissibility of an accused's criminal record and the safeguards that are already in place, including the limited scope of cross-examination, the cautionary or limiting instructions given by a trial judge, and the residual discretion itself to limit cross-examination, if prejudicial effect exceeds probative value.

- [39] I do note that the Supreme Court of Canada has granted leave to appeal in that case. Leave was granted on March 7, 2024. This leaves the authority of Hussein in a state of some uncertainty.
- [40] Finally, the Crown referred to Pepin, where an accused was charged with second degree murder. The deceased had been stabbed to death in an altercation involving a group of people. Identity and self-defence were the issues. A robbery had preceded these events.
- [41] The accused was 19 years old at the time of the incident and had a prior youth record that included a conviction for robbery. While the court excluded the prior robbery conviction as well as a conviction for carrying a concealed weapon, the judge also noted the substantial attack on the main Crown witness's character and noted it created a need to strike a balance in order to avoid showing a distorted picture to the jury: Pepin at para. 55.
- [42] This was the main point advanced by the Crown here. The Crown said that excising or editing Mr. Wareing's criminal record will create an imbalance in the information available to the jury, as the defence mounted a substantial attack on the credibility of the Crown witnesses, including substantial attacks based on their criminal records.
- [43] Now to my discussion.
- [44] I, of course, acknowledge and follow the principles and guidance of the Supreme Court of Canada in Corbett. Exclusion is the exception and the accused has the burden of demonstrating that the prejudicial effect of a prior conviction outweighs the probative value in a manner that means lesser protection is not sufficient. As some of the cases have noted, while the decisions in various cases appear to be widely divergent, that is because the cases and the exercises of discretion are very fact specific. The overarching concern is that there be a fair trial. As noted in Hussein at para. 27, the concern is that, for some prior convictions a jury:
- [27] may engage in impermissible "general propensity reasoning" by inferring that "the accused is the type of person to have committed the offence for which they stand trial because of their offending past": King, [R. v. King, 2022 ONCA 665] at paras. 141, 193. Moreover, jurors may find that the kinds of crimes the accused has been found guilty of support more specific inferences about guilt.
- [45] The Crown expressed concerns about presenting a distorted picture to the jury, relying most heavily on R. v. Singh in this regard. However, I note that in Singh, the court was concerned that editing a robbery conviction down to theft could lead the jury to believe the accused "might be a thief but certainly not a robber": at para. 23. This distinguishes Singh from the present case, because the evidence already shows Mr. Wareing to be a robber. Editing his robbery convictions to theft would not result in the jury believing he would not have done such a thing.

- [46] The other distinguishing feature in Singh is the fact that the court was not provided with authorities that endorsed an editing process (see para. 24), whereas the Ontario Court of Appeal decision in Talbot makes it clear that this is an available option.
- [47] In Laing, another case cited by the Crown in this case, the defence argued that the police perjured themselves and/or planted evidence. Reference to the accused's earlier conviction for possessing a firearm was therefore necessary to disabuse any notion that the accused would never have possessed such a thing.
- [48] Given the nature of the robbery that predated the shooting in this case, which essentially involved a home invasion by multiple people, with two persons, including Mr. Wareing, having handguns on their persons, it seems to me that to allow cross-examination on four earlier robberies would all but invite propensity reasoning, despite the most cogent of any jury instructions. For that reason, I conclude the robbery convictions should be referred to as convictions involving theft, which pairs those matters to crimes of dishonesty without the prejudicial reference to violence.
- [49] The convictions for using an imitation firearm in the commission of an indictable offence raise a different concern. The Crown says these offences are not at all similar to the offences with which Mr. Wareing is currently charged. I disagree. The accused here is charged with using a 3D printed gun to murder Ms. Ali and attempt to murder Mr. Whitty. The key issue here is whether Mr. Whitty fired first. To have the jury aware that Mr. Wareing had used an imitation firearm to commit an indictable offence on four earlier occasions would create a great risk that they would use that information in determining that important factual issue.
- [50] The probative value of those four convictions is minimal in terms of prior acts of dishonesty or general dishonesty, and the prejudicial effect is substantial. For those reasons, those convictions will be excluded from cross-examination.
- [51] I am not unmindful of the need to ensure the jury does not have an unbalanced view of the main players in this incident. I accept that the credibility of the Crown witnesses has been strongly challenged, and challenged based on their convictions and outstanding charges. The defence argues that these challenges were all founded on and related to issues specific to this case. While I am satisfied this is so, I am also satisfied that this was convenient in terms of also grounding a substantial credibility attack.
- [52] However, given the robbery incident that predated the shooting in this case and the evidence of the generally dissolute and likely lawless lifestyle of these main players, I do not see any prospect that the jurors would be left with the impression Mr. Wareing is without blemish, while the Crown witnesses are criminals.

- [53] The Crown argues that the excising of the imitation firearms convictions and reducing robberies to thefts will cause confusion in terms of its ability to refer to the sentences imposed. However, all of those convictions were dealt with together. The Crown can refer to the overall sentence imposed. The Crown can also refer to the overall number of convictions (here it is 14), which will mean the jury will have an accurate number in that regard.
- [54] Finally, I would not excise or edit the convictions for assault of a police officer and flight from police. These are offences that demonstrate a disregard or contempt for the law or the administration of justice. They have a direct bearing on the question of Mr. Wareing testifying truthfully in court.
- [55] As a concluding comment, I note that the Supreme Court of Canada in *R. v. Underwood*, [1998] 1 S.C.R. 77, noted that rulings made at this stage of the trial may be modified to reflect changes in the defence evidence, and particularly if that evidence varies from the expected evidence.

"Blok J."

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