

Case Name:
R. v. Abbey

Between
Her Majesty the Queen, and
Warren Nigel Abbey

[2006] O.J. No. 4985

72 W.C.B. (2d) 738

Ontario Superior Court of Justice

T.L. Archibald J.

Heard: November 24, 27-29, December 1, 4, 6 and 11,
2006.

Judgment: December 13, 2006.

(40 paras.)

Criminal law -- Evidence -- Admissibility -- Voir dire -- Admissions -- Relevancy -- Prejudicial evidence -- Probative value -- Voir dire to determine the admissibility of two admissions by the accused -- The accused was charged with first degree murder following a shooting -- The Crown alleged that the shooting related to a rivalry between street gangs -- The court held that the admission regarding the membership of the accused in one of the rival gangs was of substantial probative value, as it was relevant to the issue of motive -- An admission that gang members had ready access to firearms was relevant, but inadmissible, due to its significant prejudicial effect.

Voir dire to determine the admissibility of two admissions by the accused, Abbey -- The accused was charged with first degree murder following a shooting -- The Crown alleged that the accused and the victim were members or associates of warring street gangs -- The Crown theorized that the shooting was motivated by a trespass onto rival gang territory -- The parties agreed on a series of admissions regarding the existence of the two gangs, their structure, their rivalry and history of violence, and their geographical territories -- Two admissions remained in dispute regarding the purported membership of the accused in a gang, and whether gang members and associates carried guns and/or had access to guns -- The accused contended that the prejudicial effect of the two admissions outweighed their probative value -- The Crown submitted that the admissions were relevant and necessary to illustrate the motive, capabilities and intention of the accused -- HELD:

One admission was admissible, and the other was inadmissible -- The admission regarding the membership of the accused in one of the rival gangs was of substantial probative value, as it was relevant to the issue of motive -- In addition, the admission was necessary to explain the animus that may have existed between the accused and the victim -- The prejudicial effect of the admission on the character of the accused was easily offset by a properly worded instruction to the jury regarding limitation of its use -- The second admission that gang members had access to, and/or carried firearms was inadmissible -- Although the issue of whether the accused possessed a gun on the day of the shooting was relevant to the issue of identity, the significant prejudicial effect of the evidence far outweighed its slender probative value.

Counsel:

Sylvana Capogreco and Melissa Mandel, for the Crown

Doug Gosbee and Lance Talbot, for the Accused

Street Gang Evidence Voir Dire Reasons

T.L. ARCHIBALD J.:--

(A) BACKGROUND

1 Warren Nigel Abbey is charged with first degree murder. On January 8, 2004, Simeon Peter was gunned down in daylight hours at 115 Caronia Square in Scarborough. The Crown alleges that Mr. Abbey killed Mr. Peter because both men were members or associates of warring rival street gangs in Scarborough (The Malvern Crew and the Galloway Boys). It is alleged that the accused was alerted to the fact that Mr. Peter was trespassing on the Malvern Crew territory. That trespass allegedly motivated Mr. Abbey to follow Mr. Peter to Caronia Square where the Crown alleges that Mr. Abbey hunted him down, and fatally shot him three times.

2 On this *voir dire*, the Crown sought to qualify Detective Sergeant Quan of the Toronto Police Services as an expert on the existence and nature of Toronto street gangs. Detective Sergeant Quan testified concerning the existence of the Malvern Crew and Galloway Boys, their geographical territory, the nature of their "turf" wars, and the scope of their criminal activities. Detective Sergeant Quan also gave evidence that Mr. Abbey was an associate of the Malvern Crew. By referring to the list of criteria developed by the Toronto Police Service, Detective Sergeant Quan testified that Mr. Abbey displayed sufficient gang related indicia to be classified as an associate of the Malvern Crew.

3 As a result of negotiations between the Crown and the defence, a series of admissions have been made by the accused, obviating the need for me to consider whether Detective Sergeant Quan should be qualified as an expert. Those admissions are as follows:

1. The Malvern Crew and the Galloway Boys are criminal street gangs located in the northeast quadrant of Toronto.
2. The Malvern Crew and the Galloway Boys were rival Toronto street gangs.

3. There is a history of shootings and retaliation in Malvern and Galloway.
4. The Malvern Crew has turf as outlined in Exhibit B on *voir dire* three.
5. The Galloway Boys have turf as outlined in Exhibit C on *voir dire* three.
6. The Malvern Crew is made up of subsets such as Empringham (Emps), Crow Trail (C-Trail), and Brenyan Way (B-Way) among others. The subsets are territorially based and are named after streets and specific neighbourhoods.
7. Individuals can move up in the gang hierarchy by engaging in criminal activity.
8. Members and associates from the Malvern Crew and its subsets have defended their turf against rivals.
9. In 2003 and 2004, the rivalry between the Malvern Crew and the Galloway Boys resulted in a high incidence of violence occurring in the two areas.

4 A careful review of the admissions reflects the reality that they constitute stipulated facts. For example, the first admission reads as follows: "The Malvern Crew and the Galloway Boys are criminal street gangs located in the northeast quadrant of Toronto." The existence and location of the gangs are questions of fact. They do not require opinion evidence from an expert in order to be proven. All of these admissions made by Mr. Gosbee are of a factual nature.

5 In my view, Detective Sergeant Quan's testimony was virtually factual in scope and was not opinion-based to any significant degree. He testified about the factual underpinnings and characteristics of the two Toronto gangs which were allegedly involved in this shooting. His testimony was rooted in his direct knowledge as the lead member of the Toronto Police Services Guns and Gangs Squad.

6 Although Detective Sergeant Quan relied upon the Services' gang criteria to classify the accused as a Malvern Crew associate, it is important to stress that all of the indicia are entirely fact driven. For example, three of the criteria from the list are as follows: Whether an individual is known to be associated with other members of a street gang; whether an individual has admitted to being a member of a gang; and, whether an individual has been previously classified as a gang member in a court proceeding. All three indicia are questions of fact and do not fall within the sphere of expert opinion. No statistical or scientific analysis or special expertise is required to assess the criteria. Even Detective Sergeant Quan's conclusion that Mr. Abbey was associated with the Malvern Crew was fact driven and would not require expert opinion evidence in order to be given.

7 Detective Sergeant Quan is an extremely experienced and capable police officer. If his evidence is relevant to a fact at issue and the evidence's probative value outweighs its prejudicial effect, then I would allow Detective Sergeant Quan to testify about the existence and nature of the street gangs without being qualified as an expert witness.

8 Another issue concerns the appropriateness of qualifying Detective Sergeant Quan as an expert because of the potential validation of the police investigation by the jury. As a result of Detective Sergeant Quan's direct involvement in the investigation of this case, his qualification as an expert may inappropriately validate, in the minds of the jury, the investigation of the shooting and the first-degree murder charge laid against the accused by the Toronto Police Services. In other words, the danger exists that the jury may assume that because Detective Sergeant Quan is an expert, the investigation and arrest of the accused must have been well founded.

9 In conclusion, there is no need to consider whether he should be qualified as an expert concerning the existence and nature of street gangs. For authority concerning the test to determine the admissibility of expert evidence, please see the Supreme Court of Canada's decisions in *R. v. Abbey* (1982), 68 C.C.C. (2d) 394, *R. v. Lavallee*, [1990] 1 S.C.R. 852 and, in particular, *R. v. Mohan* (1994), 89 C.C.C. (3d) 402.

(B) ISSUES IN DISPUTE

10 Although the defence has agreed to admit the aforementioned nine facts, the following two admissions are in dispute. They are as follows:

1. Mr. Abbey is an admitted associate of the Malvern Crew.
2. Gang members and associates may carry and/or have access to guns.

11 The defence has conceded that the Crown, if I were to allow it to do so, could prove those two facts. They, however, argued that those proposed admissions should not be put before the jury because their prejudicial effect outweighs their probative value.

(C) POSITION OF THE CROWN

12 The Crown argued that these admissions are necessary and should be admissible to illustrate the motive and intention of the accused and to explain the *animus* between members of the Malvern Crew and the Galloway Boys. Ms. Capogreco and Ms. Mandel have argued that the fact that Mr. Abbey is an associate of the Malvern Crew leads directly to proof of his motive to kill Mr. Peter, given the tension between the rival gangs at that time. The fact that gang members and associates have access to firearms explains how the accused would have been able to obtain a firearm in order to commit the offence.

(D) POSITION OF THE DEFENCE

13 The defence argued that these two facts are of limited probative value in relation to the issues of motive and *animus* and do not lead to any inference concerning the conduct of the accused. Mr. Gosbee submitted that these facts are inherently prejudicial and could confuse and mislead the jury to such a degree that the prejudice could not be offset by a judicial limiting instruction to the jury. The defence argued that Mr. Abbey's association with members of the Malvern Crew does little to support the desired inference that Mr. Abbey had a motive to kill Mr. Peter and is not helpful in corroborating the Crown's civilian witnesses. The defence submitted that this evidence simply amounts to "bad character" evidence, which is *prima facie* inadmissible (See *R. v. Morris*, [1983] 2 S.C.R. 190, at pp. 201-2 and *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716 at p. 747).

(E) ANALYSIS

1. The Gang Association Admission by Mr. Abbey

i) Relevance

14 In order to effectively negotiate the hurdle of admissibility, the probative value of the admissions of gang association and access to weapons must outweigh their prejudicial effect. The analysis of the admissibility of this evidence must begin with the issue of relevance.

15 In *R. v. Corbett*, [1988] 1 S.C.R. 670 at p. 714, La Forest J. (in dissent) described the significance of relevance to the law of evidence as follows:

All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.

16 In *R. v. Cloutier*, [1979] 2 S.C.R. 709 (S.C.C.), Pratte J. held that "for one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other." (at p. 731)

17 In *R. v. Watson* (1996), 30 O.R. (3d) 161, the Ontario Court of Appeal explained the concept of relevance in the following fashion at p. 172:

Relevance ... requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and prima facie admissible.

18 The existence of an accused's motive to commit a crime has been held to be a highly relevant material fact. For authority on this point, please see the Supreme Court of Canada decision in *R. v. Barbour* (1938), 71 C.C.C. 1 (S.C.C.), per Chief Justice Lyman Duff at p. 19-20. In relation to the bad character component of motive, Wurtele J. of the Quebec Court of King's Bench made the following comments in *R. v. Barsalou (No. 2)* (1901), 4 C.C.C. 347 (Que. K.B.) at page 349:

While the law does not allow evidence of a general bad character to be adduced in the first instance as a criminative circumstance, whenever it is necessary to prove motive on the part of the defendant to commit the offence charged, it is competent to prove particular facts which are of a nature to shew a motive, even when they may injuriously affect his reputation.

19 More recently in *R. v. Ma* (1978), 44 C.C.C. (2d) 511 (Ont. C.A.), the Ontario Court of Appeal held that evidence of an accused's membership in a gang is admissible when it is tendered by the Crown for the purpose of allowing the jury to draw an inference relating to motive, a material fact at issue in that case.

ii) Probative Value

20 If relevance is established, the analysis then turns to the question of whether its probative value outweighs its prejudicial effect.

21 In *R. v. B.(L)* (1997), 35 O.R. (3d) 35 (Ont. C.A.), at p. 47, Justice Charron has provided the judicial gatekeeper with three helpful questions to consider in the assessment of probative value. In that case, the Court of Appeal was dealing with the admissibility of similar fact evidence. Nonetheless, the questions posed are helpful to any assessment of probative value versus prejudicial effect. In assessing the probative value of the proposed evidence, consideration should be given to such matters as:

- (i) Strength of the evidence;
- (ii) The extent to which the proposed evidence supports the inference sought to be made from it; and
- (iii) The extent to which the matters it tends to prove are at issue in the proceedings.

iii) Prejudicial Effect

22 In considering prejudicial effect, Justice Charron suggested the following questions at p. 47:

- (i) How discreditable is the evidence;
- (ii) To what extent does it support an inference of guilt based solely on bad character;
- (iii) To what extent does it confuse issues; and
- (iv) What is the accused's ability to respond to it.

23 In *R. v. B.(L.)* at p. 46, Justice Charron emphasized that it must be remembered that prejudice in this context does not mean that the evidence might increase the chances of conviction, but rather that the evidence might be improperly used by the trier of fact.

2. Mr. Abbey's Associate Membership in the Malvern Crew is Relevant

24 In this case, the question is whether the evidence that Mr. Abbey is an associate of the Malvern Crew makes the existence of the fact that Mr. Abbey may have had a motive to kill Simeon Peter more probable than without it. If it does, then Mr. Abbey's associate membership in the gang is relevant to motive.

25 The admission that Mr. Abbey is an associate of the Malvern Crew makes the existence of the material fact that Mr. Abbey may have had a motive to kill Mr. Peter, an alleged member of the Galloway Boys, more probable. As such, it is a relevant fact.

3. The Probative Value of Mr. Abbey's Admission

26 In considering the factors suggested by Justice Charron in *R. v. B.(L.)*, I have concluded that the admission has substantial probative value. First, the proposed evidence is admitted by the accused, which increases its strength. In other words, the defence is not submitting that the Crown cannot prove the likelihood that Mr. Abbey is connected to the Malvern Crew. Secondly, the proposed evidence supports the inference sought by the Crown: namely, that because Mr. Abbey was an associate of the Malvern Crew, he may have had a motive to kill Mr. Peter, who was allegedly a member of the Galloway Boys. Lastly, the issue of motive is of importance to the Crown's case in proving the identity of the shooter.

4. Probative Value versus Prejudicial Effect

27 Mr. Abbey's admission is evidence of bad character and as such is *prima facie* inadmissible; however, if it is adduced for a purpose other than to support the inference that the accused is guilty by reason of his bad character, this evidence would be admissible if its probative value outweighs its prejudicial effect.

28 In assessing the prejudicial effect of the admission, I have concluded that while the nature of the admission is potentially discreditable to the accused, a properly instructed jury would entirely

disregard the element of bad character in the evidence and would limit its use to the appropriate determination of motive. When adduced with a limiting instruction, the evidence of Mr. Abbey's gang association would not support an inference of guilt based on bad character.

29 This admission is necessary and relevant to explain the *animus* that may have existed between the accused and the deceased. It also may shed some light on the accused's motive and intention when he allegedly hunted down Mr. Peter. As Mr. Justice Lacourciere stated in *Ma* at p. 519, "It places the charge against the appellant in perspective; without such obviously relevant evidence, the jury would have decided the question of guilt in a vacuum."

30 The accused has had an ample opportunity to consider whether or not the Crown can prove that he is an associate of the Malvern Crew. After careful reflection, Mr. Gosbee and Mr. Abbey have conceded that the Crown is in a position to prove that he is an associate of the gang in question. The wording of the admission is straightforward and does not raise an issue with respect to the accused's ability to respond (per Charron J.A. at p. 47 of *R. v. B(L.)*).

31 Another consideration is the reality that the introduction of the evidence concerning the existence of the gangs may ultimately have a neutral impact because of the fact that Mr. Peter is purportedly a member of the opposing gang. The negative impact, if any, of the nature of the gangs is balanced between the deceased and the accused. Even if that were not the case, the limiting instruction to the jury would make plain that the evidence could only be used on the issue of motive and for no other purpose.

32 In conclusion, the probative value of this admission significantly outweighs its prejudicial effect. The proposed evidence will be admissible.

5. The Gang Access to Firearms Admission

33 Mr. Abbey has admitted that members and associates of gangs have access to and/or may carry firearms. The Crown wishes to place this fact into evidence on the basis that it is of great probative value and has little prejudicial effect.

6. Relevance

34 In undertaking the analysis of relevance in *R. v. Watson*, I have concluded that this admission is logically relevant to a material fact at issue in this trial; namely, whether Mr. Abbey had a gun in his possession on the date of the shooting. The fact that gang members may carry and/or have access to guns does tend to make more probable the existence of the fact that Mr. Abbey had a gun on January 8, 2004. Whether or not Mr. Abbey had possession of a gun on the day in question is relevant to the key issue in this trial - the identity of the shooter.

7. Probative Value

35 By applying the criteria from *R. v. B(L)*, I have come to the following conclusions with respect to the probative value of this evidence:

- (i) The evidence of gang access to guns is strong since it is admitted by the accused.
- (ii) While evidence that gang members may carry or have access to guns is relevant to the issue of whether Mr. Abbey had a gun on January 8, 2004, it does not greatly support that inference. Evidence of the accessibility of guns by gang members in general, does not

necessarily lead to the conclusion that Mr. Abbey had access to a gun on that particular day. It is an inference which can be drawn but it is not a particularly strong one. This inference is not as cogent as is the connection between gang association and motive.

- (iii) The issue of whether Mr. Abbey was in possession of a firearm on January 8, 2004 is a significant issue in this trial.

36 While the proposed evidence is relevant to a significant matter at trial, the extent to which it supports the inference sought to be drawn by the Crown is somewhat tenuous. It is important to point out that the Crown intends to call witnesses who can directly testify concerning the circumstances of the shooting. That evidence, if believed, is far more compelling than the fact that gang members may have access to guns, in proving that Mr. Abbey had a gun on his person on January 8, 2004, and hunted down Mr. Peter.

8. Prejudicial Effect

37 In assessing the prejudicial effect of this proposed evidence, I have considered the following factors:

- (i) The proposed evidence may be highly discreditable to the accused when put before a jury. While Mr. Abbey's association with the Malvern Crew is evidence of bad character, the evidence of the gang's access to firearms is a far more discreditable assertion.
- (ii) The fact that gang members have access to firearms creates the real risk of an inference of guilt being drawn against Mr. Abbey based solely on bad character.
- (iii) The fact that the proposed evidence comes from an admission of the accused obviously eliminates the need for the accused to respond to it. The truthfulness of the evidence is assumed on the basis of the accused's admission.

38 The above analysis suggests that the admission of the proposed evidence has significant prejudicial effect. This evidence has the risk of portraying Mr. Abbey as an armed and dangerous man and may lead a jury to improperly infer his guilt based on general evidence about gang members and associates. While this risk may be reduced by a specific limiting instruction to the jury, I am of the opinion that the evidence should be excluded on the basis that its prejudicial effect far outweighs its tenuous probative value.

(F) CONCLUSION

39 Mr. Abbey's admission that he is an associate of the Malvern Crew is admissible. The admission is of substantial probative value in that it is relevant to the issue of motive in this case. The prejudicial effect of the admission is easily offset by a properly worded instruction to the jury regarding its use.

40 The second admission that gang members may have access to and/or may carry firearms is inadmissible. The prejudicial effect of the evidence far outweighs its slender probative value.

T.L. ARCHIBALD J.

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