

The Defence Toolkit – “Murder Advice”



This week's top three summaries: *R v Amin*, 2024 ONCA 237: #Mr Big and #murder advice, *R v Patel*, 2024 NSCA 40: #common sense, and *R v NC*, 2024 ONCA 239: #credibility of accused.

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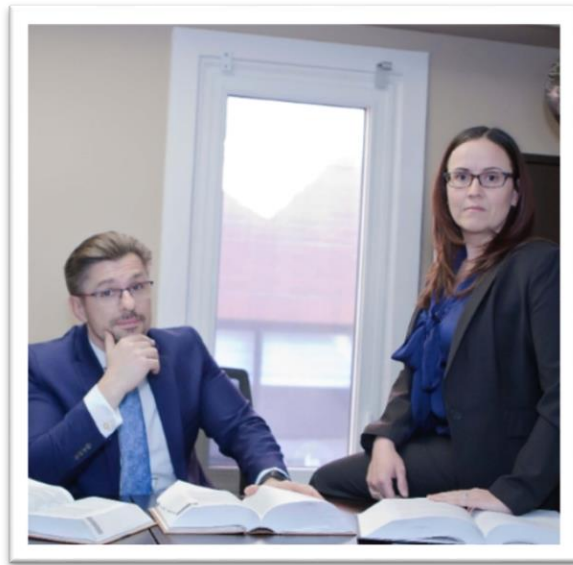
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AUTHOR'S NOTE: While R v Hart mandates a particular form of consideration for bad character evidence exclusion, in this case, the operation yielded bad character evidence in the form of advice sought and given about how to commit a murder of a girlfriend. This type of evidence was led by the Crown for the purpose of proving the identification of the accused as the murder of his girlfriend.

As can be imagined, the yield of bad character evidence in this operation was significant with both Hart bad character (ie. joining a criminal organization) and Handy bad character (ie. murder advice given and used for similarity with actual charged offence). Consequently, the ONCA assessment was that both the Hart and Handy tests had to be met by this sort of evidence.

The potential of bad character evidence to poison the minds of jurors is highlighted throughout this judgment. Also, the Court notes that legal vacuums will not be created by minor tweaks to the Mr. Big format – police will not be permitted to avoid the robust legal test for this sort of evidence.

This is at least the second time this author has seen this particular form of Mr. Big police attempt to obtain “murder advice”. The popularity of this design should be re-thought by police investigating these sorts of cases as it inevitably creates massively prejudicial evidence that has a great chance of being misused by juries to convict people simple because they associate with bad people and have a tendency to give crime advice.



[1] Evidence that accused persons committed bad acts other than the crime they are charged with committing is dangerous. This evidence can poison the jury and lead them to convict accused persons because they appear to be bad people who keep bad company, rather than because the Crown has proved that they committed the charged crime. The improper admission and misuse of such evidence can result in wrongful convictions. This risk is heightened where the Crown relies on similarities between the accused's bad acts other than the crime charged and that crime to prove that the accused is the person who committed the crime because there is a risk that such similarities are merely a coincidence.

[2] Police undercover operations intended to elicit confessions pose these and other dangers. These operations frequently induce the suspect to join a fictitious organization and participate in simulated crimes or bad actions, culminating in an interview in which the organization's boss asks the suspect to confess as the price of joining the organization. They inevitably elicit evidence of the suspect's bad acts other than the charged crime by showing the suspect's willingness to associate with bad people and/or perform simulated crimes or other wrongful acts that can be highly prejudicial. They also risk inducing false confessions because the suspect is motivated to join the organization and fears that failure to confess will result in rejection.

[3] The justice system has developed safeguards governing the admission and use of evidence of the accused's bad acts other than the crime charged and statements by the accused made during police undercover operations to protect against wrongful convictions. Where the Crown uses evidence of the accused's bad acts other than the crime charged to help prove the accused's identity as the perpetrator, it can only be admitted if it is very similar to how the charged crime was committed and its value outweighs the risks that the jury will misuse it. Trial judges who admit this evidence must warn jurors that they cannot use it to convict accused persons simply because they appear to be bad people. Further, trial judges must carefully evaluate the reliability of statements made to undercover officers to guard against the danger of false confessions.

[4] The appellant, Najib Amin, argues that his conviction for murder should be set aside because the trial judge did not comply with these safeguards. The appellant was charged with murdering Sylvia Consuelo and the only live issue at his trial was identity. During a Toronto Police Service undercover operation investigating his involvement in Ms. Consuelo's killing, he advised an undercover officer how to kill his girlfriend and evade detection, attempted to become business partners with undercover officers who claimed to have committed murder and concealed the evidence of it, and made other statements to them that the Crown sought to use against him at his trial. Crown counsel at trial argued that the appellant's murder advice was similar to how the deceased was killed and should be admitted to prove the appellant's identity as the killer. The trial judge admitted the murder advice to prove identity, and also admitted the other statements. He did not warn the jury about the dangers of misusing this evidence. The jury convicted the appellant of murder. On appeal, the appellant argues that the trial judge should not have admitted the appellant's murder advice and should have warned the jury about the dangers of misusing that advice and the other statements.

[5] We allowed the appeal on the day we heard it because we agree with the appellant that the safeguards I have described broke down in his case. The murder advice risked causing the jury to convict the appellant because he appeared to be a bad person who sought to partner with a criminal and advised him how to kill and evade detection. The

trial judge should not have admitted this highly prejudicial evidence to prove identity because it was not very similar to how the deceased was killed. The trial judge also should have, but did not, warn the jury that it could not misuse the murder advice and other incriminating statements to convict the appellant for being a bad person. These twin errors created a real risk that the jury wrongfully convicted the appellant because he appeared to be a bad person and not because the Crown proved that he murdered the deceased

Conclusion

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