

evidence of other discreditable conduct. The Accused opposes the admission of this evidence on two bases: first, that the evidence does not meet the test for admission, and second, that even if it does meet the test, it cannot be admitted because the effect of the discharge is the same as an acquittal. Therefore, the evidence cannot be revisited.

Issues

[3] There are two issues to be determined:

1. Does the evidence meet the test for admission as evidence of prior discreditable conduct pursuant to *R. v. Handy*¹?
2. If so, can it be admitted despite the fact that the Accused was discharged on the evidence after the preliminary inquiry?

Evidence of Prior Discreditable Conduct

[4] The five men – the two complainants and the three witnesses – all testified at the preliminary inquiry and their evidence is as follows:

K.O. - complainant

[5] K.O. was 16-years-old when he met the Accused, Robert Borne through his brother. He became friendly with Borne and met him socially, primarily at the rectory. During the time period that he knew Borne, he got his driver's licence, and he borrowed Borne's car on a fairly regular basis. K.O. visited Borne at the rectory, and sometimes Borne gave K.O. alcohol. The visits were social in nature with conversation along with the alcohol. Mostly, K.O. went alone, but sometimes other youths were present.

[6] K.O. went with Borne on a trip to Toronto. Borne had business in Griffith and they stopped there on the way to Toronto. They spent the night in the rectory in Griffith. K.O. was served alcohol by Borne and became drunk. He has no recollection concerning how he came to be in bed with Borne. However, at one point, he became aware of the fact that Borne was kissing him. Borne also fellated him briefly. K.O. was uncomfortable with the situation, but did not object at that time. The next night, on their return from Toronto, they stopped at a hotel in Lindsay and they were again to share a bed. K.O. advised Borne that 'he was not interested in

¹ [2002] S.C.J. No. 57.

that type of relationship'; Borne complied. There were no further incidents of a sexual nature between them. K.O. continued to socialize with Borne and to borrow his car for a considerable period of time after this incident. The relationship eventually came to a natural end.

P.M. – complainant

[7] P.M. met Borne when he was in grade 13 and Borne was teaching religion class with other priests. He was 18 years of age. P.M. and a group of friends would go over to the rectory on their lunch break or when they had a spare period. During one of his visits to the rectory, Borne gave him a hug that made P.M. uncomfortable. According to P.M., Borne was known by the students to be a practicing homosexual, and Borne suggested to P.M. on several occasions that he too was gay. P.M. said that his primary interest in Borne was the fact that he would occasionally give him alcohol and was generous in lending his car.

[8] P.M. did a second half-term of grade 13 between January and June of the year he was nineteen. During that time period, he continued to visit Borne at the rectory. P.M. recalled that he would go out with friends to bars and drink. He had lost his driver's licence and occasionally he asked Borne to drive him home to Petawawa after a night's drinking. On one occasion, instead of being driven home he stayed in the spare room at the rectory. At some point in the night, P.M. woke up to find the covers pulled down and his briefs being removed. Borne was fellating him. P.M. rolled over away from Borne; Borne lingered on the bed for a short time before leaving the room. Despite this incident, P.M. continued to socialize with Borne.

[9] There was a second occasion when P.M. stayed overnight at the rectory. P.M. indicated that he had been drinking and went over to the rectory to confront Borne about the first incident. He has no recollection whether the subject ever was discussed, but he did recall that he ended up staying at the rectory. On this occasion, he was staying in Borne's room while Borne was in the spare room. Borne came into his room and P.M. woke up when Borne sat on his bed. P.M. pretended that he was ill and Borne went to get another priest staying at the rectory to check him out. After both priests had left his room, P.M. was in fact sick. He indicated that the cause was anxiety, not the amount of alcohol he had to drink.

P.O. – witness

[10] P.O. met Borne when he was 16 years of age. He is the older brother of K.O.. He was working for the owner of a local flower shop and was involved in a homosexual relationship with him. The flower shop owner introduced P.O. to Borne and they became friends. On a trip to Toronto, the relationship became sexual and lasted for approximately two years. P.O. was able to describe only one sexual incident between him and Borne, in which he fellated Borne. He believes that it was the first time that he had done such a thing, and also believes that he felt obliged to perform this act although he agreed that he could have refused. P.O. indicated that Borne was never aggressive or demanding. P.O. testified at a deposition hearing that he had approximately a dozen sexual encounters with Borne – all consensual. P.O. borrowed Borne's car periodically, and indicated that he felt that the sexual encounters were in part a payment for the use of the car. This *quid pro quo* was never discussed with Borne, and he agreed in cross-examination that the link between the use of the car and sex was exclusively in his own mind.

D.O. – witness

[11] D.O. was just shy of his sixteenth birthday when he met Borne at his sister's confirmation. They hit it off and Borne invited him to Pembroke on the Canada Day weekend. D.O. stayed overnight at Borne's parents' house and he and Borne shared a bed. Borne initiated sexual contact and D.O. reciprocated. D.O. was already sexually active and knew that he was gay. After that first incident, they met four or five times in Pembroke, once in Mattawa and once in Corbeil over approximately a nine month period. The relationship was a sexual one. There was no alcohol involved in the relationship. Most of their visits involved an overnight stay, usually at the rectory. The relationship petered out when D.O. moved to Ottawa in the late summer/fall of the following year although they continued to speak via telephone for at least two years after that.

E.S. – witness

[12] E.S. met Borne when he was the priest at his family’s church. E.S. first interacted with Borne when he was 16-years-old and Borne suggested that he try out for a job as host for a local youth TV program. Borne and E.S. became friends after the experience with the TV show. The relationship lasted three years. Borne held E.S.’s hand while they were driving. He also hugged and kissed E.S. when they met and when they parted. The kisses were on the lips and Borne attempted to ‘French kiss’ E.S., but he did not permit it. They went on several trips together; Borne got into E.S.’s bed and ‘spooned’ with him. E.S. indicated that he never advised Borne that he did not want the touching although he never encouraged it.

Analysis

[13] The Supreme Court of Canada decision in *R. v. Handy* sets out the framework for analysing whether evidence of prior discreditable conduct should be admitted. The starting point for any analysis of the admission of prior discreditable conduct is the fact that such evidence is presumptively inadmissible.² To be admissible the prosecution must demonstrate 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.³ The crucial purpose of evidence of prior discreditable conduct is that it serves rebut the possibility of coincidence as it relates to a live and important issue in the trial.⁴ As such it can be devastating evidence, but given the potential prejudice, it must be carefully assessed before it is admitted.

[14] The probative value of similar fact evidence can be assessed by reference to a number of factors as set out in *Handy*. Those factors can be summarized as follows:

² *Handy* at para. 31.

³ *Ibid.*, at para. 55.

⁴ Mr. Justice Marc Rosenberg, “Similar Fact Evidence” 2003 LSUC Special Lectures (Toronto: Irwin Law, 2004) at 391.

1. The strength of the proffered evidence must be assessed. Is the proposed evidence capable of belief? Is there evidence of collusion and if so, has the prosecution shown on a balance of probabilities that the proffered evidence is not tainted with collusion?
2. What is the live issue at trial to which it is said the proposed evidence relates? Is that issue important to the trial?
3. What elements connect or distinguish the proposed evidence to the facts alleged in the charge? What is the degree of similarity? Connecting factors may, but need not, include:
 - a. The proximity in time of the similar acts to the offence charged;
 - b. The extent to which the other acts are similar in detail to the offence alleged;
 - c. The number of occurrences of the similar acts;
 - d. The circumstances surrounding or relating to the similar acts;
 - e. Any distinctive features unifying the similar acts and the offence charged;
 - f. Any intervening events; and
 - g. Any other factor that would tend to support or rebut the underlying unity of the similar acts and the offence alleged.
4. Having examined the proposed evidence as set out above, is that evidence capable of supporting the inferences sought by the Crown? If not, the analysis need go no further.
5. If the evidence is capable of supporting the inferences sought by the Crown, then the potential prejudice to the Accused must be assessed. The court must consider the potential for moral prejudice against the Accused – i.e. that he has committed the offence because he is a bad person. The court must also consider the potential for reasoning prejudice against the Accused – i.e. that the jury may become confused or distracted by the evidence of prior discreditable conduct, and that they may have trouble disentangling the subject matter of the charges from the other evidence.⁵

Application to the facts of this case

[15] Both counsel agree that there are two live issues in this case: first, whether the acts as alleged occurred at all, and second, if they did whether the acts were consensual. Crown agrees that the proposed evidence would not be of assistance with the second issue, but contends that it does assist the trier of fact with respect to the first issue.

⁵ Factors are drawn from *R. v. K. (C.P.)*, [2002] O.J. No. 4929 (O.C.A.) at pp. 495-497.

[16] The focus of the argument in this case is on whether the proposed evidence does in fact assist the trier of fact with the issue of whether the acts as alleged occurred. The Crown argues that there are several common factors in the evidence of all five men. They are:

- The age of the men. All of the men were between 15 and 19 years of age when the alleged incidents took place;
- Religion. The men were all members of the Roman Catholic faith, and were brought up by parents who were practising Catholics. They all attended Catholic-based schools;
- The Accused was a priest. The men met the Accused through his connection with the Catholic Church, and the Accused used his position with the Church both to foster the relationship and to protect himself. The men's parents trusted the Accused with them because of his position. Many of the alleged sexual incidents occurred on church property;
- The nature of the sexual contact. The relationships were 'romantic'; there was kissing, hugging and other affectionate behaviour. The sexual aspects were limited to kissing, touching and oral sex. The relationships were monogamous on the Accused's part, and ended when the men grew out of the age range to which the Accused was attracted; and
- Alcohol and a car. The Accused provided the men – who were generally underage – with alcohol and regularly allowed them to borrow his car. These factors attracted the men to the Accused and encouraged them to continue seeing the Accused.

[17] I agree that most of the similarities outlined by the Crown do exist. There are, however, significant differences as well. While P.O. and D.O. both had what could be described as romantic relationships with the Accused, none of the other witnesses did. Borne sometimes initiated the sexual contact; sometimes it was initiated by the witness. Borne supplied alcohol to all of the men, but it was not necessarily a factor in the initiation or continuation of the sexual contact. The alcohol, like the car, was part of Borne's attraction to these men.

[18] The existence of the similarities does not end the matter. The probative value of the similar fact evidence depends on two findings. First, that the Accused has a propensity to act in a particular way and second, that the Accused actually acted in conformity with that propensity during the alleged incident that is the subject matter of the charge.⁶

[19] In this case, there is a certain commonality in the incidents as outlined by the two complainants. They were both staying overnight with the Accused. They had both consumed sufficient alcohol to consider themselves to be drunk. They both woke up during the night to find

⁶ *Similar Fact Evidence*, at 401.

the Accused in the bed with them and touching them in a sexual manner. They were both fellated by the Accused. The two complainants did not consent to the sexual touching. Essentially, this is the *actus reus* that the Crown must prove.

[20] Nothing in the evidence of the other three witnesses would tend to make the occurrence of the *actus reus* of the offences charged more likely than not. P.O. recounted only one sexual encounter in which he was the one fellating the Accused. There is no context to this incident. The encounter was consensual. Borne initiated sexual contact with D.O. while he was staying overnight with Borne, but the contact did not include fellatio, it was consensual, and D.O. was awake when Borne initiated the contact. Fellatio did become a feature of their relationship later, but it was mutual and always consensual. E.S. indicated that Borne kissed and hugged him regularly, and ‘spooned’ with him when they were together overnight. However, Borne never assaulted E.S. while he was asleep despite having the opportunity.

[21] In short, the one remarkable feature of the alleged acts involving the two complainants is the fact that they woke up to find Borne sexually assaulting them. That feature is missing from the evidence of the other three witnesses. Their evidence cannot therefore assist in the determination whether Borne committed the acts as alleged by the two complainants. In the circumstances, the evidence of the three witnesses – P.O., P.M. and E.S. – is not admissible.

Effect of discharge at preliminary inquiry

[22] Given my finding with respect to the admissibility of the evidence of prior discreditable conduct, I do not need to address this issue.

Conclusion

[23] The Application of the Crown is dismissed.

Madam Justice Julianne A. Parfett

CITATION: *R. v. Borne*, 2011 ONSC 5740
COURT FILE NO.: 09-0815
DATE: 2011-09-29

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

– and –

ROBERT LLOYD BORNE

REASONS FOR DECISION

Parfett J.

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