

Case Name:

R. v. Corbett

**Between
Her Majesty the Queen, and
Steven Corbett**

[2015] O.J. No. 1211

2015 ONSC 1633

Court File No.: 14-4585

Ontario Superior Court of Justice

P.B. Hambly J.

Heard: February 27, 2015.

Judgment: March 12, 2015.

(14 paras.)

Counsel:

V. Reid, for the Crown.

J. Goldlist, for the Defendant.

Judgment

1 P.B. HAMBLY J.:-- Steven Corbett (Corbett) is charged with the second degree murder of Shaun McCann (McCann) on December 6, 2012 in the City of Hamilton. This is an application by the crown to introduce discreditable evidence against McCann at his trial. On February 27, 2015 I dismissed the crown's application for oral reasons. I reserved my right to provide written reasons. These are my reasons.

2 Corbett and McCann shared an apartment at 52 Blake Street, apartment 102 in the City of Hamilton. McCann moved there in mid-November 2012. Also living in this apartment was Kathleen McKenna (Kathleen), who was the girlfriend of Corbett. In early December 2012, McCann moved out of the Blake Street apartment and into a nearby apartment where Theresa Geroux (Theresa) resided. He left a flat screen TV at the Blake Street apartment. McCann wanted his flat screen TV. Corbett believed that McCann owed him rent for the time that he had stayed with him in the Blake Street apartment. On December 6, 2012, Theresa and Corbett exchanged text messages. They also spoke by phone. Corbett said that he would give McCann the TV if McCann first paid to him the rent money that he said that McCann owed to him.

3 While Theresa was speaking with Corbett by phone, McCann left her apartment having expressed the intention to go to the Blake Street apartment to get his flat screen TV. McCann went to the Blake Street apartment and entered the apartment. There is a door leading out of the Blake Street apartment into a hallway which in turn leads to Blake Street. There is also a door which leads out to a porch which fronts onto Maplewood Avenue. McCann went into Corbett's bedroom where he took hold of the TV which he claimed to own. He took it out onto the porch. There was an altercation between McCann and Corbett.

4 Kathleen was present in the apartment with Corbett's 2 year old daughter, Lilly, whom Corbett had received earlier in the day from her mother, Ashley Smith. Kathleen claimed to have heard a scuffle between the two men but not to have seen anything. There is evidence from witnesses on the street that McCann put down the TV outside the apartment and came toward Corbett on the porch. In an altercation with Corbett, McCann was stabbed in the neck with a knife. McCann stumbled onto Maplewood Avenue where he died.

5 Corbett, Kathleen and Lilly left the Blake street apartment. They took a taxi to an apartment where Ashley lived with Lilly. Corbett went into Ashley's residence. Kathleen continued on in the taxi. The police found the knife with which McCann was stabbed in a bathroom cabinet in the apartment. They found a sheath for the knife on a kitchen counter in the apartment near the back door leading to the porch.

6 Behind the front door leading to the hallway at the Blake Street apartment, to the right of the door on the wall, the police observed a knife in a sheath mounted on the wall. The case was presented on agreed facts and on transcripts admitted from the preliminary hearing. I found no measurements in the agreed facts or in the transcripts from the preliminary hearing. The crown presented a photograph of the knife on the wall. The knife would appear to be about 6 feet from the ground, to have a handle of about 6" and a blade of about 6". Counsel have referred to it as a sport knife. Counsel agree that this knife is similar to the knife that was used to stab McCann.

7 Lisa McCann is the mother of the deceased Shaun McCann. She was permitted to sit through the preliminary hearing. It took place between May 1 and 15, 2014. Corbett was committed for trial on the charge of second degree murder. The police took a statement from Lisa McCann on

December 4, 2014. At that time, she told them that she had assisted her son to move into the Blake Street apartment in mid-November 2012. She said that she saw at that time the knife behind the front door. She said that she asked Corbett what it was for. She said that he said to her in the words recorded by the officer who took the statement "that is there to fuck anybody up that fucks with him". It is the evidence of the knife and this statement of the accused that the crown seeks to introduce into evidence and which the accused opposes.

8 This is evidence that the accused possessed the knife. It is evidence that he possessed it for an illegal purpose. It is discreditable to the accused. The knife and the statement of Lisa McCann is only admissible if it passes the test for the admission of similar fact evidence. in *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717 the Supreme Court of Canada in the judgment of Justice McLaughlin set out the test as follows:

[31] This review of the jurisprudence leads me to the following conclusions as to the law of similar fact evidence as it now stands in Canada. The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition. As affirmed in *Boardman* and reiterated by this Court in *Guay*, [1979] 1 S.C.R. 18 *Cloutier*, [1979] 2 S.C.R. 709 *Morris*, [1983] 2 S.C.R. 190 *Morin* [1988] 2 S.C.R. 345 and *D. (L.E.)*, [1989] 2 S.C.R. 111 evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect.

9 In *R. v. Handy*, [2002] 2 S.C.R. 908, the Supreme Court of Canada in the judgment of Justice Binnie confirmed that the test in *B(C.R.)* continues to be the test for the admissibility of similar fact evidence in Canada. He stated the following:

[55] Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

And:

[82] The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:

- (1) proximity in time of the similar acts,
- (2) extent to which the other acts are similar in detail to the charged conduct,
- (3) number of occurrences of the similar acts,
- (4) circumstances surrounding or relating to the similar acts
- (5) any distinctive feature(s) unifying the incidents,
- (6) intervening events,
- (7) any other factor which would tend to support or rebut the underlying unity of the similar acts. (citations omitted)

10 There is no suggestion that knife on the wall played any part in the stabbing of McCann. There is also no evidence that Corbett ever used the knife for any purpose. Lisa McCann's evidence can have no credibility given that she sat through the preliminary hearing before she gave a statement to the police.

11 In *R. v. Griffin*, 2005 CanLII 5827, the accused was charged with first degree murder by shooting the victim to death. Justice Brunton stated the following:

[21] Notwithstanding the able arguments of Crown counsel, I am unable to agree that the fact that three days after the murder of Mr. Poirier, Mr. Griffin was found in possession of a loaded weapon which was not the murder weapon is in the least bit relevant to that charge.

And:

[33] In conclusion, I agree with the defence that the prejudice which would be caused by the production of the weapon far exceeds the probative value of this evidence. The production would constitute a gilt-edged invitation to the jury to embark on the forbidden chain of reasoning -- to infer guilt from general disposition or propensity.

12 In *R. v. Aubin*, [1994] J.Q. no 632, Court File No. 200-10-000064-910, the accused was charged with second degree murder. The victim was shot to death. Several days later, the accused

was found in possession of a revolver with 5 bullets instead of 6. This evidence was admitted at trial. The crown could not identify the murder weapon. The Quebec Court of Appeal in the judgment of Justice LeBel (as he then was) ordered a new trial. He stated the following:

In the present case, the evidence called with respect to the weapon and its seizure were of little probative value, even though an attempt was made to defend it as part of the circumstantial evidence. It had, however, the ability of causing considerable prejudice to the accused. The absence of one of the bullets in the magazine risked being interpreted as evidence showing that, in fact, this weapon had been used in the crime because it was missing a bullet. Next, because it was found in Aubin's possession at the time of his arrest, one could have been led to think that he had used it to kill Morin.

13 The crown submits that the inferences can be drawn from the evidence which she wishes to introduce as follows:

- that the accused possessed the knife which he used to stab McCann, with the intent to use it to cause bodily harm and was reckless as to whether death would ensue
- as rebuttal evidence to the accused's possible defence of provocation
- as rebuttal evidence to the accused's possible suggestion that McCann brought the knife with which he was stabbed to the altercation.

All this rests on the assumption that because Corbett had a knife at the front door it can be inferred that he had one at the back door.

14 The evidence does not fall into any of the six categories suggested in *Handy* as connecting the accused to the charge. It is similar in nature to the evidence rejected in *Giffin* and *Aubin*. Its prejudicial effect outweighs its probative value. It will not be admitted into evidence. The crown's application is dismissed.

P.B. HAMBLBY J.

---- End of Request ----

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