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R. v. H.

Between
Her Majesty the Queen, respondent, and
V.H., applicant

[2001] O.J. No. 1112

[2001] O.T.C. 209

49 W.C.B. (2d) 401

Court File No. P0061/01

Ontario Superior Court of Justice

Dambrot J.

Heard: February 1-2, 5-7 and 12, 2001.

Judgment: March 27, 2001.

(64 paras.)

Criminal law -- Evidence and witnesses -- Testimony respecting the accused -- Antecedents or history of accused -- Testimony respecting the victim -- Character of victim -- Behaviour of victim.

Application to introduce evidence of character or disposition of the victim. H. was charged with second degree murder in a shooting death. He handed a gun to the shooter when the victim threatened a confrontation from an apartment balcony. When the victim appeared at ground level, he acted aggressively to the shooter, despite seeing that he had a gun. H.'s defence was that he lacked intent because he could not foresee the victim's behaviour that led to his death. Further, he argued the victim was shot in self-defence, and provoked the shooter. H. sought to introduce 13 prior incidents of the victim's behaviour to establish propensity to violent, confrontational, threatening, unstable, and suicidal behaviour. The Crown argued that the evidence was irrelevant, not probative, and prejudicial. However, if it were admitted, the Crown sought to lead evidence of the victim's peaceful reputation, and H.'s prior acts of violence.

HELD: Application allowed in part. Two incidents showed a pattern by the victim of confrontational behaviour involving at least the threat of violence. They were admissible, provided that H. showed that the actual evidence was not hearsay. The two incidents could not support H.'s foreseeability defence, because that defence must be determined by the jury based on what he knew, not on what he did not know. The Crown was not allowed to adduce evidence of the victim's reputation or of H.'s previous violent behaviour. That evidence was not relevant to the shooter's claim of self-defence because H. was not involved in the confrontation between the shooter and the victim.

Counsel:

D. Fisher and A. Jeffrey, for the respondent.

J. Scarfe and E. Lewis, for the applicant.

1 DAMBROT J.:-- V. H. has applied for leave of the Court to introduce evidence of the character or disposition of the deceased in his defence in this murder trial. The Crown opposes the application, but, if it is granted, applies for leave to call similar evidence in relation to H. in reply. Although these applications were argued prior to the selection of the jury, I chose not to rule on them until part way through the Crown's case. I did this because I considered it to be necessary in order to properly determine the issues to know what the key Crown witnesses would actually say in their evidence, rather than trying to resolve and rely on the differing accounts of what Crown counsel and counsel for H. anticipated their evidence would be.

BACKGROUND

2 V. H. and Imo Lewis are charged in one indictment respectively with second degree murder and manslaughter arising out of the shooting death of Wayne Brown in Toronto on April 20, 1999. Nathanael Williams is charged with second degree murder arising out of the same incident in a separate indictment, and is scheduled to be tried immediately after this matter is completed. It is alleged by the Crown that Nathanael Williams shot Wayne Brown, and that H. and Lewis are culpable as parties. In support of this theory, Crown counsel alleged the following facts in his opening address to the jury.

3 Wayne Brown, the deceased, was a single father who lived with his two oldest sons, Jevaughn and Dwayne, and his brother Norris, in apartment 308, 30 Denarda St. in Toronto. In April of 1999, Wayne had been in a relationship for about three months with Denise Cowdrey. On April 20, 1999, Denise was at Wayne's apartment with her friend Anna Kritheranos. Denise and Anna left the apartment at some point during that evening and walked down Denarda to Weston Road where they bought some cigarettes at a variety store and then some French fries at a fast food restaurant.

4 While walking back to the apartment, Denise and Anna were approached by Imo Lewis, V. H. and Nathanael Williams. H., Lewis and Williams followed Denise and Anna up Denarda trying to strike up a conversation with them. Neither Denise nor Anna was interested and they said so politely. H., Lewis and Williams did not take this rejection well. They began to make rude and abusive comments to Anna. When Denise tried to dissuade them, they made abusive comments to her as well. At one point, H. threatened to take a gold chain being worn by Denise. Denise and Anna then walked away from H., Lewis and Williams, entered 30 Denarda and returned to Wayne's apartment. At the same time, H., Lewis and Williams left the area.

5 H. proceeded to a nearby apartment at 1240 Weston Road and obtained a sawed-off shotgun and some shotgun shells. He put the gun and the shells in a black knapsack. H., Lewis and Williams then returned to 30 Denarda. Lewis was wearing a kerchief style mask over the lower part of his face. H. was heard to say "these girls made me get a shotgun for them because they wouldn't give me that gold chain." Jevaughn and Dwayne, who had seen the altercation between the three men and the two women, and who had also seen the three men return, went to apartment 308 and told Wayne that the three guys who had been bothering Denise and Anna had come back, that they were also bothering the boys and that they were outside in front of the building.

6 Wayne went out onto his balcony and asked Jevaughn to point out the three men. Jevaughn did so. Wayne then said to H., Lewis and Williams in a loud voice, but without anger, that he was coming downstairs and that they should be gone by the time he got down. Wayne then left the balcony, went back inside his apartment, put on a sweater and shoes and headed outside. He was unarmed.

7 After Wayne left the balcony H. put the black knapsack that he had been wearing on his shoulders down on the ground. H. took a small package containing shotgun shells out of his knapsack, and handed it to Nathanael Williams. H. then took the sawed-off shotgun, which was wrapped in a towel, out of his knapsack and began to unwrap it. When he was done, H. passed the shotgun and towel to Williams. Williams loaded the shotgun, but had difficulty in closing it. Imo Lewis closed the shotgun for Williams and gave it back to him. Williams then draped the towel over the shotgun and hid it behind his back awaiting Wayne Brown's arrival.

8 Williams had the shotgun behind his back when Wayne arrived. Wayne approached Williams and grabbed him in the area of his coat collar. Wayne had no idea that any of the three men were armed until one of Wayne's sons warned him, from the balcony that "they have a shotgun." Wayne immediately let go of Williams and backed up a few feet.

Williams then removed the towel, pulled the shotgun out from behind his back and pointed it to the ground in front of him. Wayne asked Williams "what are you going to do with that?" He then walked slowly towards Williams, repeatedly asking him what he was going to do with the gun. As Wayne got to within about six feet of Williams, Williams pointed the shotgun directly at him and shot him in the midsection. Wayne immediately dropped to the ground. He died of the wound several hours later in the hospital. Immediately after Williams shot Wayne, Williams, H., and Lewis fled the scene, going in various directions.

9 The jury has heard evidence supporting much of what was said in the Crown's opening. In particular, the jury has heard the evidence of Williams, as well as several of the other eyewitnesses. Williams testified that he did in fact shoot Wayne Brown, and gave the following account of the confrontation between Brown and the three accused in his examination-in-chief.

10 Williams met Lewis and H. on Weston Road on April 20, 1999. The three men decided to shoot off a firearm on the train track behind 30 Denarda. A short time later, the three men encountered two girls at the intersection of Weston Rd. and Denarda. H. and Lewis spoke to the girls, ultimately getting into a dispute with them. Williams then returned to Weston Road and entered a convenience store. Lewis and H. headed towards 1240 Weston Rd. Williams rejoined Lewis and H. at the door of the building as they came out. The three men then walked up Denarda to an area in front of the building. H. was wearing a knapsack. Along the way, someone said, "I might as well rob her for her chain."

11 Ultimately, Williams, Lewis and H. found themselves standing in front of 30 Denarda. A man emerged onto a third or fourth floor balcony and started screaming in Williams' direction in an aggressive fashion. The man said, "Who are you?" "Where do you live?" "Do you live around here?" Williams did not respond. The man then asked a young male child who was on the balcony with him if he knew "these guys," referring to Williams, H. and Lewis. The child pointed at all three of the men and replied, "No." The man then said, "When I come downstairs, I don't want to see you down there or its trouble." Again none of Williams, H. and Lewis replied. The man then left the balcony. Williams believed that he was coming downstairs.

12 Williams testified that after the man left the balcony, he turned around and saw that one of Lewis or H. had a "short" shotgun in his hands. The gun was in open view, was not wrapped in anything, was cracked open, and was not loaded. The one of Lewis and H. that did not have the gun had ammunition for the gun. The gun was loaded by one of H. and Lewis and was then handed to Williams, still open. Williams tried to close the gun, but was unable to do so. Lewis then helped him close it, without being asked, by pushing a knob on top of the gun while the gun remained in Williams' hands.

13 At that time, Williams moved further east, to a point under the balcony where the man had appeared. He wrapped the gun in a white towel that he had received from Lewis or H.. The man from the balcony then appeared from around the corner of the building further east. The man passed H., reached Williams, took him by the collar and, still yelling, asked, "Who are you?" and "Do you live around here?" Williams did not answer. The man asked, "Which one of you guys is bothering the girls?" At that point, someone on the balcony yelled, "He has something behind his back." The man let go of Williams and stepped back, saying, "Whatever you have behind your back, you better keep it to yourself." He then stepped back further, ultimately stopping about twenty feet from Williams.

14 At that point, Williams removed the shotgun from the towel and held it by his side, hoping, he said, that it would induce the man to leave. Instead, the man said, "What are you going to do with that," or "You can't do nothing with that," and started approaching Williams, taking baby steps. After the man took three or four steps, Williams pointed the shotgun at him. The man put his hand behind his back in the area of his buttocks. He kept approaching Williams, giving Williams the "full eye", repeating the same words. At that point, Williams saw H. moving behind the man, doing "side-steps," as if he was trying to see what was behind the man. H. made a face as if he had seen something, and fled. Williams then pulled the trigger of the shotgun, shooting the man. The man was twelve feet from him when he fired the shot. Williams then ran.

15 It is apparent that this evidence implicates H. and Lewis in the shooting, but, at the same time, may give rise to an argument that Williams shot Brown in self-defence. H. and Lewis, of course, stand to benefit from this aspect of Williams' evidence. If the jury is satisfied that he shot Brown in self-defence, or has a reasonable doubt on the issue, then there was no murder or manslaughter, and H. and Lewis cannot be guilty as parties.

16 In deciding the issues on these applications, it is important to consider not only Williams' evidence, but also the evidence of other witnesses that is inconsistent with Williams' version of his confrontation with the deceased.

17 Norris Brown, Wayne Brown's brother, was in the apartment when Wayne Brown went out onto the balcony. Wayne went out to the balcony because Dwayne and Jevaughn had run into the apartment complaining that some boys downstairs had threatened to beat them up. He remembered that he, Denise, Anna, and Wayne Brown's sons Dwayne and Jevaughn all accompanied Wayne onto the balcony. Dwayne and Jevaughn pointed out the three men. Denise added that these were the same boys that had threatened her and Anna. Wayne then said to the three men that they couldn't go around threatening people like that. One of the men said, "What are you going to do about it?" Wayne replied that he was coming to speak to the men. His tone of voice was normal and his emotional state was calm. Wayne then proceeded downstairs. Norris told him not to go, but Wayne said that he was just going to go downstairs and talk to them.

18 After a while, Julius Letts, a young friend of Dwayne and Jevaughn, entered the apartment, shouting "The boys, them have a gun." Norris went out onto the balcony and saw Wayne against a wall, facing the three men. Wayne had his hands behind his back and was speaking to the them. One of the men had something long behind his back covered in a towel. Norris thought it was a gun, and ran downstairs and outside, where he found his brother lying on the ground.

19 Denise Cowdrey testified that she remembered Jevaughn rushing into the apartment complaining that "they came back." When Wayne asked who, Jevaughn replied that it was the same guys that bothered Denise and Anna. Wayne asked Jevaughn to show them to him, and Jevaughn led him to the balcony. Anna followed them, but Denise did not. When Wayne reentered the apartment, he said that he was going downstairs. Denise told him not to go, but he said that he would not "make" anyone "punk off" his girlfriend or his children. He was frustrated and annoyed. As Wayne left the apartment, Denise heard him say to Norris that he was just going to talk to them.

20 Anna Kritheranos also recalled Dwayne and Jevaughn coming into the apartment and telling Wayne that the same three guys that had bothered Denise and Anna had come back and were bothering them. Wayne asked Jevaughn to show him the men and went out on the balcony with him. Anna did not go out onto the balcony. When Wayne came back into the apartment from the balcony, he indicated that he was going downstairs. After Wayne left, Julius came in to tell Wayne not to go downstairs because the men had a gun. Jevaughn went out onto the balcony to warn his father, yelling, "Junior, Junior. He has a gun." Anna followed Jevaughn out onto the balcony and saw Wayne talking to one of the men who was standing three feet in front of him. She then saw and heard a shot coming from the lower part of the man, and observed Wayne fall to the ground.

21 Julius Letts testified that after Denise and Anna had returned to the apartment, he remained outside playing with Dwayne, Jevaughn and another boy named Tristan. They observed the three men, whom Julius identified as Williams, H. and Lewis, returning to 30 Denarda. Jevaughn was scared, and he, Dwayne and Tristan went into the apartment building and proceeded upstairs. Julius remained outside. After the three boys left, but before the three men arrived, two other boys named Astro and Richard joined Julius. When the three men arrived, Julius heard H. say, "These girls let me go get a shotgun for them because I wanted that gold chain." He then observed Wayne Brown come out on the balcony with Jevaughn. Jevaughn pointed the three men out to Wayne, and said, "Him, him and him." Wayne asked Julius if he knew these guys. He replied, "I only know Astro and Richard." Wayne then said to the three men, "When I come downstairs, I don't want to see you guys down there." Wayne spoke loud enough to be heard, and seemed upset, but was not yelling. Wayne then left the balcony.

22 H. then removed a knapsack that he had been wearing and placed it on the sidewalk. He took out what appeared to be a bandana tied at the ends containing small items that sounded like marbles hitting each other and handed it to Williams. He then took out a larger item that Julius thought was a gun wrapped in a bandana and began to unwrap it. No discussion took place among the three men. Julius rushed into the apartment to warn Wayne about the gun. When he arrived at the apartment, Wayne was gone. He told Jevaughn, "They have a gun." Jevaughn said, "I know. They shot Junior."

23 While there are obvious inconsistencies in the various accounts of the confrontation between Wayne Brown and Williams, H. and Lewis, there is much that does not appear to be in dispute. Clearly the three men had no reason to expect to have contact with Wayne Brown when they returned to 30 Denarda. Clearly Brown initiated the contact by coming out onto his balcony and addressing them. While there are different recollections of Brown's tone and exact words, it is beyond dispute that he communicated to the three men that he was coming downstairs. Significantly, both Williams and Letts recall him saying that he didn't want to see them there when he came down. At this stage of the trial, I do not know if any Crown witness will testify that Brown did not take Williams by the collar in an aggressive manner before Williams produced the gun; that Brown did not advance slowly on Williams after Williams produced the gun, saying words such as "What are you going to do with that"; or that Brown did not put his hand behind his back in the area of his buttocks. I note, however, that Crown counsel conceded at the outset of his argument on these applications that the

deceased did yell down to the three men, that he did tell them to leave by the time he came downstairs, and that he did take hold of Williams by the coat, all before he realized that Williams had a gun. In short, while there differences of detail in the evidence, there would appear to be no dispute that Brown initiated the confrontation, and that he was the first to behave in an aggressive fashion.

THE EVIDENCE OF THE DISPOSITION OF THE DECEASED PROFFERED BY H.

24 In his application, V. H. seeks leave to place before the jury evidence of some thirteen prior incidents involving Wayne Brown that are not directly related to the offence presently being tried, but that the applicant says will establish aspects of Brown's character or predisposition. This evidence, the applicant argues, will assist the jury in determining whether or not he is guilty. Specifically, the applicant contends that this evidence will support two positions taken by the defence, namely: (1) that Williams shot Brown in self-defence; and (2) that H. lacked the mens rea necessary for either murder or manslaughter, because he did not foresee the actions of Brown, either subjectively or objectively, that led to Brown being shot.

25 Counsel for H. apprised me of the factual details of the proposed evidence by filing police occurrence reports relating to these incidents that had been disclosed to the defence by the Crown. The following outlines of these incidents describe them in a manner that is as favourable to the defence as the occurrence reports allow. Counsel for H. have not ascertained the availability of the witnesses necessary to prove these events, their willingness to testify or the extent to which their evidence would conform to these summaries. Accordingly, I do not know at present what evidence actually could be called to prove these incidents, or whether that evidence would fully support the descriptions of the incidents that have been provided to me. The thirteen incidents may be briefly summarized as follows:

- (1) On March 24, 1995, Wayne Brown and Daniel Bartley were both having their hair cut at the Iram Jam hair salon. Bartley told Brown that he believed that Brown was spreading rumours about him. Bartley then said to Brown, "I'm going to bust a shot in your face." Brown reported the incident to the police. Bartley was arrested for uttering threats of death in connection with this matter on April 9, 1995.
- (2) On April 11, 1995, Daniel Bartley was waiting to use a pay phone on Trethewey Dr. in Toronto. Brown drove up behind Bartley and said, "Fucking nigger." He then exited his vehicle, made eye contact with Bartley, and lifted his T-shirt to reveal the handle of a revolver. He then pointed his finger at Bartley and jerked it a few times as if firing a handgun. Bartley complained to the police. Brown was interviewed later that day and provided information about his whereabouts at the time of the offence. In view of this information, and the history between Brown and Bartley, the investigating officer concluded that Bartley might be using the police for his own personal reasons, and declined to charge Brown.
- (3) On April 15, 1995, Daniel Bartley telephoned Wayne Brown and stated, "Pussy you are a dead." Ultimately, Brown told the investigating officer that he was content to drop this matter.
- (4) On September 17, 1996, Angela Reid, who was 17 years old at the time, got into a physical fight with Roberta Williams, who was 19. As a result, each of them had minor scratches and bruising. After the fight, Roberta Williams told Wayne Brown, the father of her two year old child, that Reid had slapped the child in the face while the baby was being held by Williams. Brown became upset and attended at the apartment occupied by Reid and her mother. When Angela Reid came to the door, a verbal altercation erupted. Reid's mother then came to the door, at which time Brown stated, "If I find out that you hit my kid, I'm going to come back and shoot the place up." Investigation revealed conflicting stories, and the police concluded that they had no grounds for charges.
- (5) On March 14, 1997, at about 9:00 P.M., Wayne Brown went to the apartment of Nadine Brown. Nadine Brown had been in a three year common law relationship with Wayne Brown, but was not living with him at this time. They had a five month old baby together. Nadine and Wayne Brown got into a heated argument. Wayne Brown punched Nadine Brown in the head and shoulder before leaving. Nadine Brown was holding the baby in her arms when Wayne Brown hit her.

- (6) On March 16, 1998, Wayne Brown returned to Nadine Brown's apartment. They again got into a heated argument. On this occasion, Wayne Brown threw two bricks through a window in the front door, causing \$200 of damage.
- (7) On January 13, 1998, "Angel" telephoned Wayne Brown, accused him of puncturing a tire on his automobile and threatened to shoot him in the face the next time he saw him. Brown telephoned "Angel" back and told him that he intended to report the incident to the police. "Angel" told Brown that if he made a police report he would be shot.
- (8) On January 17, 1998, "Angel" called Wayne Brown again and told him that he knew where Brown lived, what kind of car he drove and where to find him.
- (9) On January 30, 1998, Wayne Brown was approached by "Angel" and a companion while picking up his son from the residence of the child's mother. The companion pulled back his jacket and reached for a .38 calibre handgun. Brown left in his vehicle. As he drove away, he observed "Angel" reach for his waistband.
- (10) On March 6, 1998, Roberta Williams attended at Wayne Brown's residence to pick up her son, who was now two years old. Williams and Brown got into a dispute over custody that ultimately developed into a physical struggle. Both suffered scratches to the face, but neither party wanted to pursue criminal charges.
- (11) On May 15, 1998, Wayne Brown was in the Crystal Restaurant with his girlfriend. While he was there, "Angel" and another unknown man entered and approached Brown. "Angel" and the unknown man both removed handguns from their waistbands. The unknown man pointed his gun at Brown. A third man intervened and "Angel" and the unknown man left. Roberta Williams told the police that this was a false accusation by Brown.
- (12) On July 11, 1998, while engaged in a quarrel on Weston Rd. with his ex-girlfriend who was picking up their two year old child from him, Wayne Brown leaned into the window of his girlfriend's car. The driver wound up the window, catching Brown's hands. In order to set himself free, Brown pulled on the window, causing it to break. Shortly after this incident, Brown discovered a threatening message on his answering machine. A male caller threatened a "war" with Brown, and said that he wanted to be repaid for the broken window. The driver of the car, and the threatening caller, were thought to be an individual known as "Mr. Big." Brown paid for the damage to the window of the car.
- (13) On July 14, 1998, Wayne Brown attempted to commit suicide by taking an overdose of Tylenol 3's, and slashing his wrist. He told hospital staff that he was depressed because he was unable to find employment.

26 None of these incidents were known to Williams, H. or Lewis prior to Wayne Brown being shot and killed.

THE ARGUMENT

27 As I noted above, counsel for H. says that this evidence will support two positions taken by the defence, namely: (1) that Williams shot Brown in self-defence; and (2) that H. lacked the mens rea necessary for either murder or manslaughter, because he did not foresee the actions of Brown, either subjectively or objectively, that led to Brown being shot. More specifically, he argued that this evidence is relevant to the following issues:

- (1) Whether or not Williams was acting in self-defence when he shot Brown;
- (2) Whether or not Williams was provoked;
- (3) If Williams was acting in self-defence when he shot Brown, whether or not he used excessive force; and
- (4) If H. handed the gun to Williams, whether or not he had a culpable state of mind at that point in time.

28 Counsel for H. argued that the evidence is relevant to the first three issues because it tends to establish that Wayne Brown has a propensity for what counsel initially described as violent, confrontational and threatening behaviour. He later added to this list a propensity on the part of Brown for turbulent behaviour, for confrontational behaviour with a "vigilante dimension", for using the police to make trouble, and to invite confrontation. All of this, in turn, is said to support the evidence of Williams that Brown, and not Williams was the aggressor, and thus supports the defences of self-defence and provocation.

29 Counsel for H. argued the evidence is relevant to the fourth issue because it tends to establish that Wayne Brown had a propensity for violence unknown to H., or had an unstable or suicidal state of mind unknown to H., and as a result, lacked a normal sense of self-preservation. This in turn would support the defence position that the actions of Brown that led to the shooting were not foreseeable to H., and as a result neither Brown's death nor even harm coming to Brown was foreseeable, either subjectively or objectively, thereby precluding a finding that H. was guilty of the offences of murder or manslaughter as a party.

30 It does not do justice to the capable and thorough argument presented by Crown counsel on these applications, but it is sufficient to say that the Crown takes the position that:

- (1) the proposed evidence is inadmissible because it is irrelevant to any real or live issue in this trial;
- (2) even if the proposed evidence is relevant to a live issue, it is inadmissible because it is not probative of that issue;
- (3) even if the evidence is relevant and probative, it is inadmissible because its probative value is slight, and is greatly outweighed by its prejudicial effect; and
- (4) in the alternative, if the evidence is admissible, it opens the door to evidence being led in reply of (a) prior acts of violence by H., and (b) evidence of the deceased's reputation for possessing a peaceable disposition.

ANALYSIS

31 The starting point for consideration of the admissibility of evidence of the disposition or character of a deceased not known to the accused must be the decision of Martin J.A. in *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.). Martin J.A. concluded that where self-defence is raised, evidence of the deceased's disposition for violence is admissible to show the probability of the deceased having been the aggressor. Where relevant and admissible, such disposition may be proved: (1) by evidence of reputation; (2) by proof of specific acts; and (3) by psychiatric evidence. Where proof of previous acts of violence is offered, they will be admitted if they have sufficient probative value to prove a disposition for violence, and if such disposition is relevant. (I note that in *R. v. Cameron* (1995), 96 C.C.C. (3d) 346 (Ont. C.A.), Galligan J.A. said that that the evidence had to "support the probability" or "tend to show" that the deceased was the aggressor.)

32 Martin J.A. went on to elaborate that evidence of previous acts of violence not known to the accused must be confined to evidence of previous acts of violence which may legitimately and reasonably assist the jury in arriving at a just verdict with respect to the claim of self-defence. This does not mean, however, the previous acts must meet the test for the introduction of similar fact evidence against an accused.

33 In *R. v. Palma* (2000), 149 C.C.C. (3d) 169 (Ont. S.C.J.), Watt J. explained that the underlying premise for the admissibility of this sort of evidence is that a person's disposition is a reliable predictor of specific conduct. Specifically, he noted, two inferences are involved in the process of proof of specific conduct through the proof of prior conduct. First, there is an inference of disposition from conduct on other occasions. Secondly, there is an inference of conduct on the specific occasion from the existence of that disposition. In *R. v. Yaeck*, [1989] O.J. No. 3002, aff'd 68 C.C.C. (3d) 545, leave to appeal top S.C.C. ref'd 71 C.C.C. (3d) vii, Watt J. made the same point slightly differently. Borrowing language from p. 497 of the judgment of Martin J.A. in *Scopelliti*, he said that to be admissible, the incidents must be capable "of supporting an inference that the deceased had a propensity for violence of a kind likely to result in conduct of a kind that might cause a victim of such violence to consider it to be life threatening." I bear this reasoning in mind when I consider the admissibility of the evidence proffered here.

34 In considering whether previous acts of violence may legitimately and reasonably assist the jury in this chain of reasoning, a trial judge must look at the acts individually and in combination, in order to assess their cumulative probative effect, and should take into consideration matters such as their frequency (although even one incident may be sufficient to establish disposition) and their temporal proximity to the allegations in the case. (See *R. v. Yaeck*, supra; *R. v. Kendall and McKay* (1987), 35 C.C.C. (3d) 105 (Ont. C.A.); and *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 (S.C.C.).)

35 Finally, it must be remembered that evidence of prior acts of violence by the deceased is likely to arouse feelings of hostility towards the deceased, and might lead a jury to conclude that the deceased deserved his or her fate. It is for this reason that the cases emphasize that the court has a discretion to exclude such evidence if its probative value is slight but its prejudicial effect is great. (See the judgment of Martin J.A. in *Scopelliti*, at 496, and of Abbey J. in *R. v.*

Colley, [1993] O.J. No. 1156.) At the same time, I bear in mind the reluctance of courts to exclude evidence offered by an accused in his or her defence. (See *R. v. Arcangioli*, supra.)

36 Before analyzing the evidence, two last points need to be made. First, not all of the evidence tendered by the defence is evidence of acts of violence by the deceased, and second, not all of it is advanced to support a defence of self-defence. Neither of these two points, on its own, is a bar to admissibility. As Doherty J.A. noted in *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.), there is no rule limiting prior misconduct by the deceased to cases in which self-defence is raised. Evidence of disposition, like evidence of habit, can constitute circumstantial evidence of conduct of any sort on a specific occasion.

37 That being said, however, I am of the view that argument that the fourth ground of relevance advanced by H., despite its inventiveness, is misconceived. To reiterate, H. argues that prior acts of violence by the deceased, and his suicidal state of mind, assuming that the deceased had a suicidal state of mind, tend to establish that Wayne Brown lacked a normal sense of self-preservation, and accordingly his actions leading to the shooting were not foreseeable to H., either subjectively or objectively, if and when he handed the shotgun to Williams. The problem with this argument, in my view, is that the evidence in question adds nothing to the issue of foreseeability.

38 Foreseeability arises in this case, as I presently understand it, and bearing in mind that the Crown's case is not yet complete and the defence has not yet begun, as follows. H. would have the mens rea to be a party to a murder committed by Williams if (1) he intended that Williams cause the death of Brown, or if he intended that Williams cause bodily harm of a kind likely to result in death and was reckless whether death ensued or not (s. 21(1) of the Criminal Code), or (2) if he formed an intention in common with Williams to commit an offence and foresaw that murder was a probable consequence of carrying out that common purpose (s. 21(2) of the Code.) H. would have the mens rea to be a party to manslaughter if (1) he aided or abetted an unlawful act that was inherently dangerous, and a reasonable person in all the circumstances would have foreseen that its consequence would be harm to another that was neither trivial nor transitory (s. 21(1)), or (2) if he formed an intention in common with Williams to commit an offence and a reasonable person in all of the circumstances would have foreseen at least a risk of harm to another as a result of carrying out the common intention. Accordingly, H.' subjective foresight of the death of Brown may be decisive in the jury's consideration of the offence of murder, and the objective foreseeability of harm to Williams would be a necessary consideration in respect of the charge of manslaughter. The foreseeability that Brown would advance on Williams in the face of a shotgun, if the jury finds that he did so, will obviously form a part of their consideration of this issue.

39 The problem I have with the argument that evidence tending to establish that Wayne Brown lacked a normal sense of self-preservation is admissible to show that Brown's actions were not foreseeable is that I fail to see how such evidence could assist the jury at all with questions of foreseeability. The question for the jury is whether H., or a reasonable person in his position, would have foreseen that Brown would advance on Williams. That is a question that the jurors can resolve on the basis of ordinary human experience. Brown's actions are either of a kind that is foreseeable, or was foreseen, or they are not. It doesn't assist in determining this question to know why he advanced on a person pointing a shotgun. He may have advanced for reasons having to do with a peculiar psychological makeup, but that tells us nothing about whether his doing so was peculiar or was foreseeable in the circumstances. In addition, neither H., nor a reasonable person in his shoes, were or would have been aware of Brown's psychological makeup, and accordingly could not have taken it into consideration in respect of what was foreseeable. It is the circumstances known to H., and not those that were unknown to him, that bear on this issue.

40 If support for this proposition is necessary, then I refer to the decision in *Scopelliti* itself, at p. 492, where Martin J.A. stated, "Obviously, evidence of previous acts of violence by the deceased, not known to the accused, is not relevant to show the reasonableness of the accused's apprehension of an impending attack." I rely as well in this regard on the judgment of Galligan J.A. for the Ontario Court of Appeal in *R. v. Cameron* (1995), 96 C.C.C. (3d) 346. He stated, at 358-9:

It is contended on behalf of the appellant that the trial judge misdirected the jury about the use to which it could put the evidence about Blackwood's addiction to cocaine and the expert evidence of the addict's potential for violence. There was evidence from a police officer that Blackwood was a cocaine addict. It was determined that he had cocaine in his body when he died. There was expert evidence that an addict, after consuming cocaine, could be quite aggressive. After reviewing that evidence, the trial judge instructed the jury as follows:

In these proceedings, there is a limited use which may be made of that evidence. The accused has given evidence here of the manner in which he caused the death of the deceased on June 11, 1991. He has asserted that, in the conflict, David Blackwood was the aggressor. The response of the accused, as I understood his evidence, was in self-preservation, and more instinctive than intentional. The evidence which I have mentioned may be considered by you as bearing on the question of who was the aggressor, more particularly, as supportive of the accused's assertion that it was the deceased, not he, who was so. Its weight on that issue is, of course, as with every item of evidence, a matter for you. It bears, in other words, on the probability or otherwise of the incident having occurred with the deceased as the aggressor.

There are two uses to which the evidence must not be put. You must not consider it as bearing on the state of mind of the accused at the time of the altercation, because he knew nothing of it, hence could not have taken it into account. Further, it must not be used by you to reason from such prior or likely aggressive behaviour or speech that the deceased was deserving of retaliation or punishment on account of it. "You buys your tickets, you takes your chances", as it were. No such chain of reasoning is permitted under our law.

The complaint about that passage is that the trial judge ought to have told the jury that the evidence could be considered as bearing upon the state of mind of the appellant at the time of the altercation because the appellant testified that Blackwood showed signs of being under the influence of drugs. It was argued that the evidence should be considered in relation to his state of mind in so far as that bore on the defence of self-defence.

In my view, that instruction was in accordance with the law and is impeccable. There was no evidence that the appellant had any knowledge of Blackwood's long-standing addiction to cocaine. It could not have been taken into account by him, therefore, in deciding what steps were appropriate and necessary to defend himself. The trial judge was correct when he instructed the jury as he did because facts unknown to an accused cannot bear upon his state of mind.

41 While the issue in Cameron related to the state of mind of the accused in so far as it bore on the defence of self-defence, I see no difference in principle here. What is not known to the accused cannot bear on what was foreseeable to him. If H. had known that Brown lacked a normal sense of self-preservation, it would obviously have made Brown's actions foreseeable to him. But since H. did not know that Brown lacked a normal sense of self-preservation, such a lack of a sense of self-preservation if it existed, would be quite irrelevant to the determination of what was foreseen, or foreseeable, by H..

42 I turn then to consider the admissibility of the evidence proffered by the defence on the basis that it is relevant because it tends to establish that Wayne Brown had a propensity for violent, confrontational and threatening behaviour. The thirteen incidents can be grouped into seven groups. Incidents (a) to (c) all concern Bartley, and can be dealt with together. Items (e) and (f) both concern Nadine Brown, and can be dealt with together. Items (g) to (i) and (k) all concern "Angel", and can be dealt with together. The remaining incidents can best be considered individually. Before commencing this analysis, I will make one additional point.

43 As I noted above, there would appear to be no dispute that Brown initiated the confrontation between himself and the three men, particularly Williams, and that he was the first to behave in an aggressive fashion. Crown counsel argues that in those circumstances, the evidence of Brown's propensity for violence cannot be of assistance to the jury. The purpose of the evidence is to support that version of events that portrays the deceased as the aggressor. In this case, there is no question that Brown was the aggressor, and so the evidence is unnecessary. There is much force to this argument. At the same time, however, there are aspects of Brown's aggression that apparently remain in dispute. What words did Brown actually use when speaking to the three men from the balcony? How aggressive was his tone? Most significantly, when Brown advanced on Williams after the shotgun was produced, did he place one hand behind his back as if he was reaching for a weapon? I recognize that disposition evidence will likely be of limited assistance to the jury in resolving these precise issues. But I am not prepared to say that the disposition evidence is of no relevance. If the jurors find that the disposition evidence makes it more likely that Brown would reach for a weapon and advance belligerently on an armed man, then they might consider it to be more likely that he did so in this case, and that Williams did in fact fear for his life and react in self-defence. Nor am I prepared to conclude that the probative value of this evidence

would necessarily be outweighed by its prejudicial effect, at least if the quantity of the evidence that is admitted is subjected to the judicial discretion to exclude that I referred to above. Most particularly, I bear in mind the adoption by Martin J.A. at p. 494 of Scopelliti of the view of Dean Wigmore (Wigmore on Evidence, vol. 1, pp. 676-7) that the number of instances of prior violent conduct on the part of the deceased admitted into evidence can be controlled by the trial Court's discretion.

The Daniel Bartley Incidents

44 These three incidents took place four years before the deceased was shot. On March 24, 1995, Daniel Bartley threatened to shoot Brown. On April 11, 1995, Brown, apparently in retaliation, threatened by gestures to shoot Bartley. On April 15, 1995, Bartley threatened death to Brown. These incidents were remote in time from the homicide in this case. To the extent that we know the history of the dispute between Bartley and Brown, and I suspect that there is a great deal more to it than either man disclosed to the police, Bartley instigated the making of threats. In only one of the three incidents did Brown make a threat, and as I have noted, that took place as apparent retaliation for the first threat that Bartley made to him. In none of the incidents did actual violence occur. Given the foregoing, it is my view that these three events do not logically and reasonably support an inference that Brown is either violent or confrontational.

45 Counsel for H. suggested that evidence of others confronting Brown shows that he attracts confrontation to an unusual degree. Even assuming that that is an inference that the jury might reasonably draw, in my view there is no basis to attribute Brown's misfortune to his disposition, as opposed to his choice of neighbourhood or associates. In any event, it is impossible to imagine how his being a magnet for confrontation logically supports the view that he was the aggressor in his interaction with Williams, and that Williams acted in self-defence.

46 However this evidence is analyzed, I do not think that it is capable "of supporting an inference that the deceased had a propensity for violence of a kind likely to result in conduct of a kind that might cause a victim of such violence to consider it to be life threatening." Nor in my view could the evidence, as a matter of logic and human experience, support the probability or tend to show that the deceased was the aggressor in his altercation with Williams.

47 There is an additional reason why this evidence will not legitimately and reasonably assist the jury in arriving at a just verdict with respect to the claim of self-defence. The series of events in question obviously flows from a real animus that existed between Bartley and Brown. Much of the story about these events can only be testified to by the protagonists. Neither of them would likely be nor have been a reliable reporter of these events. Indeed it is clear that the police had real concerns about the truth of Bartley's allegation that Brown threatened him. In the circumstances, it is hard to imagine that the jury could be assisted in their task in this case by the distraction of being asked to resolve a dispute between the deceased and a stranger to this litigation based on a one-sided version of it given by only one of the protagonists four years after the fact.

The Angela Reid Incident

48 This incident took place two and a half years before the deceased was shot. On September 17, 1996, Brown threatened to shoot up the residence of Angela Reid if he found out that it was true that she had slapped his two-year-old child, as Roberta Williams, the mother of the child had reported to him. While this was confrontational behaviour on the part of Brown, it was not violent behaviour. Once again, I do not think that this evidence, standing alone, having regard to its nature and its relative staleness, is capable "of supporting an inference that the deceased had a propensity for violence of a kind likely to result in conduct of a kind that might cause a victim of such violence to consider it to be life threatening." Nor could the evidence support the probability or tend to show that the deceased was the aggressor in his altercation with Williams.

The Nadine Brown Incidents

49 These incidents took place two years before the deceased was shot. On March 14, 1997, Wayne Brown got into a heated argument at Nadine Brown's apartment. Before leaving, Wayne Brown punched Nadine Brown in the head and shoulder. On March 16, 1997, Wayne Brown returned and got into a heated argument with Nadine Brown once again. On this occasion, he threw two bricks through a window in the front door. Wayne Brown's behaviour on these occasions was violent and confrontational. I am satisfied that they meet the test for admissibility. I appreciate that Wayne Brown's conduct on these occasions would not likely have put Nadine Brown in fear for her life. That, however, does not deprive the evidence of its capacity to be viewed by the jury as being capable "of supporting an inference that the deceased had a propensity for violence of a kind likely to result in conduct of a kind that might cause a victim of such violence to consider it to be life threatening."

The "Angel" Incidents

50 These incidents took place approximately one year before the deceased was shot. On January 13, 1998, "Angel" threatened to shoot Wayne Brown. When Brown told "Angel" that he intended to call the police, "Angel" threatened to shoot Brown if he did so. On January 17, 1998, "Angel" again threatened Brown. On January 30, 1998, "Angel" and a companion threatened Brown with a gun. On May 15, 1998, "Angel" and a third man again threatened Brown with a gun. In each of these incidents, "Angel" was the aggressor. Wayne Brown was neither confrontational nor violent in any of them. I see absolutely no basis for the admissibility of any of this evidence. The additional submission made by the defence that the jury might conclude that Brown had a propensity to use the police to make trouble is far-fetched, is at best conduct from which a habit rather than a propensity could be inferred, and in any event would not lead to an inference that the deceased would engage in conduct of a sort that he is said to have engaged in here.

The Roberta Williams Incident

51 This incident took place one year before the deceased was shot. On March 6, 1998, Wayne Brown got into a dispute with Roberta Williams concerning custody when she attended at his residence to pick up their two year old son. Both suffered scratches to the face. There is no indication in the material placed before me who the aggressor was. There is no suggestion that Brown was confrontational, although he obviously was violent. In the absence at least of evidence that Wayne Brown was the aggressor, once again, I do not think that this evidence is capable "of supporting an inference that the deceased had a propensity for violence of a kind likely to result in conduct of a kind that might cause a victim of such violence to consider it to be life threatening." Nor could the evidence support the probability or tend to show that the deceased was the aggressor in his altercation with Nathanael Williams.

The "Mr. Big" Incident

52 This incident took place nine months before the deceased was shot. On July 11, 1998, Brown broke an automobile window while trying to free his hand from that window. The occupant, "Mr. Big", had rolled up the window and caught Brown's hand. Shortly after this incident, "Mr. Big" left a threatening message on Brown's answering machine. I see nothing in this incident that could make it admissible.

The Attempted Suicide

53 This incident also took place nine months before the deceased was shot. On July 14, 1998, Brown attempted to commit suicide by taking an overdose of Tylenol and slashing his wrist. He did so apparently because he was depressed about being unemployed. The defence theory of admissibility is that in view of his suicidal tendencies, it is probable that Brown would advance on a person holding a loaded shotgun, thus supporting the defence theory of self-defence. There are several problems with this theory. First, this particular single incident of attempted suicide, of itself, does not support the theory that Brown was suicidal. Second, the nature of the attempted suicide is so dissimilar to the conduct here that it is incapable of supporting an inference that Brown would also have attempted suicide in the manner suggested here. In the earlier incident, Brown obviously made a considered decision to take an overdose of pills and slash his wrists. Here, the purported suicide would have involved an instant decision to advance on a loaded shotgun which Brown unexpectedly found himself facing. Finally, the suicide attempt apparently took place when Brown was depressed. There is an absence of evidence that Brown was depressed at the time of the shooting. In all of the circumstances, I would not admit this evidence.

Looking at the Evidence Cumulatively

54 Having decided that the Nadine Brown incident is admissible, I re-examined the other incidents to determine whether any of them should be admitted when viewed cumulatively, having particular regard to the evidence that I am admitting. It seems to me that the reasons that I have identified for refusing to admit the evidence of each of these incidents remain valid, and controlling, even when the incidents are viewed cumulatively, save in one instance, namely the Angela Reid incident. While there was no violence associated with the incident, and while it did not involve life-threatening behaviour, and while the incident is relatively stale, when it is added to the Nadine Brown incident, there emerges a pattern of confrontational behaviour on the part of Wayne Brown involving at least a threat of violence when he perceived a challenge either to himself or to the safety or security of his children. Accordingly, I would admit evidence of the Angela Reid incident, but only if the defence also leads evidence of the Nadine Brown incident. I would also leave open the possibility of admitting evidence of the Roberta Williams incident if the defence is able to provide additional information about it that overcomes the obstacles I presently see to admissibility.

Necessity for Proof by Admissible Evidence

55 As I have noted, I do not presently know how the accused H. proposes to prove any of the proffered incidents, or if he actually is in a position to prove any of them. In this regard, I adopt the following comment of Watt J. in *Palma*, at p. 182:

In *R. v. Williams* (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), Martin J.A. emphasized the requirement that the disposition of a third person may only be proven by admissible evidence. He made particular reference to the hearsay rule. At p. 366, he said:

Where the disposition of a third person is sought to be proved by specific acts, those acts must be proved by admissible evidence and may not be proved by hearsay unless the hearsay evidence proffered falls under one of the exceptions to the rule excluding hearsay evidence. [Emphasis added.]

The phrase "one of the exceptions to the rule excluding hearsay evidence" must now be taken to refer to any common law or principled exception.

56 Accordingly, before evidence of the two incidents that I have provisionally admitted can be lead, counsel for H. will have to apprise the court of the nature of the evidence that they actually intend to adduce.

THE CROWN'S APPLICATION TO ADDUCE REPLY EVIDENCE

57 As I have noted, Crown counsel takes the position that if the Scopelliti evidence is admitted, it opens the door to evidence being led by the Crown in reply of (a) prior acts of violence by H., and (b) evidence of the deceased's reputation for possessing a peaceable disposition. It is clear that evidence of the deceased's reputation for possessing a peaceable disposition is admissible in reply. The admissibility of prior acts of violence of an accused in reply is less certain. Once again, a consideration of the issue must begin with a review of the judgment of Martin J.A. in *Scopelliti*.

58 In *Scopelliti*, Martin J.A. stated, at p. 498:

I would wish, however, to guard myself against being taken to hold that, even if the respondent had not adduced evidence of his peaceable character, it would not have been open to the Crown to adduce evidence in reply with respect to the respondent's disposition for violence, if such were the case, as the trial Judge's reasons seem to imply. It may be that by introducing evidence of the deceased's character for violence, an accused impliedly puts his own character for violence in issue: see *Wigmore on Evidence*, 3rd ed., vol. I (1940), p. 472. However, I set aside this question until it requires to be decided.

59 Nearly twenty years later, there remains some controversy about this issue. I do not propose to add appreciably to the number of words written on this point. It is sufficient to say that I am in complete agreement with the reasoning of Watt J. in *R. v. Yaeck*, supra, Kerr J. in *R. v. Dickson* (unreported, Ont. Ct. (Gen. Div.), Nov. 19, 1990), and Phelp J. in *R. v. Robertshaw* [1996] O.J. No. 1542 (Gen. Div.), and share their view that where the defence calls evidence of the deceased's disposition for violence in support of a defence of self-defence, it is open to the Crown, in principle, to call evidence of the disposition for violence of the accused. I note that there is some support for this view as well in the decision of the Ontario Court of Appeal in *R. v. Conway* (1985), 17 C.C.C. (3d) 481, a case of first degree murder. In that case, evidence was lead of prior acts of violence of both the deceased and the accused. With respect to the latter, at p. 488, the Court stated:

He [the trial judge] should also have further instructed the jury that the evidence with respect to the appellant's prior acts of violence could be considered by them as relevant in considering the issue of who was the aggressor in the altercation.

I note, however, that this decision is not determinative, because the accused had put his character in issue in that case by leading evidence of his good character.

60 In any event, I fail to see how this situation differs in principle from the situation in *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, affirmed [1977] 2 S.C.R. 824. *McMillan* establishes the principle that where the accused leads evidence of the disposition of a third person in an effort to show that, as between the accused and the third person, it is more likely that the third person committed the crime, the Crown may call evidence of the similar disposition of the accused to rebut the inference that it is more likely that the third person committed the crime, and to ensure that the jury

does not act on a distorted version of the facts. I emphasize, however, that any evidence sought to be tendered by the Crown on this basis in reply is subject to the same restrictions as is the evidence tendered by the accused. Most importantly, it must be evidence that will assist the jury in the particular case.

61 In this case, the circumstances are a bit unusual. The accused H. seeks to tender the disposition evidence to support the view that the deceased was the aggressor in his confrontation with Williams, H. and Lewis, and accordingly that Williams killed the deceased in self-defence. As a result, there is no real contest between the deceased and the applicant as to which of the two was the aggressor. In reality, the contest, if there is one, is between the deceased and Williams. As a result, I do not see how the jury will be assisted by evidence of the disposition for violence of H.. In reaching this conclusion, I am assisted by the explanation given by Watt J. for the admissibility of such evidence in reply in *Yaeck*, supra, at para. 21, as follows:

On the other hand, where evidence is adduced in such cases of the deceased's disposition for violence, it is at least arguable that the prosecution may, in reply, adduce evidence of the accused's disposition for violence in the manner permitted in *Scopelliti*, supra. The introduction of such evidence in relation to the deceased endeavours to persuade the trier of fact that, as between the accused and the deceased, it is more likely the deceased who was the aggressor than the accused on account of the deceased's disposition for violence. The disposition for violence of the deceased renders it more likely that he or she acted in accordance therewith at the material time. It is at least implicit in such a position that the accused asserts, that as between the two parties, the accused is not or less so inclined or disposed. To put the matter otherwise, the assertion by the accused that the deceased acted in such a way on account of disposition, implies that the accused did not so act since he or she lacks such disposition. By parity of reasoning with that employed in *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, affirmed [1977] 2 S.C.R. 824, the prosecution should be entitled to show that the combat was between two persons of similar disposition for violence, not one with and the other without it. The trier of fact would then have evidence bearing on the probability of each version of aggression, as well as the direct evidence thereof, thereby being in a better position to assess the legitimacy of the claim.

62 It seems to me that the real issue here is whether or not Williams shot Brown in self-defence. Evidence of H.' disposition for violence simply does not speak to this issue. In an ingenious and persuasive argument, Mr. Fisher argued that the actions of the three accused were inextricably interwoven, and should not be artificially divided for analytical purposes. In some cases, this argument might carry the day. But in this case, the significant actions in advancing this crime alleged against H., namely bringing the gun and ammunition to the scene of the crime and handing them to Williams, were all complete before Brown had come out of his apartment, before he took hold of Williams, and before he advanced on the loaded gun. The claim of self-defence arises substantially from these facts. In the circumstances, H. disposition for violence could not have affected the pertinent events.

63 Finally, without discussing them individually, I am prepared to say that none of the evidence proffered by the Crown is capable of rebutting an inference that Williams was not the aggressor in this incident.

64 Accordingly, I will not admit the Crown's evidence in reply. In view of the fact that this ruling is being made before the close of the Crown's case, and before I know precisely what evidence will be led by the defence on this issue, if any, the Crown will be at liberty to renew its application should the defence evidence differ in a meaningful and significant way from what has been anticipated.

DAMBROT J.

cp/d/qlrme/qldah