[Judgment has been edited to remove identifying information]

R. v. Atlin, 2002 YKSC 27

Date: 20020506
Docket: S.C. No. 00-00548A
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

EARL JOSEPH ATLIN

DAVID MCWHINNIE — For the Crown

GORDON R. COFFIN — For the Defence

MEMORANDUM OF RULING ON *VOIR DIRE*
(Similar fact evidence)

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[1] HUDSON J. (Oral): On this *voir dire*, the Crown seeks ruling on the admissibility of evidence of similar fact, which it asserts are relevant to the credibility of the complainant and that the probative value of the evidence far outweighs the prejudicial effect thereof.

[2] The charge before the court is that the accused, between the 1st day of December, 1986, and the 15th day of January, 1988, at or near Carcross, Yukon Territory, sexually assaulted S.J.. is a male.

[3] On commencement of the *voir dire* counsel agreed that a transcript of the complainant's testimony at the preliminary hearing would be entered to form a basis to determine the relevance and to be assessed against the evidence sought to be admitted to support a decision on its admissibility as similar facts according to law. In this way, the complainant would not have to testify twice.

[4] As I say, counsel agreed to this. However, I remain uncertain that I would do it again as I do not believe that it saves time and carries with it the strong possibility that the *voir dire* would have to be opened again once the complainant has testified at the trial before the jury if his evidence is significantly different from that given at the preliminary hearing. I am only saying that my ruling, regarding the use of that method, should not be taken as a precedent. Although in this case I am not concerned because counsel agreed. I would be concerned that it may not always be appropriate.

[5] Briefly, the complainant's evidence is that in 1987, when he was 10 years of age, Mr. Atlin was staying in the complainant's father's home and that Mr. Atlin sexually assaulted the complainant. He described how the accused took the complainant's clothes off, pulled his own pants down, fondled the complainant,

performed fellatio upon him, and impelled the complainant to perform fellatio on the accused.

[6] Approximately two weeks later at the accused's residence, while the complainant's father was visiting there, this was repeated and the fondling and fellatio again took place. On this occasion anal intercourse was attempted.

[7] In cross-examination, information that the accused kissed him on the lips and penis was introduced.

[8] The first incident lasted 10 to 15 minutes, with more time for the disrobing and fondling. The second incident took 15 to 20 minutes, again, with additional time for disrobing and fondling. The accused said to the complainant at the time of the second incident, "Don't tell anyone."

[9] On the second occasion it was revealed by the complainant that the accused had a wart on his penis and was circumcised.

[10] The evidence of the witness on the *voir dire* related to matters which occurred when the witness was approximately 10 years old and in grade 4.

[11] The witness, M.J., was born in 1962. [. . .] He estimated that the accused was 10 years older than him. Between grade 4 and grade 5, something occurred.

M. J. had started school at six years of age or in 1968. Therefore, in grade 4, the matters that occurred would be in 1972 or 1973.

[12] The accused coaxed M.J. to come into his bedroom. The accused became naked and took down M.J.'s pants. There was fondling and fellatio and masturbation. The accused forced M.J. to perform fellatio on him after having performed fellatio on M.J. Anal sex was attempted.

[13] M.J. testified that over a three-year period this happened 15 to 20 times. A further incident was detailed which took place at a hangar on an abandoned airfield near Carcross. M. J. described this incident in detail and that fellatio took place, as had been done previously. It was often the case that the accused would be intoxicated when these incidents occurred. Other such incidents occurred at a family fish camp, on other camping trips and on walks and on hikes.

[14] The witness, M.J., has never spoken to the complainant concerning these matters. He thinks that the complainant is a distant relative but he is not too sure. He left the Yukon in 1982 and has rarely returned.

[15] Evidence such as this is generally inadmissible. The law provides that evidence of propensity and disposition going to persuade the trier of fact that the accused is the type of person to commit the offence charged is inadmissible. The law has evolved, however, to the point that evidence of discredible conduct may be

admitted not for the purpose of showing propensity but for the purpose, as in this case, on the issue of the credibility of the complainant.

[16] The evidence will be admissible when its probative value clearly outweighs the prejudicial effect on the accused. In the case of *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (S.C.C.) (QL), Cory J. states at para. 48:

> Thus, where similar fact evidence is adduced to prove a fact in issue, in order to be admissible, the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted.

[17] In the case of *R. v. C.R.B.* (1990), 55 C.C.C. (3d) 1 at 16 (S.C.C.) (QL), McLachlin J., as she then was, provides further guidance:

> The old category approach determining what types of similar fact evidence is permissible has given way to a more general test which balances the probative value of the evidence against its prejudice.

This has been called a "principled approach".

[18] I recognize that in reaching a decision on this most serious question of admissibility, I may have to engage in a weighing of the evidence to assess the probative value and the prejudicial effect. This is to ensure that the evidence has substance and is not fanciful. However, I do not extend my evaluation to the same deliberation that a trier of fact must do.

[19] It must be assessed to establish that the evidence sought to be admitted has substantial and persuasive probative value to overcome the prejudicial effect which will always accompany such evidence. Having said that, I turn to the evidence and the similarities to be found when examining the complainant's testimony and the evidence of M.J.

[20] I find that the similarities between the complainant's testimony and the evidence of M.J. are generally as follows:

- The progression of the incidents from fondling to fellatio to attempted anal sex;
- The avuncular nature of the relationship between the accused and the alleged victims (the accused standing in the place of or actually being an uncle);
- The sex of the alleged victims;
- The age of the alleged victims;
- The use of persuasion and the relatively gentle force employed by the accused with respect to both victims.

There, I am describing the evidence given in a *voir dire*.

[21] Defence counsel urge upon me that there is a reference to pantyhose in the one incident in the evidence of M.J. which does not appear in the complainant's testimony. I have considered that and do not find that it affects the more significant similarities close to the events described.

[22] There is also kissing described in the evidence of M.J. which does not appear in the evidence of the complainant. I have also considered that.

[23] I have regard to the dissimilarities which generally involve matters somewhat removed from the actual incidents alleged. Differences in times, sleeping arrangements recalled, the late disclosure of some aspects of isolated incidents are some of those. The frequency of the incidents is the subject of some contradictory evidence by the witness, M.J.

[24] The prejudicial effect that exists with respect to the testimony sought to be entered, while considerable, is probably, in my view, to be mitigated by appropriate jury instruction.

[25] In the end, I find that based on the significant similarities and what I view to be the strength of the evidence sought to be admitted, the probative value of the *voir dire* evidence does outweigh the prejudicial effect on the accused. I hold that if the evidence of the complainant at the preliminary hearing is not contradictory to the evidence to be given at trial, that the evidence of M.J. is admissible on the issue of the credibility of the complainant.

[26] In reaching this conclusion, I have also considered the evidence which shows that no communication took place between M.J. and S.J. so as to raise a suggestion of collusion. Indeed, this has not been raised by counsel.

[27] The similarities which exist even when the incidents are so widely separated in time, I find, in fact, tend to strengthen the evidence proposed and support the probative value.

[28] As this is not a case where the evidence proposed is so weak as to be incapable of supporting any rational inference, I find that the threshold test referred to in the authorities has been met.

[29] I have also observed that the testimony of M.J. on the *voir dire* was given with articulation and, although with a trace of sarcasm, may be found by a trier of fact to be strong evidence. This enhances the probative value of the proposed evidence.

[30] With the reservations mentioned, the proposed evidence of similar facts may be admitted.

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HUDSON J.