

Citation: *R. v. Abdullahi*, 2010 YKTC 5

Date: January 14, 2010

Docket: 09-00237

Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

MOHAMED MOHAMED ABDULLAHI

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486.4 or 486.5 of the *Criminal Code*.

Appearances:

Bonnie Macdonald

André Roothman

Counsel for Crown

Counsel for Defence

RULING ON VOIR DIRE

Overview

[1] Mr. Abdullahi is on trial on a charge of having sexually assaulted K.L., contrary to s. 271 of the *Criminal Code*. The nature of the allegation is that Mr. Abdullahi picked up K.L. in the taxi he was operating and, while giving her a ride, exposed his penis to her and placed her hand on his exposed penis, contrary to her will. Mr. Abdullahi denies these allegations.

[2] During his cross-examination by Crown counsel, Mr. Abdullahi made several comments that resulted in Crown counsel arguing that he had put his character in issue. Crown counsel sought an adjournment in order to determine whether it intended to call rebuttal evidence.

[3] Defense counsel asserted that Mr. Abdullahi had not put his character in issue.

[4] I made a preliminary determination that Mr. Abdullahi had put his character in issue and granted the Crown application for an adjournment of the trial.

[5] At the continuation of the trial, Crown counsel called Ms. Kelly Nadeau as its only witness on the *voir dire*.

[6] This is my ruling on the extent to which Ms. Nadeau's evidence is admissible as evidence on the trial.

Testimony

Mohamed Abdullahi

[7] The testimony of Mr. Abdullahi which is at issue arose when the Crown put her theory of the case to him. The testimony reads as follows:

Q Okay. All right. All right. I'm just about done, but let me put to you the Crown's theory here. Let me put to you what I think actually happened. You can tell me if you agree or disagree with that. I'm going to suggest to you that you saw a pretty girl by herself in the middle of the night, maybe a little bit drunk, walking down Two Mile Hill, and you thought you'd stop for her?

A Not true. I picked up more than 20, 30 in the same night.

Q All right. And I would suggest to you that she told you she didn't have any money and you kind of thought that there's no such thing as a free ride?

A Not true. I'm not looking for hooker. I was working.

Q And then if she could not pay with money, she could pay some other way?

A I told you, I'm not looking for hooker. I'm married man and have kids.

Q Mm-hmm.

A I was working.

Q Are your wife and kids here –

A It matters?

Q -- in Whitehorse? Pardon me?

A It matters?

Q I'm just asking; you brought them up.

A No, they are not here.

Q Where are they?

A They are Umen (phonetic).

Q So you must not see them very often?

A Often enough, yeah.

Q But you don't see them everyday; you would agree with me on that?

A I see them on the phone, on the internet.

Q Pardon me?

A On the internet.

Q Right. But to be –

A On the phone.

Q -- to be actually with them, you don't see them very often?

A Physically, no. but still the technology makes it easy, everything, now.

Q Yeah. So I'll continue on with my theory, that you – if she couldn't pay the ride, that she was going to pay in some other fashion; and I think you've disagreed with me on that point?

A You should remember that I'm a Muslim, first of all, I'm prohibit to do that things, even.

THE COURT: Sorry, I didn't hear the last part of that.

A I said I believe in it, as Islam, you don't do adultery. It's prohibited in Islam, when you are real Islam and you believe in that. And I am a practising and I believe in it. And I raised a lot of kids and I a was a head of community and I really proud of those children today, are going to university, that I put it, on my hand, on the road. So I mean it, like what you say in another way, it's no me who doing it, that.

MS. MACDONALD:

Q I'll suggest to you that you continued trying to touch her, you continued hitting on her, and you didn't care whether she liked it or not and you didn't stop until she made it clear to you that what you were doing was wrong and that the authorities could potentially become involved?

A Untrue.

Q I would suggest to you that what you've talked about today, about her stopping at Baranov Trailer Court, about her asking if you knew where to buy weed; I would suggest that that is untrue and this is something that you have invented to try and escape responsibility for what you actually did?

A Not true.

Q Do you think that because you're a Muslim that means that you're not going to do bad things? I'm sorry, I just can't leave that alone. You brought it up and I –

A Okay. Don't generalize the idea, first of all. And secondly, I will tell you this. I'm proud of myself that I never drink, never smoked in my life. And I have been married and I raised kids and I have kids, and I never do such of that thing. If I don't like to my mother, to my wife, to my kids and to my daughter, and I wouldn't do that to anybody else. It doesn't matter the race, they believe in their belief, and wherever they come from, I won't do that. That's what I wanted to tell you. I testify front of the Court and anywhere else.

Voir dire testimony of Kelly Nadeau

[8] Ms. Nadeau testified that she met Mr. Abdullahi in March 2008 and that they started to date each other in April 2008. They have a child born March 26, 2009 and are involved in litigation over access to the child and child support.

[9] Ms. Nadeau related an incident that occurred after she first met Mr. Abdullahi but before they started to date as a couple. On this occasion she went to a movie theatre with her sister-in-law. Mr. Abdullahi came later and sat with her at the outside of the row of seats on the left hand side of the theatre. While they were watching the movie, they were kissing. Mr. Abdullahi then pulled out his penis and asked her to touch it. He grabbed her hand and put it on his penis. Ms. Nadeau pulled her hand away and stated that she was "disgusted". Approximately 1 ½ to 2 weeks later, Mr. Abdullahi apologized to her and she forgave him. They subsequently entered into an intimate relationship.

[10] Ms. Nadeau testified that she did not know K.L. and was not aware of any details of the charge of sexual assault Mr. Abdullahi was on trial for. She only learned that Mr. Abdullahi was already married approximately two months earlier and that he had previously advised her he was single.

Law

[11] While Crown counsel cannot ask questions in cross-examination that are designed to “trick” an accused into putting his or her character in issue, that is not what occurred in this case. In response to Crown counsel’s suggestion that Mr. Abdullahi thought that there was “no such thing as a free ride” when K.L. couldn’t pay, he spontaneously stated that he was not looking for a hooker and would not commit adultery because it was contrary to his Muslim faith and his marital and family status.

[12] Defense counsel argues that Mr. Abdullahi’s testimony should be narrowly construed, pointing in particular to the excerpt from the transcript at p. 32, ll. 5 – 9 that reads as follows:

Q All right. And I would suggest to you that she told you she didn’t have any money and you kind of thought that there’s no such thing as a free ride?

A Not true. I’m not looking for hooker. I was working.

Q And then if she could not pay with money, she could pay some other way?

A I told you, I’m not looking for hooker. I’m married man and have kids.

[13] Defense counsel’s argument is that Mr. Abdullahi was specifically referring to only the fact that he would not obtain sexual favours from a hooker due to his beliefs and family status.

[14] I find that this submission is not tenable. When Mr. Abdullahi’s comments are read in the context of the questions being asked by Crown counsel and her putting the Crown’s theory of the case to him, it is clear to me that Mr. Abdullahi was stating that due to his Muslim faith and marital and family status he would not do what K.L. stated he did. The reference to “adultery” by Mr. Abdullahi cannot be so narrowly construed in these circumstances as being limited to an allegation that he would attempt to procure the services of a hooker. Firstly, that is not what the Crown was alleging. Further, the narrow interpretation defense counsel suggests should be applied would have Mr. Abdullahi stating only that he wouldn’t try to obtain sexual favours from the complainant

in exchange for her inability to pay cab fare, as though she was a hooker, due to his beliefs and marital and family status, but that it doesn't mean he was saying he wouldn't try to obtain sexual favours at all. Mr. Abdullahi is clearly equating "adultery" to the act alleged to have occurred by K.L.

[15] By denying the alleged act that formed the basis of the charge against him on the basis that he was not the sort of person who would do that, he put his character directly into issue. The issue on which Mr. Abdullahi put his character in issue was not collateral and, as such, Crown counsel is entitled to call evidence in rebuttal. The evidence Crown is entitled to call is not limited, in these circumstances, to evidence of general reputation, but may be evidence of specific acts of bad character. (See *R. v. McFadden* (1981), 28 C.R. (3d) 33 at paras. 8 – 10; *R. v. Brown* (1999), 123 O.A.C. 258 at para.30).

[16] The policy principle behind allowing the Crown to rebut a defendant's evidence of good character was explained by Wigmore as follows:

After a defendant has attempted to show his good character in his own aid, *prosecution may in rebuttal* offer as evidence his bad character. The true reason for this seems to be, not any relaxation of the principle just mentioned, *i.e.* not a permission to show the defendant's bad character, but a liberty to refute his claim that he has a good one. Otherwise a defendant, secure from refutation, would have too clear a license unscrupulously to impose a false character upon the tribunal. (Wigmore on Evidence, 3rd ed., vol. 1 (1940), pp. 457-8; See also *Brown*, paras. 36, 37).

[17] The circumstances are such that the rebuttal evidence of Ms. Nadeau, only became significant when Mr. Abdullahi testified. This is not evidence that Crown counsel would have been expected or even permitted to call as part of its case in chief.

[18] Evidence of good character may be rebutted by:

- i. extrinsic evidence of bad reputation;
- ii. extrinsic evidence of similar acts; or
- iii. cross-examination of the defendant concerning specific past acts of discreditable conduct.

[19] In this case Mr. Abdullahi was subjected to a limited cross-examination by Crown counsel on his assertions that his Muslim faith and marital and family relationship meant that he would not have committed the offence with which he is charged. Mr. Abdullahi's testimony in this regard could not have been reasonably anticipated and Crown counsel could not be presumed to have knowledge at that time of specific acts in Mr. Abdullahi's past, involving Ms. Nadeau, on which he could be cross-examined. I have no information as to whether Crown counsel had any prior knowledge of the nature of the evidence provided by Ms. Nadeau.

[20] Rather than seeking an adjournment of the trial to allow for additional investigation to determine whether Mr. Abdullahi should be further cross-examined on any specific past acts, Crown counsel concluded her cross-examination and now seeks to discredit Mr. Abdullahi's evidence of good character by way of rebuttal evidence of a similar past act.

[21] Similar fact evidence is admissible to rebut evidence of good character. In **R. v. McNamara** (1981), 56 C.C.C. 2d 193 at para. 327, the court stated:

It was also contended on behalf of the appellant that where evidence of good character, in whatever form, is introduced by the prisoner (whether it be extrinsic evidence or by his own testimony) it cannot be rebutted by evidence of specific acts of bad conduct: rather, the Crown is confined to rebutting the evidence of good character by evidence of general reputation or by proof of a previous conviction pursuant to s. 593 of the *Criminal Code*. Counsel for the appellant argued that the provisions in s. 593 constitute the only exception to the common law rule that evidence of good character can only be rebutted by evidence of bad reputation. There is at least one additional exception namely *the Crown may adduce similar fact evidence in rebuttal of evidence of good character*. In *Guay v. The Queen* (1978), 42 C.C.C. (2d) 536, 89 D.L.R. (3d) 532, [1979] 1 S.C.R. 18, Pigeon J., delivering the judgment of the Supreme Court of Canada, said at p. 547:

On the admissibility of similar fact evidence, I think it should be said that it is essentially in the discretion of the trial Judge. In exercising this discretion, he must have regard to the general

principles established by the cases. There is no closed list of the sort of cases where such evidence is admissible. It is, however, well established that it may be admitted to rebut a defense of legitimate association for honest purposes, *as well as to rebut evidence of good character*. Where the evidence is admissible on the first mentioned basis, it may be admitted as part of the case for the prosecution.

[22] In order to qualify as similar fact evidence for the purpose of rebutting an accused's evidence of good character, this evidence, however, must sufficiently resemble the allegation that forms the subject matter of the charge against the defendant (*Brown* at paras. 32, 33), and the probative value of the evidence must exceed its prejudicial effect (*R. v. Handy*, 2002 SCC 56, paras. 41, 42, 55).

[23] There is authority for the proposition that, while an accused can be cross-examined on specific acts that fall short of the similar fact rule, the Crown cannot call such evidence in rebuttal. (See *R. v. Buckley*, 2009 NSSC 204 at para. 61 – 63, referring to *Brown*, para. 32).

[24] There is some commentary to the contrary, however, that states that *Brown* stands for the proposition that the Crown can call evidence of specific acts that do not satisfy the similar fact evidence rule. (*The Law of Evidence*, Fourth Edition, (Toronto: Irwin Law 2005), c. 3, s.14.7). The Court stated in *Brown* at paras. 45 and 46 that:

Where the Crown is permitted to adduce evidence of bad character, to rebut evidence of good character, and that evidence does not constitute similar fact evidence, the reply evidence can only be used to neutralize the evidence of good character and to assess the accused's credibility. This court held in *R. v. McNamara et al.* No. (1), supra, at pp. 352-53, that it cannot be used as affirmative evidence of the accused's disposition to commit the offence charged...

...

Thus the evidence of bad character cannot be used to show that the person was likely from his character to have committed the offence. The evidence does, however, have a bearing on the general credibility of the accused. In theory, what the jury is asked to do is reject the accused's evidence as unreliable...

[25] In *Brown*, a case of aggravated assault against a child, the appeal court dealt with three instances of reply evidence that had been admitted by the trial judge in convicting Mr. Brown. For our purposes, only the analysis of the reply evidence of the appellant's son as to specific acts of physical abuse or violence by the appellant against him as a child is relevant.

[26] At trial, the appellant, who was unrepresented, gave evidence as follows:

...I did not assault Mr. Tanner [the child], I did not shake Mr. Thomas Tanner. I have never abused a child in my life, Your Honour. I have three grandchildren and I have three grown up children of my own...

[27] Mr. Brown was not cross-examined on any specific acts of abuse involving his now grown up children, although Crown counsel was aware at the time of information previously provided to the police by the appellant's son that disclosed prior acts of violence by the appellant against the son and his brother.

[28] The Court of Appeal agreed that the appellant had put his character in issue by attempting to show through all the character evidence he had called that he was not the type of person to have committed the offence with which he was charged. The Court, however, held that the trial judge had erred in admitting the reply evidence of the son of specific acts of misconduct by the appellant against the son and his brother. The Court found that the specific acts of misconduct did not sufficiently resemble the act with which the appellant had been charged to constitute similar fact evidence.

[29] The Court struggled, however, with the more difficult question as to whether the appellant's assertions as to having never abused a child, implicitly including his own children and grandchildren, should be open to contradiction (para. 35). The Court stated in para. 36 that there remains a discretion for a trial judge to:

...permit contradiction of the type of sweeping claim the appellant made in this case. The discretion to admit such evidence is necessary as a

matter of fairness to prevent the accused from manipulating the rules of evidence to present a wholly distorted picture to the trier of fact

and continues in para. 37 to state that:

In my view, similarly, where an accused does not simply lead evidence of his good character generally, but relies upon specific acts that bear a direct relationship to the offence charged, he or she should be open to contradiction on those narrow points to avoid permitting the accused to leave the trier of fact with a distorted picture.

[30] The Court further stated in para. 37, however, that before calling such evidence, the Crown is required to show that "...resort to the traditional rules of evidence will not suffice to prevent a distorted picture", pointing to the Crown's decision not to cross-examine the appellant on these prior acts of misconduct. The Court found that this reply evidence should, therefore, not have been allowed. An underlying factor in the Court's decision was the unrepresented status of the appellant at trial and associated prejudice that arose as a result in the particular circumstances of the case.

Application to this case

[31] The first question with respect to the evidence of Ms. Nadeau, is whether it is credible. I find that her evidence is credible and is a description of events that actually occurred. She was not successfully challenged in cross-examination, or by any other evidence, so as to undermine to any extent her testimony, and there are otherwise no inconsistencies within it. There is no evidence to indicate that there was any collusion or improper motive on her part.

[32] The second question is whether Ms. Nadeau's evidence falls within the rubric of similar fact evidence.

[33] The similarity with the evidence of K.L. is the act of Mr. Abdullahi exposing his penis, asking Ms. Nadeau to put her hand on it, and then his actions in putting her hand on his penis. The comparative circumstances, however, are markedly different. This took place in a movie theatre, not a taxi, in the context of something more akin to a date,

and with someone whom Mr. Abdullahi had a prior relationship, albeit it of a minimal nature.

[34] I find that the evidence of the sexual act in the movie theatre is not sufficiently similar to the act alleged by K.L. to constitute similar fact evidence. That does not conclude the matter, however.

[35] Mr. Abdullahi's statements that he was not a person who could have committed the offence charged because it was of a sexual nature and he was, because of his faith, and marital and family status precluded from such or any sexual activity outside of marriage, has the potential to mislead the trier of fact. It is a sweeping comment as to Mr. Abdullahi's good character and is directly related to the charge he is being tried on. As such, the Crown should be permitted to adduce evidence of specific acts that contradict Mr. Abdullahi's assertions as to his character.

[36] Resort to the traditional rules of evidence may have been sufficient in this case to have allowed such evidence to be adduced. Certainly, if the Crown was aware at the time of Mr. Abdullahi's relationship with Ms. Nadeau, including the incident in the movie theatre, he could have been cross-examined on this relationship and incident. Even if the Crown did not have this knowledge at the time, perhaps the cross-examination could have been adjourned in order for the Crown to conduct further investigation and then continued with Mr. Abdullahi being questioned on the information provided by Ms. Nadeau. .

[37] As stated earlier, I have no information as to the Crown having any prior knowledge of the evidence of Ms. Nadeau. In the circumstances, and in consideration of what her evidence is, I find that the decision by the Crown to call the evidence of Ms. Nadeau in rebuttal was appropriate. This case is not similar to the circumstances that existed in *Brown*. I find that there is no prejudice to Mr. Abdullahi that arises from having this evidence adduced by way of reply evidence, rather his having been firstly cross-examined on it.

[38] The probative value of the evidence of Ms. Nadeau exists firstly in its capacity to negate any evidence of good character which would support Mr. Abdullahi in his assertion that he was not the type of person who would commit the offence charged. The evidence of Ms. Nadeau relates to the commission of a particular sexual act and a subsequent sexual relationship which, in Mr. Abdullahi's own words properly construed, were contrary to his faith and marital and family status, and which constituted adultery.

[39] If the evidence of Ms. Nadeau is not admitted, the trier of fact is left with the good character evidence of Mr. Abdullahi that he is not the kind of person who would commit the offence charged. The only other evidence to contradict this good character evidence is the evidence of K.L. that Mr. Abdullahi did in fact do so.

[40] The evidence of Ms. Nadeau, however, rebuts the good character evidence in that it shows that Mr. Abdullahi's faith, and marital and family status did not prevent him from exposing his penis to her, or having a subsequent sexual relationship with her that produced a child. It would be a miscarriage of justice to allow the evidence of good character to stand when there is clearly evidence which rebuts this evidence, while at the same time not being at all indicative of Mr. Abdullahi having a propensity to commit the offence charged.

[41] As stated in *Brown* at paras. 45, 46, the use to which evidence of bad character, that falls short of similar fact evidence, can be put is limited to being capable of neutralizing the evidence of good character, and, secondly, in assessing the accused's overall credibility. It does not, however, indicate that he is the type of person who would be more likely to have committed the offence with which he is charged.

[42] Therefore, I find that the evidence of Ms. Nadeau, to the extent that it establishes the existence of a sexual relationship between her and Mr. Abdullahi, is admissible for the purpose of rebutting the good character evidence that he is not the kind of person who

would commit the offence charged, and for consideration in an assessment his overall credibility.

COZENS T.C.J.