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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation:	***R. v. De Jaeger*, 2014 NUCJ 07(No.2)**
Date:	20140318
Docket:	07-13-85; 07-13-95; 08-02-27
Registry:	Iqaluit

Crown: **Her Majesty the Queen**

-and-

Accused: **Eric Jose De Jaeger**

Before:	The Honourable Mr. Justice Kilpatrick
Counsel (Crown):	Doug Curliss Q.C. Scott Hughes
Counsel (Accused):	Malcolm Kempt
Location Heard:	Iqaluit, Nunavut
Date Heard:	March 17, 2014
Matters:	Application to cross-examine the accused on character

REASONS FOR JUDGMENT

(NOTE: This document may have been edited for publication)

Restriction on Publication: By court order made under section 486.4 of the *Criminal Code*, any information that could identify the complainants shall not be published in any document or broadcast or transmitted in any way.

I. INTRODUCTION

[1] Crown seeks to cross-examine this Defendant on the factual details underlying the convictions set out in the Defendant's criminal record.

[2] In a criminal trial, the laws of evidence ordinarily preclude the Crown from conducting such an expansive cross-examination. Beyond proving the criminal record itself, it is not usually open to the Crown in a criminal prosecution to go behind the record and lead evidence related to the factual details associated with entries on a criminal record.

[3] The Crown's application is premised upon the contention that Mr. De Jaeger put his character in issue while testifying in his own defence.

II. FACTS

[4] At the outset of this trial, the Defendant entered guilty pleas to eight counts of indecent assault. The factual allegations surrounding these eight counts remain in dispute however. The Defendant alleges in his testimony that all eight incidents involved brief fondling of the complainants genitals or buttocks and that this was done on top of the complainants clothing. The Defendant claims that he did what he did as a way of "shooing" the young children out of his bedroom where they were not welcome and interfering with his work.

[5] During the Crown's cross-examination of the Defendant, the Crown spent much time exploring the Defendant's version of the facts in relation to the counts for which guilty pleas had been entered. The Defendant was asked these questions and gave these answers:

> Q: As a priest, you would not want to do anything that it was – was against the secular laws, like the laws of Canada or the laws of Belgium, or whatever?
>
> A: Yeah, mmm-hmm
>
> Q: Do you agree?
>
> A: Yes, yeah.
>
> Q: Generally speaking, that would be the approach of a priest?
>
> A: That's correct
>
> Q: And so, at the time that you did it, you didn't have a problem with any of those aspects for what you were doing? You didn't view it as a problem

with the Bible, church's rules, Canadian rules or general morality? It was all okay in your mind?
A: I don't think about it. You know, just – we're coming back to the same thing. It just happened, and there is no – no thought given to it, there is no—no – no-- you call it planning on it, or whatever. It just happened, and then – and then you let go of it.
Q: Sure, but the kid walks into the room, and rather than you grabbing his crotch, you punch him in the face. Why didn't you punch him in the face?
A: That's violence.
Q: Right.
A: That's violence. Yeah, I'm not a violent person, so I don't do these things.
Q: So, you don't view what you did as any form of violence?
A: That's correct, yes.
Q: So, as long as the kid –and violence, in your own mind is defined – how do you view violence?
A: Hurting anybody.
Q: And so, that – that wasn't hurting the kid?
A: That's correct, yeah. . .

Transcript of Proceedings (January 23, 2014) vol 23, at 1684-1685 (emphasis added)

[6] No objection was raised by Defense to this line of questioning.

[7] The Crown returned to this line of questioning later in its cross-examination. The Defendant was asked these questions and gave these answers:

Q: Now you said that when you were doing it, that the kids never tried to get away. They just kind of stood there.
A: Yes, that's correct.
Q: And again, in your mind, would it have made a difference if they tried to get away? At the time. I realize you think differently now, but at – at the time, if –
A: I think so
Q: Okay
A: If they would have, like, reacted to this or have been or – or – I'm not a violent person. So I wouldn't know. I would have reacted, I think so.
Q: So from your perspective, you don't regard what you did to them as – as violence, as any—
A: At the – at the time, no.
Q: Right, right
A: No, definite – no, I wouldn't – no, no, definitely not.

Q: And today you regard what you did to them as violence?
A: Yeah, there's no – yeah, but it's a different way of thinking now, yes.
Transcript of Proceedings (January 23, 2014) vol 24, at 1777-1778, (emphasis added)

III. THE CHARACTER EVIDENCE RULE

[8] Detailed evidence of other acts of misconduct by a citizen accused of a crime is generally not admissible in a criminal trial. This type of evidence, called bad character evidence, has long been recognized by the common law to have great potential to prejudice a citizen's right to a fair trial. It has great potential to distract and confuse the trier of fact with a multiplicity of issues unrelated to the matter at hand. It has great potential to consume significant amounts of court time on peripheral issues.

[9] Two forms of prejudice are caused by the use of bad character evidence. Reasoning prejudice results where a trier of fact places undue weight upon evidence related to earlier misconduct. Moral prejudice results where a judge or jury is tempted to infer guilt from knowledge of the bad character of a Defendant.

[10] If used improperly, this type of reasoning can undermine the presumption of innocence. If used indiscriminately, it can poison the mind of a trier of fact and make adjudicative objectivity much more difficult to achieve.

[11] Over many years and many cases, the common law has learned that these inferences are all too easily made. These inferences can be made in the absence of any real evidence linking an accused to the commission of a crime. This is particularly so where the disreputable conduct under consideration is highly reprehensible or morally abhorrent. A wrongful conviction may result. For this reason, the common law "character evidence rule" prevents the Crown from leading evidence of bad character unless or until the Defendant puts his or her character in issue.

[12] If a Defendant chooses to put his or her character in issue by suggesting that he or she is not the type of person to commit the alleged crime, the situation changes. Should this happen, the evidential door that is otherwise closed to the Crown swings open to allow the reception of evidence of bad character. Evidence of bad character then becomes admissible to rebut the inference that would flow from otherwise unchallenged defense character evidence. This evidence of “bad character” may take the form of evidence related to general reputation, or evidence related to specific incidents that reflect “bad character”. This would certainly include the particulars of previous convictions of a Defendant.

[13] In Canada, the common law character evidence rule was changed by statute. If a Defendant chooses to testify in his or her own defense, section 12 of the *Canada Evidence Act*, RSC 1985 c C-5 [section 12], allows the prosecution a limited right to cross-examine a defendant on his or her criminal record and to prove the record if it is disputed. A criminal record is thought to be relevant to a trier of fact’s assessment of the speaker’s credibility or believability.

[14] However, in keeping with the spirit of the common law rule, jurisprudence interpreting section 12 limits the Crown’s ability to go behind the record to explore the factual details of the offence underlying the conviction unless or until the Defendant puts his or her character in issue.

IV. ANALYSIS

A. The Cross-Examination

[15] None of the eight complainants who testified about the substance of these alleged indecent assaults suggest that they had been punched by the Defendant. Beyond the application of force necessary to commit the fondling activity, there was no suggestion by any of these eight complainants that the Defendant had used any overt force or threats of force before, during, or after the commission of the alleged indecent assaults. The Crown's question "why didn't you punch him in the face?[1]" was not supported by any evidence in relation to the eight counts then being discussed.

[16] The Crown's hypothetical question put the Defendant in an untenable position. The question was a trap. The question invited the Defendant to respond as he did by saying that he was not a violent man and would, therefore, not have responded in this way. The Defendant was induced by this line of questioning to give evidence of good character. It is this evidence of good character that the Crown now seeks to rely upon as a pretext for leave to cross-examine the Defendant on the particulars of his previous convictions.

[17] When the Crown again returned to its earlier line of questioning, a second hypothetical was put to the Defendant, namely active resistance by the complainant's to the Defendant's fondling. Once again, there was nothing in the evidence in relation to the eight counts then being discussed to suggest that this scenario had any basis in fact.

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[1] *Transcript of Proceedings* (January 23, 2014) vol 23, at 1685 line 12.

[18] The Defendant testified that he would have reacted differently. The Court infers that the Defendant meant by this that he would have analyzed what he did do to the complainants differently and would have better understood his act of fondling to be an act of sexual violence. In responding to this second hypothetical situation, the Defendant "volunteered" that he was "not a violent person"[2]. The Defendant testified that he now thinks differently about what he did. The Defendant concedes that what he did do to the complainant's was a form of sexual violence.

[19] The Court finds that the Defendant's response to this second hypothetical situation was both tainted and conditioned by the form of questions put to him in the first scenario posited by the Crown. In the context of the cross-examination as a whole, the Court finds that the Defendant was unwittingly lured into giving character evidence by an inappropriate question put to the Defendant in cross-examination.

B. The Examination in Chief

[20] The Court does not agree with the Crown submission that the Defendant first raised the issue of his character during his examination in chief. A Defendant does not put character in issue by denying guilt or by repudiating the allegations raised against him or her.

[21] The Defendant has chosen to testify in English. English is a second language to the Defendant whose native tongue is Flemish.

[22] Typical responses by this Defendant can be found in his examination in chief. There, Mr. De Jaeger is asked the following questions and gives the following answers:

> Q: Did you ever threaten him?
> A: No, never threaten anybody.
> *Transcript of Proceedings* (January 21, 2014), vol 21 at 1417.

[2] *Transcript of Proceedings* (January 23, 2014) vol 24, at 1778 line 3.

The second question is in relation to the eight complainants Mr. De Jaeger admits to indecently assaulting:

> Q: Have you ever threatened any of these eight boys?
> A: I never threatened anybody, but not - - for sure, not those boys.
>
> *Transcript of Proceedings* (January 21, 2014), vol 21 at 1433.

[23] The responses given by this Defendant were intended to be specific to the questions asked. The responses, when read in context, were given in defence of the specific criminal allegations then being discussed. They were never intended by the Defendant to relate to a general character trait.

V. CONCLUSION

[24] An accused does not put his or her character into issue in circumstances where he or she is tricked into doing so by inappropriate questions raised by the Crown in cross-examination. See *R v Beecham*, (1921) 16 Cr App R 26 (CCA); *R v Bricker,* (1994) 90 CCC (3d) 268 at p.19 (ONCA), leave to appeal to the SCC refused; *R v Turpin,* 2005 BCSC 490.

[25] It is entirely unnecessary to go behind this record to rebut the suggestion that the Defendant initially raised in his cross-examination (that he was not a violent person) and then corrected. To do so in the circumstances presented here could potentially undermine trial fairness.

[26] The Criminal Record of the Defendant [Trial Exhibit 14] is a record relating to violence. The Court is entitled to consider the record on an issue of credibility. The Defendant's own criminal record contradicts any suggestion that violence is out of character for this citizen.

[27] The Defendant himself later retracted any suggestion that the eight counts that are the subject of guilty pleas do not relate to violence. All eight counts on their face relate to indecent assaults.

[28] Given this retraction, the probative value associated with cross-examination on the facts of the earlier convictions is slight. The prejudicial effect of this evidence of bad character is substantial.

[29] It is not necessary to go behind the criminal record in order to make findings of fact with respect to why the Defendant engaged in fondling activity with these eight complainants. This forms part of the overall credibility assessment that is properly left to the trial judge to determine on the whole of the evidence heard at trial.

[30] The Crown's application for leave to cross-examine the Defendant on the facts underlying his earlier convictions is therefore denied.

Dated at the City of Iqaluit this 18th day of March, 2014.

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Justice R. Kilpatrick
Nunavut Court of Justice