SUPREME COURT OF YUKON

Citation: *R v Amin*, 2023 YKSC 44

Date: 20230811
S.C. No. 20-01515
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

RUDRA PULASTYAKUMAR AMIN

Publication, broadcast or transmission of any information that could identify the complainants or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*. [This ban does not apply to Michelle Palardy]

Before Chief Justice S.M. Duncan

Counsel for the Crown — Faiyaz Alibhai

Counsel for the Accused — Jennifer Budgell

REASONS FOR DECISION

Overview

[1] Rudra Amin was charged with seven counts of sexual assault between June 1, 2017 and November 30, 2018 involving three complainants. He has elected trial by judge and jury.

[2] The Crown has applied to tender the evidence from each of the seven counts across all of the counts in order to prove the occurrence of the *actus reus* of the

offences. The Crown says the evidence establishes that Rudra Amin used a specific system or *modus operandi* in committing the alleged offences. The Crown argues the evidence shows a “highly distinctive pattern of behaviour” and as a result has probative value that outweighs any prejudicial effect. The distinctive pattern of Rudra Amin’s behaviour rebuts the defence of suggested fabrication by the complainants and of consent, and supports the credibility of the complainants. In sum, the Crown seeks to rely on the totality of the evidence for all the counts. The Crown says this balances the effect of the defence argument that the complainants’ testimony was unreliable because they shared their stories with one another in advance of speaking to the police.

[3] The defence argues there was no pattern of conduct of Rudra Amin. The defence points out the absence of similarities in detail across the allegations. The defence says there is a significant risk of moral and reasoning prejudice if the cross-count evidence is permitted to be used by the jury in their consideration of all the offences.

[4] Further, the defence says a consideration of other evidence at trial suggests *animus* towards Rudra Amin by the complainants because of his infidelity to them. Their text messages and meetings where they shared their stories and became angry at his behaviour may have consciously or unconsciously influenced their accounts of the incidents. The defence suggests this *animus* motivated them to go to the police, rather than any alleged sexual assaults.

[5] The defence says the Crown is applying the collusion defence improperly in this application. The Crown has conceded there is an air of reality to the defence of collusion. The defence says the Crown must first show there are sufficient similarities in the evidence or the existence of a pattern of conduct in order to introduce the cross-

count evidence for the desired purpose. Then the Crown must disprove on a balance of probabilities there was likely or probably no tainting of that evidence through collusion before it can be used in this way. The defence says the Crown's argument reverses this approach.

[6] The issue is whether the Crown has satisfied the burden of showing that the probative value of the similar fact cross-count evidence in supporting the *actus reus* and thus the credibility of the applicants has outweighed its prejudicial effect in this case.

[7] This application was argued during the pre-charge conference at trial, after completion of the evidence. I ruled at that time with reasons to follow that the Crown had not met its burden of showing on a balance of probabilities that the probative value of the use of the evidence across all of the counts outweighed its prejudicial effect. As a result, evidence from one count could only be used on that count by the Crown in its effort to prove beyond a reasonable doubt that it occurred. These are my reasons for that ruling.

Legal Principles

[8] Cross-count similar fact evidence is presumptively inadmissible. Here the issue is not the admissibility of the evidence, as it was all before the Court, but the use and purpose to which it may be put. Presumptively the evidence on a count may only be used to determine whether the Crown has proved that count beyond a reasonable doubt. Here the Crown seeks to use the evidence on all the counts to establish a pattern of conduct of the accused that may be considered by the jury in their decision on each count.

[9] The evidence of the similar acts must be examined to determine if they have enough similarity to support the probative value. The acts must also be connected to the alleged offences, and the precise issue for which the Crown seeks the introduction of similar act evidence must be clearly articulated. Factors in support of the admission for the proposed purpose include proximity in time of the similar acts, similarity in detail and circumstances, number of occurrences, any distinctive features unifying the various incidents, intervening events, and any other factor that tends to support or rebut the underlying unity of the similar acts. Further, the credibility of the similar act evidence is relevant (*R v Handy*, 2002 SCC 56 ("*Handy*"), *R v MacCormack*, 2009 ONCA 72, *R v Tsigirlash,* 2019 ONCA 650; *R v Arp*, [1998] 3 SCR 339).

[10] The probative value of the evidence increases with the degree of similarity, as that similarity reduces the probability of coincidence. This determination is case and fact specific (*Handy*).

[11] There are two types of prejudice potentially created by the introduction of similar fact cross-count evidence: moral prejudice and reasoning prejudice. Moral prejudice is the risk that the trier of fact will be led to convict based on the bad character of the accused. Reasoning prejudice is the risk that the trier of fact will be distracted by the multiple incidents from the need to focus on each offence one by one, or confused by the evidence from multiple incidents, or encouraged to place more weight than justified by logic on the similar fact evidence (*Handy*; *Tsigirlash*). Finally, there is a risk of using undue trial time to consider the evidence. This applies in a situation where extrinsic evidence is being introduced as similar fact evidence, unlike this case.

[12] The possibility of collusion is connected to the probative value of the cross-count evidence. Where, as in this case, there is some evidence of collusion – that is, conscious or unconscious influence by one witness upon another that affects their evidence – its existence can serve to destroy the foundation upon which the admissibility of the similar evidence is based. If the events are too similar to be explained by coincidence, but at the same time there is evidence that the witnesses have influenced one another, then that possibility may taint the probative value of the similar fact evidence (*Handy*). Thus the Crown must satisfy the trial judge on a balance of probabilities that the evidence of similar fact is not tainted by collusion (*Handy*). The defence is not required to prove collusion.

Analysis

[13] There were three complainants in this case. The time period during which the alleged assaults occurred was between the summer of 2017 and November 2018. Two complainants each alleged two assaults, and one complainant alleged three assaults.

[14] Taking the offences in chronological order, the first complainant alleged Rudra Amin assaulted her in the shoe room of the store where they both worked, at least once and possibly three times during the summer of 2017. He allegedly pushed her against the shelves and groped and kissed her. She resisted and eventually he stopped.

[15] The second allegation from the same complainant occurred in her car after a work bowling party, in September 2017, when she offered to drive Rudra Amin home. They took a detour, at his suggestion and with her agreement, to a pullout on the side of the road. He began groping and trying to kiss her in the car. She resisted and he stopped.

[16] The third allegation occurred at the complainant's residence. After a work party, in October 2017, she told Rudra Amin he could stay overnight but not in her bedroom. At some point during the night, he asked to come into bed with her for a cuddle. She agreed to a cuddle but nothing more; she said he could not touch her. She alleged he began groping her, trying to kiss her, and trying to move her hand toward his erection. She jumped out of bed, told him to leave, and he did.

[17] The second complainant was in a serious relationship with Rudra Amin for six months between September 2017 and March 2018. She assumed their relationship was exclusive. They were practically living together. Once their relationship ended, they continued to see each other. The first allegation arose when he came over to watch a movie with her in August 2018. She told him she was seeing someone else, but he said it would be okay and she agreed. As they were sitting together at opposite ends of the couch watching the movie, he began gradually inching his way towards her and eventually got close enough to kiss her. The complainant told him it was not a good idea but he kept going. She got up from the couch and, while walking down the hallway, Rudra Amin followed her, pushed her up against the wall and began kissing her and groping her breasts. He had his whole body up against her. She again asked him to stop and said she did not want to do this. Eventually she was able to push him away and he left.

[18] This complainant's next allegation occurred on September 28, 2018. Rudra Amin came to her house after they exchanged texts because he said he wanted to hang out with her and talk. She told him she did not want him in her house; they could talk on the porch. He asked for a glass of water and came into the house to retrieve it. They sat on

the couch and he began inching his way toward her so that eventually he was sitting beside her. She kept telling him he could not do this and she did not want to do this. He tried to kiss and touch her and eventually they were lying on the couch and he was on top of her. He began groping, touching and kissing her with his hands on her breasts and vagina. He pulled her pants down and then his pants and had intercourse with her. She began to cry and told him to stop, as she had been telling him all along. He apologized and left shortly after.

[19] The next complainant had a casual dating relationship with Rudra Amin between January and June 2018. After she returned to Whitehorse in November 2018 from spending six months in Portugal, he asked her to dinner. After dinner, he drove her home and asked to come in. She eventually agreed. She made tea and they may have smoked marijuana. As she was walking him to her door, he pushed her against the wall and began groping her breasts and vagina. She resisted, tried to push him away, and eventually he stopped when she said her mother would be home any time.

[20] This complainant's second allegation was that Rudra Amin walked into her place of work at a sushi restaurant one evening when it was not busy, said, "hi" to her, and then pushed her up against a booth and kissed her. She sternly and firmly told him she was not interested in him romantically and to leave, which he did.

[21] The striking similarities among the counts are described by the Crown as:

- The alleged assaults occurred within 18 months (reducing the likelihood that he changed his ways).
- The alleged assaults all began with Rudra Amin attempting to kiss and grope the complainants.

- Rudra Amin used his weight and strength in each case to overpower the complainants.
- Rudra Amin was persistent and ignored repeated requests to stop.
- Certain of the offences occurred when Rudra Amin pushed the complainants against the wall.
- Rudra Amin obtained permission to be or remain in the complainants' residences despite their reservations.
- The alleged assaults were of short duration.
- The alleged assaults occurred after the relationship ended or when there was no relationship.
- Certain of the alleged assaults occurred as sudden outbursts.

[22] The defence responds:

- The timing of 18 months coincides with the time Rudra Amin knew the complainants and there was a significant period of time during that 18-month period where there were no allegations.
- The alleged sexual activity was not uniform or distinct. The allegations of beginning the assault with kissing and groping, common to some of the counts, are hallmarks of consensual encounters. Other individual counts have distinct differences – from full sexual intercourse, to asking the complainant to touch his erection, to kissing alone, to kissing and groping other parts of the body.
- There was no consistency to the allegations that he used his weight and strength to overpower the complainants.

- The allegation of ignoring repeated requests to stop is a common characteristic or hallmark of sexual assaults and not distinctive. In some incidents described by the complainants he did stop when asked. The alleged persistence was described in some but not all of the incidents.
- Pushing against the wall was described in three of the seven counts.
- Not all of the incidents occurred in the complainants' residences – two occurred at the complainants' workplaces, and one in a car. In at least one of the incidents, the complainant invited him to stay at her residence.
- While most of the incidents described were of relatively short duration, the alleged consensual encounters with the second complainant were not.
- The nature of the relationships with each woman was different – one was a co-worker, one was a serious girlfriend, and one was a casual dating relationship.
- While possibly four of the counts were relatively sudden outbursts, three were not.

[23] I agree with the defence that there are not enough "striking similarities" among all the offences to establish a unique and distinct pattern of conduct. The circumstances of this case are distinguishable from the two principal cases relied on by the Crown where the probative value of the similar fact evidence was found to outweigh its prejudicial effect.

[24] In *R v Shearing*, 2002 SCC 58 ("*Shearing*"), the accused was a cult leader who was alleged to have grossly abused his power. He preached that he could facilitate the attainment of higher levels of consciousness by young girls through sexual and spiritual

contact. He was charged with 20 counts of sexual offences between 1965 and 1990 against 11 complainants. Nine complainants were “believers” – that is, members of the cult – while two were sisters who lived with the accused at his group residence while teenagers. All the complainants were teenagers at the time of the alleged assaults. The Supreme Court of Canada found that “the appellant has a situation-specific propensity to groom adolescent girls for sexual gratification by exploiting pseudo-religious elements of the Kabalarian cult and/or its related domestic arrangements” (at para. 31) and he proceeded in that way with each complainant. The similarity among the counts arose from a specific *modus operandi* – that is, his abuse of power and the theme of quack spiritualism. Many of the incidents were concurrent. The fact they extended over many years demonstrated a consistency of behaviour. The Court found that the trial judge properly noted the inflammatory effect of the similar fact evidence – that is, the combination of sex and spiritualism had the significant possibility of creating moral prejudice. Reasoning prejudice was also a risk, as the jury might become distracted or confused by the multiple incidents. The Court further observed that the jury was properly warned about propensity reasoning and the accused was not limited in his response to any allegation nor was he taken by surprise. In the end, the Court found that the trial judge appropriately found that both probative value and prejudicial effect were significant, but that probative value prevailed.

[25] In *R v B(T)*, (2009) 95 OR (3d) 21 (CA), (“*B(T)*”) a non-jury case, there were two complainants who were sisters. Both were step-nieces of the accused. Eleven counts of sexual offences involved one sister and three counts involved the second sister. The Court of Appeal for Ontario found the trial judge erred in rejecting the similar fact

evidence for the purpose of showing a pattern of similar behaviour of the accused confirming each complainant's testimony, and in excluding it on the ground of prejudice. The Court of Appeal noted the similarities of each allegation – all but one occurred in the accused's truck when the complainants were teenagers alone with him in the truck. He drove them to a remote area (bush road) and sexually assaulted them. The Court of Appeal further noted that in a judge alone trial the risks of moral and reasoning prejudice were much lower than in a jury trial. The judge had already heard the bad character evidence, so the exclusion of the similar fact evidence would make no difference to any risk of inference of guilt on the basis of bad character. This risk was further reduced because of the similarities among the incidents with none more reprehensible than the others. The Court of Appeal stated that judges are presumed to know the law and the proper uses of evidence so that the risk of distraction or confusion or placing of improper weight seemed "counterintuitive" (at para. 27).

[26] I am mindful of the caution of the Court in *Shearing* that the judge's task is not to take a mechanical or microscopic approach in determining the similarities or dissimilarities among the offences – that is, not to add up the similarities and differences and derive a net balance. Nor is it appropriate to draw similarities on an "excessively macroscopic level of generality" (at para. 60). Where to draw the balance is a matter of judgment.

[27] Unlike the two cases described above, in this case there are insufficient features that unify the acts to demonstrate a unique or distinctive *modus operandi*. There was no overall context such as the cult spiritual leader promoting sexual activity as a means of enlightenment to teenage girls who were followers or living at his residence. There was

no similarity in location, creation of opportunity, or relationship between the accused and the complainants as there was in *B(T)*. While there were some similarities among some of the offences (such as the groping and kissing, and pushing up against a wall or shelves) there were also many differences (varied location – workplace, residence, car; varied type of activity – kissing and groping, full sexual intercourse, asking if the complainant would touch his erection; different nature of relationship with each complainant – co-worker, casual dating, committed relationship; some approaches sudden and without warning – the shoe room incident and the sushi restaurant incident – and other approaches occurred after dinner and conversations, or gradually while watching a movie). In sum, not only were there many differences among the offences, but there was also no overarching context unifying them all. The evidence across all counts does not have sufficient probative value to support a legitimate chain of reasoning furnishing evidence of any individual count (*B(T)* at para. 34).

[28] Moreover, the risk of moral prejudice in a multiple count trial with a jury is real. While instructions about the improper use of bad character evidence will be given in any event, the possibility remains that a jury may be inclined to find Rudra Amin guilty on one count because he was guilty on another count that contained some similarities in evidence.

[29] There is also a significant risk of reasoning prejudice. Not all of the offences contain similarities to each other; only certain of the offences do. Different offences share certain similarities, while other offences share other similarities. There is a risk the jury will become distracted and/or confused by the multiplicity of the incidents. They may attempt to determine if some of the similarities do or should influence their views

on a given offence instead of thinking about the evidence for each offence. The jury may also put undue weight on certain factors and not consider all of the evidence to determine whether a certain offence was committed or not.

[30] As a result, I find that the probative value of the existence of some similarities among the offences is not sufficient to support a particular and distinct *modus operandi*, and that in this jury trial context, the prejudicial effect, both moral and reasoning outweighs the probative value that does exist.

[31] Given this finding, it is not necessary for me to consider whether the Crown has shown on a balance of probabilities that the complainants did not collude. The Crown conceded an air of reality to collusion and asks that instructions to the jury be given regardless of the ruling in this application.

[32] For certainty, I confirm I do not accept the Crown's argument that because the jury will be instructed on collusion, fairness requires that similar fact cross-count evidence be put to them as well. That is not the test. While some of the cases permitting the use of similar fact evidence rely on the fact that it is being introduced in response to issues raised by the defence, those issues are defences such as consent or denial, not the spectre of collusion.

[33] For these reasons, the Crown's application is denied.

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DUNCAN C.J.