NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Borden*, 2017 NSCA 45

Date: 20170531
Docket: CAC 444208
Registry: Halifax

Between:

John Arthur Borden

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Duncan R. Beveridge

Appeal Heard: November 14 and 15, 2016 and February 22, 2017, in Halifax, Nova Scotia

Subject: Criminal law: admission of fresh evidence; scope of cross-examination of a crown witness on prior acts of discreditable conduct; Crown introduction of bad character evidence of an accused; jury charge on self-defence; non-direction on prior inconsistent statements.

Summary: There were two versions of events about a violent encounter outside a house party. The complainant said the appellant stabbed him with a knife. The appellant said that when he was confronted by the complainant, a fight ensued. Only while being pummelled by the complainant did he stab the complainant in self-defence.

Appellant's trial counsel believed that he needed the trial judge's permission to cross-examine the complainant about his violent character as evidenced by numerous criminal convictions for uttering threats or similar conduct. He called it a "*Scopelleti* application". The trial judge ruled that the appellant could only cross-examine the key Crown witness,

the complainant, on nine of his 41 convictions and the Crown could introduce in its case in chief an exhibit demonstrating the appellant's convictions for violent offences.

The Crown argued to the jury that the appellant had a violent disposition as evidenced by his convictions. The judge gave inconsistent instructions to the jury. He told them they could use the appellant's criminal convictions to help them decide who was the aggressor in the altercation, yet also that the convictions could not be used to reason he committed the offences charged or that he is a person of bad character and, thus, likely to have committed the offences charged.

The jury had questions about the applicability of self-defence. The trial judge repeated his initial charge.

A witness testified about a prior statement. That statement recounted a version of events told by the complainant inconsistent with his sworn testimony but consistent with what the appellant said had happened. The trial judge gave no instructions on prior statements.

Issues:

(1) Was the fresh evidence admissible?

(2) Did the trial judge err in his jury charge on self-defence?

(3) Did the ruling by the trial judge on the "*Scopelliti* application" impact on trial fairness?

(4) Did the trial judge commit reversible error by not charging on the use the jury could make of prior statements?

Result: The motion to adduce fresh evidence was dismissed. The trial judge's answer to the jury question about the law of self-defence could have been clearer, but in the circumstances, did not amount to reversible error. The "*Scopelleti* application" was misguided. The trial judge was wrong to put limits on the right of the appellant to cross-examine the complainant on his prior discreditable conduct, including his numerous prior convictions, and to permit the Crown to introduce as an exhibit a document evidencing the appellant's criminal record. The error was compounded by his jury instructions that they could, as the Crown urged, use the appellant's prior convictions for violent offences to determine who had been the aggressor in the altercation. In these circumstances, the trial judge's failure to charge the jury about how to deal with prior statements was inadequate.

The appeal is allowed, the convictions quashed and a new trial ordered, to be undertaken at the discretion of the Crown.

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Judges:	Fichaud, Beveridge and Scanlan, JJ.A.
Appeal Heard:	November 14 and 15, 2016, and February 22, 2017 in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Fichaud and Scanlan, JJ.A. concurring
Counsel:	Roger Burrill, for the appellant Timothy O'Leary, for the respondent William Mahody, Q.C. for LIANS, watching brief only

Reasons for judgment:

INTRODUCTION:

[1] This appeal arises from a house party that did not end well. A violent encounter happened outside, in the dark. The appellant, John Borden, admitted he stabbed the complainant, Richard (Ricky) Borden, but said he had done so in self-defence.

[2] The jury convicted the appellant of aggravated assault and possession of a knife for a purpose dangerous to public peace. He was acquitted of attempted murder and uttering a threat to kill Ricky Borden. The trial judge sentenced the appellant to five years' incarceration for the aggravated assault offence and one year concurrent for the possession of a weapon, less remand credit.

[3] Originally, the appellant represented himself on his appeal. He complained that the judge did not allow him to present "all of the evidence" and his trial counsel had been inadequate. Mr. Burrill assumed carriage of the appeal. An Amended Notice of Appeal followed.

[4] The Amended Notice of Appeal asserted that the trial judge had erred in his jury charge on self-defence, and there had been a miscarriage of justice by the failure of trial counsel to produce relevant evidence. There was no overt suggestion that the appellant's trial counsel was ineffective. Nonetheless, the appellant moved to adduce fresh evidence to further the claim there had been a miscarriage of justice. I will set out the details of the proposed fresh evidence later. Eventually, ineffective assistance of counsel became an issue.

[5] We heard the fresh evidence motion and argument on November 14 and 15, 2016. During that hearing, the panel sought submissions on two matters: 1) the "*Scopelliti* application" (and the trial judge's charge that flowed from that); and 2) the adequacy of the trial judge's charge with respect to prior statements.

[6] The parties filed further materials to address these issues. We heard further evidence and submissions on February 22, 2017.

[7] There are many aspects about this trial that were unsatisfactory. The errors and missteps by counsel and the trial judge led to an unfair trial.

[8] For the reasons that follow, I would allow the appeal, quash the convictions and order a new trial.

[9] I will provide an overview of the pre-trial proceedings and the trial, then the appellant's motion to adduce fresh evidence and the ensuing appeal proceedings.

OVERVIEW

[10] The appellant had counsel. He elected trial by judge and jury. Committal for trial followed a preliminary inquiry. Eventually, June 8 to the 18 of 2015 became the set trial dates.

[11] Mr. Eugene Tan became the appellant's lawyer in February 2015. Mr. Tan arranged to bring an application labelled "Application for Admission of Character Evidence". He filed a detailed brief. The Crown replied. The application was heard on June 1, 2015 by the trial judge, the Honourable Justice Glen G. McDougall.

[12] I will provide more details about this application later. It suffices for now to observe that trial counsel believed that he needed judicial fiat to introduce character evidence of the complainant via cross-examination on his criminal record. The Crown countered that it should be allowed to introduce the criminal record of the appellant as part of its case.

[13] The trial judge agreed. He set parameters. The appellant could not cross-examine on the whole of the complainant's criminal record, and the Crown could introduce details of the appellant's convictions for violent offences from 2000 forward. Included in that record were convictions for assault with a weapon and aggravated assault, and three for assault *simpliciter*.

[14] At trial, the Crown called 14 witnesses. Eleven were people that had hosted or attended the birthday party at Lillian Clyke's house in Sunnyvale, Guysborough County on June 28, 2013. The cast was rounded out by the emergency room physician who treated the complainant, Ricky Borden, and two police officers.

[15] It is unnecessary to sort out all of the familial and social relationships of the people that were at the party. The key figures in the lead up to, and during the fracas, were Ricky Borden, his brother Norman Borden, Juanita Byard, Walter Mansfield, Marcus Timmons, and the appellant.

[16] The theory of the Crown was that the appellant, with a history of jealousy and violence, became upset by the attention the complainant was paying to his former girlfriend, Juanita Byard. It was the appellant who caused the incident inside the house. After Ricky Borden went outside, the appellant followed, uttered death threats and carried out an unprovoked knife attack on the complainant.

[17] All of the witnesses agreed that Ricky Borden and a number of his brothers arrived at the party before the appellant. The mood was good. Music was on. Some people were dancing. There was food and alcohol.

[18] The appellant, John Borden, is related to Ricky Borden, but not closely. The appellant arrived at Lillian Clyke's home around 10:00 p.m. It was dark out.

[19] Tensions developed inside between Ricky Borden and the appellant. There were various accounts about who said what to whom. All were in agreement that loud and angry words were exchanged between Ricky Borden and the appellant. Due to the commotion, Lillian Clyke ordered Ricky Borden to leave. He, Norman Borden, and Walter Mansfield went outside.

[20] Time estimates varied, but not long afterwards, the appellant also left. The accounts of what happened when he went outside differ sharply. Ricky Borden said he was just getting some beer out of Norman Borden's trunk when the appellant ran towards him, yelling death threats. Ricky threw beer cans at the appellant. The appellant had a knife, he kept coming and stabbed Ricky twice in the abdomen. Ricky then started running around Norman's car.

[21] Eventually, the appellant caught up to Ricky Borden and stabbed him in the flank. Ricky cried out, turned and grabbed the appellant and threw him to the ground. Ricky Borden described how he got on top of the appellant and started punching him. He also said he called for Norman's help to get the knife away from the appellant.

[22] Norman Borden heard no threats being yelled by the appellant. Otherwise, his evidence generally tended to confirm that of the complainant. Norman said he saw the chase by the appellant around his car, heard the complainant's utterance of having been stabbed, and took the knife out of the appellant's hand.

[23] Walter Mansfield's testimony also confirmed part of the complainant's evidence. He testified that he went outside at the same time. He saw the appellant running toward the complainant, but heard no threats and saw no knife. Mr. Mansfield said he heard the complainant say that he had been stabbed, but he did not see it. He did not want to get involved and went inside a nearby home. Before leaving the scene, he heard the complainant hollering for Norman to come and get the knife.

[24] A few minutes later, the complainant went into that home and asked Mr. Mansfield to drive him to the hospital.

[25] John Clyke was also outside. He realized there was a fight. Ricky Borden was on top of someone and asking for somebody to get the knife. He saw and heard nothing before that happened.

[26] The appellant denied any animosity on account of jealousy. Juanita Byard's testimony did not support the Crown theory. Whatever caused tensions inside the house, the appellant testified that he had thought Ricky Borden would have left the yard by the time he went out.

[27] The appellant said he simply wanted to walk home after leaving Lillian Clyke's house. As he started to do so, Ricky Borden threw beer cans at him, striking him at least twice. He said Ricky then took up a fighting stance. They wrestled each other to the ground. Ricky Borden was on top of him, punching him, and, at one point, hit him in the head with what he thought was a beer bottle. Fearing for his life, the appellant said he managed to get his pocket knife out, open it and stab the complainant twice in the left side. The appellant said that after this, the complainant called for Norman's help. Before Norman could take the knife from him, he tossed it out of his reach.

[28] The appellant testified that he was able to wriggle out from under the complainant. Once on their feet, the fight continued. At one point, the appellant said he pushed the complainant backwards onto Norman. The appellant believed

that Norman had the appellant's knife at this point, and that the complainant's contact with Norman is what caused the stab wound to the complainant's left flank.

[29] The appellant founded his belief on the fact that after that contact, Norman and he fought briefly. Norman had his knife, and when the appellant tried to kick him, Norman stabbed him in the upper left leg. Norman denied he had used a knife. He testified that the appellant had a second knife. It was after the appellant produced the second knife, that he fought briefly with the appellant.

[30] The putative stab wound to the appellant's leg, and the availability of evidence tending to confirm its existence, was one of the central themes of the original fresh evidence motion. I will describe the trial evidence and the proffered fresh evidence in more detail later.

[31] Walter Mansfield drove the complainant to the hospital. Marcus Timmons, who had come to the party with the complainant, accompanied them to the hospital. Norman Borden followed shortly afterwards in a separate car. He got into somewhat of a confrontation with the investigating officers outside the hospital. Eventually, the police retrieved the appellant's knife from Norman Borden.

[32] The appellant ended up in Juanita Byard's car. Much was made by the Crown of the different places they visited, and that they spent the night together in the car in a secluded area. It was the Crown's position that the appellant's activities amounted to "after the fact conduct", permitting the jury to draw an inference of guilt against the appellant. No objection was taken at trial nor on appeal to this nebulous proposition.

[33] Ms. Byard said that the appellant complained of a bump on his head and a broken nose. She said he was able to walk. She did not actually see any injury. Ms. Byard described seeing him bleeding from his nose and the presence of blood on his shirt. She was with him when he was arrested without incident later that day.

[34] The police searched the area where Ricky Borden and the appellant were fighting. They found a broken watch, tentatively identified as belonging to Ricky Borden, the appellant's hat, and a broken bottle.

[35] Cst. Len MacDonald and Sgt. Terry Miller were present when the appellant was arrested on June 29, 2013. Sgt. Miller described the appellant as cooperative and compliant. Sgt. Miller believed the appellant was wearing blue jeans. He noticed the appellant had a superficial injury to the left side of his head, but had no difficulty walking or moving.

[36] Cst. MacDonald testified that the appellant did not appear to be injured, except for an abrasion on the top of his head, which did not require medical attention. He observed no difficulty in how the appellant walked or moved. Photographs were taken that day of the appellant's injuries to his head and face.

[37] Marcus Timmons had gone to the party with Ricky Borden. They were friends. The appellant did not know Marcus Timmons. He was on the Crown witness list, and was announced as being a Crown witness at the opening of the trial before the jury. Nevertheless, without explanation, the Crown elected not to call him as a witness.

[38] Mr. Tan's attempts to compel Mr. Timmons' appearance at trial were frustrated. Mr. Timmons ripped up his subpoena. The trial judge issued a warrant. The police arrested Mr. Timmons on the warrant in Dartmouth. Rather than appear personally, a decision was made for Mr. Timmons to testify by video-link from the Halifax Law Courts.

[39] Mr. Timmons was a decidedly uncooperative witness with Mr. Tan.

[40] Mr. Timmons had given an audio-taped statement to the police on July 3, 2013. In this statement, he said that as Ricky Borden was going out the door he told Marcus to stay inside. Marcus heard yelling and screaming. When he went outside, Ricky's shirt was full of blood. Marcus and Walter Mansfield took Ricky to the hospital.

[41] On the way, Ricky told them that the appellant had said something to him, and he, Ricky, told the appellant to go outside and "settle it like real men". Ricky was getting the better of the appellant. In particular, he was on top of the appellant. That is when the appellant stabbed Ricky.

[42] When Marcus Timmons testified, he professed to have no recall of who was in the vehicle when Ricky went to the hospital or what was said. He even swore that he had no recall of talking to the police or of the events of June 28. Mr. Tan

brought an application under s. 9 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 to cross-examine Mr. Timmons as an adverse witness. The application was successful.

[43] During Mr. Tan's cross-examination in front of the jury, Mr. Timmons maintained that he had no recollection of giving an audio-taped statement to the police. He did acknowledge that Ricky told him he had challenged the appellant to go outside and settle their dispute like men. He would not say for certain that Ricky told him that he was getting the better of the appellant when he got stabbed.

[44] Mr. Timmons acknowledged it was his voice on the audio-tape describing those very details. He maintained that he had no recollection of it "but if I said it, it happened".

[45] As mentioned earlier, the appellant acknowledged an exchange of words with Norman and Ricky Borden at the party. The appellant described the challenge by Ricky Borden to "come the fuck outside". Both sides had raised voices. Some of the guests held the appellant back as Ricky and Norman Borden went outside. I have already set out the gist of the appellant's account of the outside events.

[46] I will add a few details about the appellant's account that help inform the claimed for relevance of some of the fresh evidence. First, the appellant testified that the complainant broke his nose and jaw. Second, in response to Mr. Tan's invitation, the appellant showed the jury the scar on his left leg from the stab wound inflicted by Norman Borden. The appellant explained that it did not cause him much pain at the time. He cleaned it up that night with a towel and put a band-aid on it. It was later "looked at" when he was in jail in Burnside.

[47] At the end of the appellant's evidence, the Crown elected not to call rebuttal evidence. Counsels' addresses to the jury followed immediately.

[48] Defence counsel stressed to the jury that self-defence can be a complete defence to the charges of attempted murder and aggravated assault. There was no suggestion self-defence was relevant to the charge of possession of a weapon for a purpose dangerous to the public peace. Counsel appropriately stressed the evidence of Marcus Timmons, a friend of Ricky Borden. According to Timmons, Ricky Borden told him a version of events that was similar in some important details to that of the appellant.

[49] That is, the complainant was on top of the appellant and was "getting the better" of him when the appellant stabbed the complainant. Defence counsel suggested that Mr. Timmons was not an ideal defence witness, but that he had adopted the content of his police statement.

[50] As to the criminal record of the complainant, defence counsel said this:

> Does he have a history? Yes, he does. He has a history. He was cross-examined on his criminal record. He has a number of convictions for uttering threats. You heard some of the details. And bear in mind that he was cross-examined on the terms of his sentence, as well. And they were not insignificant. In fact, some sentences exceed anything that John Borden received. He discusses his history, that he has been in fights, that he was recently involved in a scuffle, although he says that it was collateral damage, for lack of a better term. But he's not going to back down from anybody.

[51] Defence counsel made no mention of the appellant's criminal record.

[52] The Crown's summation stressed the evidence that tended to corroborate the complainant's testimony about how the incident started inside the house and the events outside. Counsel pointed out the problems with the appellant's testimony, in particular: his claim of being able to open a knife with one hand and stab the complainant; his evidence that tried to account for the stab wound to the complainant's flank; and, the absence of evidence that he had suffered a broken nose or serious injury to his leg.

[53] With respect to the evidence about the criminal antecedents of the complainant and the appellant, the Crown argued that the jury was entitled to consider their prior convictions. He pointed out to the jury that the complainant had only been convicted of uttering threats, a fact that he had acknowledged, yet the appellant had been convicted of a number of assaults. Counsel's argument to the jury was as follows:

> John Borden did admit that he was angry inside only for a minute, but he was angry. And I would submit to you that, in reality, John Borden's evidence that he was not the aggressor outside is just not supported and it's not believable. And, indeed, you can consider in determining who the aggressor in this fight was. And they can put before you evidence of prior convictions of both Ricky Borden and John Borden.
>
> My friend put to Ricky Borden the fact that he had been previously convicted of uttering threats and he acknowledged that. You did not hear of Ricky Borden being convicted of an assault ever. You did hear of John Borden being convicted

> of a number of assaults and this is from a man who has, by his own admission, a temper.

[54] I will only refer to those parts of the trial judge's charge that are relevant to understanding the issues. The judge attempted to explain to the jury the different uses they could make of prior criminal convictions as between the complainant, Ricky Borden and the appellant.

[55] For Ricky Borden, the trial judge told the jury that they could use the fact, number and nature of the convictions to help them decide how much or little they believe or rely on his evidence. They could also use this evidence in helping them to decide who was the aggressor.

[56] With respect to the appellant's criminal record, the trial judge cautioned the jury that they must not use the fact he has committed offences in the past or the number or nature of the offences as evidence he has committed the charged offences or is the sort of person who would do so. The jury could only use the fact, number and nature of the convictions to help them decide how much or little they will believe or rely on his testimony.

[57] However, he also told the jury that they may also use the appellant's criminal convictions in helping them decide who the aggressor was in the altercation between the complainant and the appellant.

[58] The jury were told nothing about how to deal with prior consistent or inconsistent statements.

[59] Neither counsel voiced any objections to the jury charge. An hour and a half into deliberations, the jury had a written question. It was not made an exhibit. The trial judge said he had written it down. He said the question was: "Can the aggressor use self-defence when he starts losing a fight and believes he is in danger?"

[60] After discussing the question with counsel, the trial judge, with the concurrence of counsel, repeated his initial charge to the jury on self-defence. The jury deliberated the rest of the day, and, at the end of the following morning, returned their verdict.

THE FRESH EVIDENCE MOTION

[61] There are two aspects to the appellant's fresh evidence motion. The first comes from an affidavit of Murray Timmons sworn April 22, 2016. Murray Timmons swore that Ricky Borden drove his brother, Marcus Timmons to Dartmouth sometime around June 10-12, 2015. He saw Ricky Borden hand $400.00 cash to Marcus and say he was "not to go to court". Affidavits from Ricky Borden and Marcus Timmons denied any such arrangement.

[62] When Murray Timmons was produced for cross-examination on his affidavit, he recanted the relevant paragraphs. The appellant did not press for relief based on this prong of the motion to adduce fresh evidence.

[63] The second aspect of the proposed fresh evidence is based on affidavits from the appellant and a Correctional Officer at the Central Nova Scotia Correctional Facility in Burnside (Central Nova).

[64] The appellant says he instructed trial counsel to call medical and other evidence to confirm that the appellant had been stabbed by Norman Borden. Attached to his affidavit were copies of notes made by a nurse from the Health Care Unit of Central Nova on July 5, 2013 that the appellant presented to her unit with a "week old stab wound" to his upper left thigh. She cleaned the wound, applied ointment and a Band-Aid.

[65] The Correctional Officer confirmed his contact with the appellant in the summer of 2013, when the appellant had complained of an injury to his leg. At the officer's request, the appellant showed him the injury. The Officer said he saw a puncture hole of some significance which led him to escort the appellant to the Health Care Unit.

[66] The appellant's affidavit referred to his brown pants that he wore the night of June 28, 2013. They were produced and marked as an exhibit before us. They have a hole in them. The appellant said the hole was caused by what he said had happened—Norman Borden stabbed him.

[67] The appellant described how he signed the pants out of his personal effects and had the Sheriffs transport them to the Courthouse in Guysborough. He showed them to trial counsel and asked that they be introduced. Trial counsel ultimately decided not to do so.

[68] Trial counsel filed an affidavit sworn July 22, 2016 that explained trial preparation, strategy, and why he did not introduce the pants. I will refer to this affidavit later when I discuss the "*Scopelliti* application". Mr. Tan acknowledged, in his affidavit, that he was aware the appellant had testified at his bail hearing on July 2, 2013 that he had suffered a stab wound to his leg, along with a fractured jaw and broken nose.

[69] Trial counsel explained that he was concerned about producing the pants because: from what he said he observed, the injury did not appear to line up with the hole in the pants; the pants had been washed since June 28, 2013; there was no apparent blood stain; he could not establish continuity or "chain of custody" of the pants; no witnesses could confirm any type of injury to the appellant's leg.

[70] It was trial counsel's view that the pants would be "ultimately damaging" to his credibility.

[71] The Crown tendered affidavits from S/Sgt. Steven Halliday and Cst. Reid.

[72] Cst. Reid was one of the officers that interacted with the appellant when he was in custody. He said the only injury the appellant complained about on June 30, 2013 was to his nose, and that the appellant had declined medical treatment.

[73] The appellant had formally complained to the RCMP about the lack of medical treatment he had received while in police custody. S/Sgt. Halliday investigated the complaint. He obtained the appellant's medical records, documents and digital copies of CCTV footage from the relevant RCMP detachments. There was no smoking gun.

[74] The video footage confirmed that the appellant wore brown pants while in RCMP custody (not the blue jeans that Sgt. Miller described). No damage or staining to the pants could be observed. The appellant appeared to have no problem walking, although at one point he could be seen hopping to the police van on his right leg.

[75] Medical records did not substantiate a broken nose or jaw, but did show his request on July 2, 2013 to have his nose, jaw and left leg "looked after".

[76] There is no need to make findings or comment about the merits of the rationale behind trial counsel's decision not to introduce the brown pants as an exhibit.

[77] Whatever view is taken of the decision about not introducing the pants (with or without medical records), which arguably could bolster the appellant's version of how the violent encounter with Ricky Borden ended, I am not satisfied it can reasonably be viewed as causative of a miscarriage of justice.

THE APPEAL PROCEEDINGS

[78] The appeal proceedings on November 14, 2016 commenced with cross-examination on the fresh evidence affidavits.

[79] Trial counsel's affidavit of July 22, 2016 had referred to his strategy to seek admission of character evidence with respect to Ricky Borden—specifically, his criminal record. He called it a "*Scopelliti* application" and said that it had been "successful".

[80] Trial counsel's affidavit recounted that the complainant's criminal record had been admitted as a trial exhibit, except for certain convictions found by the trial judge to be irrelevant, or unduly prejudicial. He described the application in the following way:

> 24. Ricky Borden's character was, in fact, placed in issue during the conduct of the defence. Upon my first meeting with John Borden, I identified the character of Ricky Borden to be a ground for exploration. Based on this, I notified the Court on February 25, 2015 that I would be seeking admission of character evidence (Ricky Borden's criminal record) through a *Scopelliti* application. This motion was scheduled by the Trial Judge for written submissions on May 1, 2015, and an oral hearing on June 1, 2015. I filed my submissions on April 30, 2015.
>
> 25. This motion was successful, and Ricky Borden's criminal record, less certain convictions that were determined by the Learned Trial Judge to be irrelevant, or unduly prejudicial, was admitted as an Exhibit at trial.
>
> 26. Ricky Borden's record was put to Ricky Borden in cross examination for the purposes of suggesting that Ricky Borden, and not John Borden, had initiated the assault that formed the subject matter of the trial. Ricky Borden's history of assaults was admitted into evidence, and, further, he admitted in cross examination that some of his assaults were committed against his spouse.

[81] Some details set out above are not quite correct. As will be described later, Ricky Borden's criminal record was not introduced as a trial exhibit. The trial judge did rule that defence counsel was precluded from cross-examining Ricky Borden on all of his convictions. His reasons will be discussed later.

[82] An edited version of the *appellant's* criminal record was tendered by the Crown as part of its case as an exhibit. Convictions prior to 2000 were omitted as being too remote.

[83] During cross-examination of Mr. Tan by the appellant on November 14, 2016, the Crown objected to questions about the so-called "*Scopelliti* application" described in trial counsel's affidavit, because this aspect of the trial proceedings had not been specifically raised as a topic of complaint concerning trial counsel's conduct. We permitted the questions to be asked.

[84] Later on November 14, 2016, a further potential issue was identified—the apparent lack of instruction to the jury on the permissible and impermissible uses they could make of the contents of prior witness statements.

[85] After discussion with the parties on November 15, 2016, the panel decided to follow the protocol set out in *R. v. Mian*, 2014 SCC 54. It was our unanimous view that, based on a preliminary review, there was "good reason to believe" that failure to address these issues would risk an injustice. The record was complete. No prejudice was identified.

[86] The Crown, appropriately, requested that the issues be reduced to writing. The parties were afforded an opportunity to make further submissions. Filing dates were set for written argument or further materials. The Court wrote to the parties specifying the issues.

[87] Extensive supplementary facta were filed by the parties. Trial counsel, with the assistance of his lawyer, filed an affidavit sworn January 17, 2017 that elaborated on the rationale behind the "*Scopelliti* application". Attached to the affidavit were the written briefs filed by the parties on the application. On February 22, 2017, both parties cross-examined trial counsel on his affidavit. I will refer to this evidence later.

ISSUES

[88] There are three issues left to address:

1. Did the trial judge err in his jury charge on self-defence?
2. What was the impact on trial fairness from trial counsel's *Scopelliti* application?
3. What was the impact on trial fairness from the trial judge's omission to instruct the jury on how to assess prior inconsistent statements?

SELF-DEFENCE

[89] The appellant asserts two problems about the jury instructions on self-defence. One centers on what the judge did and did not tell the jury about the law of self-defence. The other is that he told the jury that self-defence had no application to the charge of possession of a weapon for a purpose dangerous to the public peace.

[90] The appellant claims that the trial judge failed to explain the law of self-defence in the context of an accused who wishes to rely on self-defence where he or she has initially assaulted the complainant.

[91] The "new" self-defence regime came into force as s. 34, just three months prior to June 28, 2013 (the *Citizen's Arrest and Self-Defence Act*, S.C. 2012, c. 9, in force on March 11, 2013, S/I2013-5). Once there is an air of reality to the defence, the Crown must disprove, beyond a reasonable doubt, at least one of the following:

1) that the accused believed on reasonable grounds that force or a threat of force was being used or made against them or another person;

2) the accused's acts were done for the purpose of defending or protecting themselves or another;

3) the act was reasonable in the circumstances.

See: s. 34(1) of the *Criminal Code*; *R. v. Levy*, 2016 NSCA 45.

[92] To determine if the act in question was reasonable in the circumstances, s. 34(2) sets out a non-exhaustive list of nine factors a court must consider. It provides:

> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> (a) the nature of the force or threat;
>
> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
>
> (d) whether any party to the incident used or threatened to use a weapon;
>
> (e) the size, age, gender and physical capabilities of the parties to the incident;
>
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
>
> (f.1) any history of interaction or communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
>
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[93] The statutory simplification, while laudable, does not relieve the trial judge from explaining the law of self-defence in the actual context revealed by the evidence. The appellant says the trial judge failed to do so.

[94] The appellant's argument is that the trial judge told the jury that self-defence is not a "loose term"—quite the opposite, the law defines the circumstances in which it can apply, and prescribes the nature and extent of what a person is lawfully entitled to do for the purpose of defending or protecting themselves.

[95] He explained to the jury:

> In some circumstances, a person who believes on reasonable grounds that force is being used or threatened against him may do something that would otherwise be an offence but be acting lawfully. An accused who believes on reasonable grounds that force is being used or threatened against him may do something that

> otherwise would be an offence but be acting lawfully, provided that what he does is for the purpose of defending or protecting himself from that use or threat of force and is reasonable in the circumstances as the accused knew or honestly believed them to be. **This is so even if the accused provoked the use or threat of force or intentionally killed or seriously injured the person who used or threatened to use the force.**
>
> [Emphasis added]

[96] The appellant complains that trial judge said nothing about self-defence in the context of initial aggression or assault by the appellant—more was needed.

[97] Further, the appellant says the significance of the omission is amplified by the jury question: "Can the aggressor use self-defence when he starts losing a fight and believes he is in danger?"

[98] Rather than clearly answer this question, the trial judge simply repeated the entirety of his charge on self-defence. There is no shortage of authority that a trial judge's answers to jury questions are extremely important. They must be clear, correct and comprehensive (see: *R. v. Naglik*, [1993] 3 S.C.R. 122 at para. 27; *R. v. Layton*, 2009 SCC 36; *R. v. D.M.S.*, 2004 NSCA 65 at para. 23; *R. v. Levy*, *supra* at para. 53).

[99] As the appellant points out, it is somewhat ironic that under the previous legislative regime with four distinct, complex and sometimes irreconcilable provisions, the answer to the jury's question was readily available. The former s. 35 defined the limits on self-defence when it was the accused who had assaulted another, but later sought to justify the use of force in self-defence.

[100] I agree with the appellant. The judge should have directly answered the jury's question with a simple "yes"—qualified only by the need for them to have a reasonable doubt on the requirements for self-defence found in s. 34(1).

[101] If the jury took the view that the appellant had been the aggressor in the incident or had initially assaulted the complainant, they could consider that as a factor as to whether the appellant's actions were reasonable under s. 34(2)(c)—the appellant's role in the incident (see: *R. v. Levy*, *supra* at paras. 107-113; *R. v. Bengy*, 2015 ONCA 397 at paras. 45-48). In this way, a protection is hopefully present to prevent self-defence from becoming too ready a refuge for people who instigate violent encounters, but then seek to escape criminal liability when the encounter does not go as they hoped and they resort to use of a weapon.

[102] Despite the appellant's criticism of what the judge told the jury, I am not convinced that the lack of a clearer or more comprehensive answer amounts to legal error. The trial judge properly sought input from the parties. They agreed with the trial judge's proposed solution of simply re-charging them and invitation for further questions if they were still unclear.

[103] Before embarking on that re-charge, the trial judge prefaced his remarks with this qualifier:

> And there is one thing I will say, that when I read the question "Can the aggressor," rightly or wrongly I said I think that could be interchanged with "Can the person who provoked an altercation." I hope I'm right when I look at it from that perspective, as well, and I'm not missing the boat entirely here, missing the mark.

[104] The jury did not seek any further clarification.

[105] In addition, the appellant can point to no error in the judge's instructions on the law of self-defence, only that it could have been better. After suggesting to the jury that "aggressor" can be interchanged with "the person who provoked", the trial judge instructed them that even if the appellant provoked the use of force he could still be found not guilty based on self-defence.

[106] Lastly, an appellate court is entitled to consider the fact that neither the Crown nor defence counsel objected; and the trial judge made it abundantly clear the jury should ask further questions if they were not satisfied with his answer (see: *R. v. T.(M.)*, 2012 ONCA 511; *R. v. Pintar* (1996), 93 O.A.C. 172 at para. 76).

[107] The jury was not left with an erroneous view of the law. An accused is entitled to a properly, not perfectly instructed jury (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 2). I would not give effect to this ground of appeal.

[108] As to the second aspect of the charge on self-defence, the Crown essentially concedes that the trial judge was wrong to direct the jury that self-defence did not apply to the charge of possession of a weapon for a purpose dangerous to the public peace. There were also problems with directions about the elements of this offence. The concession is appropriate in light of *R. v. Proverbs* (1983), 2 O.A.C. 98; *R. v. Kerr*, 2004 SCC 44; *R. v. Budhoo*, 2015 ONCA 912 at paras. 72-73.

[109] However, the Crown suggests that any errors with respect to the s. 88 offence should be viewed as harmless and the conviction upheld by application of the *proviso* set out s. 686(3)(b)(iii). I need not decide if I would apply the *proviso* in light of my conclusion that the convictions are otherwise tainted and a new trial is appropriate.

THE "*SCOPELLITI*" APPLICATION

[110] With respect, the decision to bring the application was, at best, misguided. It was based on a flawed view of the law. I need not address the argument that launching the application and then not withdrawing it, once the Crown secured the permission of the trial judge to introduce the appellant's criminal record as an exhibit, amounted to ineffective assistance of counsel.

[111] Not all the blame can be fixed on trial counsel. The trial judge is the ultimate gatekeeper on what evidence the jury hears and what instructions are needed on how to carry out their adjudicative task.

[112] With respect, the trial judge erred in law in a number of respects. First, in granting the application which led him to impose unwarranted limits on the cross-examination of the complainant, and permitting the Crown to introduce the appellant's criminal record as an exhibit. Second, in his jury instructions about the use the jury could make of that record.

[113] To understand why the application was misguided, I will first set out the law about the purpose and consequent boundaries of cross-examination and the unique circumstances that underpin a "*Scopelliti*" application. I will then turn to the details of the defence application and the trial judge's rulings. Lastly, what the trial judge told the jury.

Cross-examination

[114] Cross-examination is of fundamental importance. It is recognized as a component of the right to make full answer and defence, protected by ss. 7 and 11(d) of the *Charter*. (See *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Lyttle*, [2004] 1 S.C.R. 193).

[115] The purpose of cross-examination is not just to ask random questions or have a witness repeat what they said in direct examination. Rather, it is to weaken

the evidence given on direct, support the cross-examiner's case or to discredit a witness. Sopinka[1] describes these principles and the breadth accorded a cross-examiner:

> §16.127 The oft-quoted words of Wigmore that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" indicate its great value in the conduct of litigation. Three purposes are generally attributed to cross-examination:
>
> (1) to weaken, qualify or destroy the opponent's case;
>
> (2) to support the party's own case through the testimony of the opponent's witnesses;
>
> (3) to discredit the witness.
>
> To accomplish these ends, counsel is given wide latitude and there are, accordingly, very few restrictions placed on the questions that may be asked or the manner in which they may be put. Any question which is relevant to the substantive issues or to the witness' credibility is allowed. It appears that the scope of cross-examination is wide enough to permit questions which suggest facts which cannot be proved by other evidence.

[116] There are important differences between the permitted scope for ordinary witnesses and an accused. Ordinary witnesses can be cross-examined as of right, not just on all relevant matters, but also generally on prior disreputable conduct.

[117] That conduct, if not relevant to some matter in issue at trial, only goes to credibility. Subject to one important exception, the cross-examiner may be stuck with the answer he or she gets—as contradictory evidence may be precluded by the collateral fact rule.

[118] That important exception is the ability to prove a prior conviction, should the witness deny its existence or refuses to answer (s. 12(1.1) *CEA*).

[119] However, when an accused testifies, cross-examination on prior discreditable conduct is limited to instances that have resulted in convictions. This distinction was clearly explained by Martin J.A. in *R. v. Davison, DeRosie and MacArthur* (1974), 20 C.C.C. (2d) 424 (Ont. C.A.):

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[1] Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis, 2014).

> [63] An accused who gives evidence has a dual character. As an accused he is protected by an underlying policy rule against the introduction of evidence by the prosecution tending to show that he is a person of bad character, subject, of course, to the recognized exceptions to that rule. As a witness, however, his credibility is subject to attack. If the position of an accused who gives evidence is assimilated in every respect to that of an ordinary witness he is not protected against cross- examination with respect to discreditable conduct and associations.
>
> [64] If an accused could in every case be cross-examined with a view to showing that he is a professional criminal under the guise of an attack upon his credibility as a witness it would be virtually impossible for him to receive a fair trial on the specific charge upon which he is being tried. It is not realistic to assume that, ordinarily, the jury will be able to limit the effect of such a cross-examination to the issue of credibility in arriving at a verdict.
>
> . . .
>
> [71] It seems reasonable to assume that Kerwin, J., in the passage quoted above, did not intend to cast doubt on the well-established principle that an ordinary witness may be cross-examined with respect to discreditable conduct and associations, unrelated to the subject-matter of his testimony, as a ground for disbelieving his evidence (*Phipson on Evidence*, 11th ed. (1970), at p. 654), but was rather enunciating a principle peculiarly applicable to an accused.
>
> . . .
>
> [73] I conclude that, save for cross-examination as to previous convictions permitted by s. 12 of the *Canada Evidence Act*, an accused may not be cross-examined with respect to misconduct or discreditable associations unrelated to the charge on which he is being tried for the purpose of leading to the conclusion that by reason of his bad character he is a person whose evidence ought not to be believed. Cross-examination, however, which is directly relevant to prove the falsity of the accused's evidence does not fall within the ban, notwithstanding that it may incidentally reflect upon the accused's character by disclosing discreditable conduct on his part.

See also: *R. v. Burgar*, 2010 ABCA 318.

[120] To ensure trial fairness, s. 12 of the *CEA* has been interpreted by the Supreme Court of Canada to give to a trial judge the discretion to prohibit or limit the cross-examination of an accused on his/her criminal record (*R. v. Corbett*, [1988] 1 S.C.R. 670).

[121] There are other distinctions regarding the ability to cross-examine an ordinary witness as opposed to an accused. Absent an accused putting his or her character in issue, an accused cannot be cross-examined on having received a

conditional or absolute discharge (*R. v. Danson* (1982), 66 C.C.C. (2d) 369 (Ont. C.A.) and *R. v. Sark* (2004), 182 C.C.C. (3d) 530 (N.B. C.A.)).

[122] But there is no such restriction for a non-accused witness. *R. v. Cullen* (1989), 52 C.C.C. (3d) 459 illustrates. The main Crown witness had received a conditional discharge on a charge of possession of burglar's tools. The trial judge restricted the defence in its cross-examination because he had been granted a conditional discharge for the offence. A new trial was ordered by the Ontario Court of Appeal. Galligan J.A. explained (p. 463):

> In my opinion those authorities show that, for the purpose of challenging a witness' credibility, cross-examination is permissible to demonstrate that a witness has been involved in discreditable conduct. Possession of burglar's tools is an offence that could contain an element of dishonesty. A person involved in such an offence is a person who could be considered to have been involved in discreditable conduct. In my opinion, therefore, the trial judge's restriction of defence counsel's cross-examination within the parameters of s. 12(1) of the *Canada Evidence Act* deprived the defence of the opportunity to bring to the attention of the jury circumstances which may very well have assisted the jury in deciding what weight it would place upon the complainant's evidence.

[123] Furthermore, while an accused can only be cross-examined on the bare bones of his or her criminal record, the charge, the date and the punishment imposed, an ordinary witness can be cross-examined on the underlying facts of the conviction (*R. v. Miller* (1998), 131 C.C.C. (3d) 141 (Ont. C.A.)). Indeed, an ordinary witness can even be cross-examined on the underlying facts behind outstanding charges (*R. v. Gonzague* (1983), 4 C.C.C. (3d) 505 (Ont. C.A.)).

[124] What flows from this state of the law is that counsel for the appellant needed no judicial fiat to cross-examine Ricky Borden, or any crown witness, on prior discreditable conduct or associations, and if conduct resulted in a criminal conviction, the date, punishment imposed and the underlying facts. On the other hand, the appellant could have sought a ruling (prior to testifying) from the trial judge to restrict the Crown from cross-examining him on his criminal record, including recent offences for the very conduct that he was on trial for.

[125] Instead, trial counsel brought what is referred to as a *Scopelliti* application. I turn to that issue and why such an application was misguided.

A Scopelliti application

[126] The application is named after a case, *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.). It established an important principle: an accused advancing self-defence can lead evidence that a victim has committed specific acts of violence, even if those acts were unknown to the accused at the time of the alleged offence.

[127] There is no controversy, where there is an air of reality to self-defence, an accused can lead evidence about the reputation of the victim for violence and even specific violent acts, if known to the accused. But in *Scopelliti*, the defence applied to call evidence that the victims had exhibited violent unprovoked behaviour against others. Those incidents were completely unknown to the accused.

[128] The trial judge ruled the defence could do so. The jury acquitted. The Ontario Court of Appeal dismissed the Crown appeal. Martin J.A. wrote the unanimous reasons for judgment. He summarized the law about the evidence of reputation or acts of violence by a deceased as follows:

> [29] It is well established that where self-defence is raised, evidence not only of previous assaults by the deceased on the accused, but also of previous acts of violence by the deceased, known to the accused, towards third persons, is admissible to show the accused's reasonable apprehension of violence from the deceased. Evidence of the deceased's reputation for violence, known to the accused, is admissible on the same principle: see *R. v. Drouin* (1909), 15 C.C.C. 205 and commentary at 207; *R. v. Scott* (1910), 15 C.C.C. 442; *Wigmore on Evidence*, 3rd ed., vol. II (1940), at pp. 44-52; *Phipson on Evidence*, 12th ed. (1976), at pp. 188, 228.
>
> [30] 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. However, there is impressive support for the proposition that, where self-defence is raised, evidence of the deceased's character (i.e. disposition) for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased.

[129] Justice Martin then turned to general principles to guide the outcome; while policy precludes the introduction of evidence of the criminal character of an accused, no such policy precludes admissibility of a deceased's character. He reasoned:

> [33] We were not referred by counsel to any Canadian or Commonwealth decision on the question of the admissibility of evidence of the deceased's character (disposition) for violence, not known to the accused, as evidence of the probability of the deceased's aggression where self-defence is raised as an issue. **However the admission of such evidence accords in principle with the view expressed by this Court that the disposition of a person to do a certain act is relevant to indicate the probability of his having done or not having done the act. The law prohibits the prosecution from introducing evidence for the purpose of showing that the accused is a person who by reason of his criminal character (disposition) is likely to have committed the crime charged, on policy grounds, not because of lack of relevance.** There is however, no rule of policy which excludes evidence of the disposition of a third person for violence where that disposition has probative value on some issue before the jury: see *R. v. McMillan* (1975), 7 O.R. (2d) 750, 23 C.C.C. (2d) 160 at 167, 29 C.R.N.S. 191; affirmed [1977] 2 S.C.R. 824, 33 C.C.C. (2d) 360, 73 D.L.R. (3d) 759; *R. v. Schell and Paquette* (1977), 33 C.C.C. (2d) 422 at 426.
>
> [Emphasis added]

[130] In this case, there was no deceased. The complainant was alive and well. There was no principle in play that could legitimately restrict the appellant's right to cross-examine the complainant on his character, including of course each and every one of his prior convictions. Further, the complainant's reputation for violent behaviour, as exhibited by his record for such offences and otherwise, was well-known to the appellant.

[131] There was no need to bring any application to seek permission to cross-examine the complainant on his record or other acts of discreditable conduct and associations.

[132] With these principles in mind, we can turn to the details of the application trial counsel advanced at trial.

The Defence Application

[133] The circumstances of the *Scopelliti* application are revealed by the briefs filed by the respective trial counsel and by their oral submissions to the trial judge.

[134] The application was not an off-the-cuff affair. Trial counsel deposed that he notified the Court on February 25, 2015, almost four months in advance of trial, he would be seeking admission of "character evidence (Ricky Borden's criminal record) through a *Scopelliti* application". Briefs were filed on April 30 and May 1, 2015. Submissions were heard by the trial judge on June 1, 2015.

[135] The thrust of the defence submissions to the trial judge was that admission of the complainant's propensity to engage in aggressive and violent behaviour was necessary for the appellant to make full answer and defence; while not a true *Scopelliti* application, the same principles applied. Counsel suggested that evidence of the bad character of a Crown witness was generally not admissible, but exceptions exist. In this case, counsel submitted that the complainant's propensity for violence was relevant, and its probative value was not outweighed by prejudicial effect on trial fairness.

[136] Originally, counsel sought admission of some of the complainant's criminal record and general reputation evidence (to be tendered through the appellant). This latter aspect was abandoned.

[137] The criminal record of the complainant was extensive. From most recent to oldest:

Section and Description of Offences	**Offence Date**	**Sentencing**	**Sentence or Custodial period**
CC. 86(1) Careless Use of a Firearm	December 27, 2013	August 12, 2014	$500.00 Fine 2 years' Probation
CC. 86(1) Careless Use of a Firearm	December 27, 2013	August 12, 2014	$500.00 Fine 2 years' Probation
CC. 86(1) Careless Use of a Firearm	December 27, 2013	August 12, 2014	$500.00 Fine 2 years' Probation
CC. 92(1) Possession of a Firearm Knowing Possession is Unauthorized	December 27, 2013	August 12, 2014	$250.00 Fine 2 years' Probation
CC. 92(1) Possession of a Firearm Knowing Possession is Unauthorized	December 27, 2013	August 12, 2014	$250.00 Fine 2 years' Probation
CC. 92(1) Possession of a Firearm Knowing Possession is Unauthorized	December 27, 2013	August 12, 2014	$250.00 Fine 2 years' Probation

CC. 129(a) Resists/Obstructs Peace Officer	April 30, 2009	April 1, 2010	60 days Intermittent Sentence 12 months' Probation
CC. 129(a) Resists/Obstructs Peace Officer **CC. 264.1(1)** Uttering Threats	April 5, 2006 April 5, 2006	January 9, 2007 January 9, 2007	8 months' Sentence 18 months' Probation 8 months' Concurrent Sentence 18 months' Probation
CC. 264.1(1) Uttering Threats **CC. 145(3)** Breach of Undertaking **CC. 145(3)** Breach of Undertaking	December 21, 2003 January 5, 2004 January 22, 2004	February 1, 2005 February 1, 2005 February 1, 2005	12 months' Sentence 18 months' Probation 1 month Consecutive Sentence 18 months' Probation 2 months' Consecutive Sentence 18 months' Probation
CC. 254(5) Fail-Refuse Breathalizer **CC. 733(1)** Breach	November 11, 2000 November 11, 2000	December 19, 2001 December 19, 2001	15 days' Sentence 30 days' Consecutive Sentence
CC. 264.1(1)(a) Uttering Threats **CC. 264.1(1)(a)** Uttering Threats **CC. 264.1(1)(a)** Uttering Threats **CC. 264(2)(d)** Engaging in Threatening Conduct **CC. 733.1** Breach	March 16, 2001 March 16, 2001 March 16, 2001 March 16, 2001	June 19, 2001 June 19, 2001 June 19, 2001 June 19, 2001	16 months' Sentence 16 months' Concurrent Sentence 16 months' Concurrent Sentence 3 months' Consecutive Sentence 1 month Concurrent Sentence

CC. 733.1 Breach	March 16, 2001	June 19, 2001	1 month Concurrent Sentence
CC. 733.1 Breach	March 16, 2001	June 19, 2001	1 month Concurrent Sentence
CC. 733.1 Breach	March 16, 2001	June 19, 2001	4 months' Consecutive Sentence
CC. 733.1 Breach	April 4, 2001	June 19, 2001	1 month Concurrent Sentence
CC. 139(2) Obstructing Justice	April 4, 2001	June 19, 2001	4 months' Consecutive Sentence
CC. 264.1(1)(a) Uttering Threats	December 1–15, 2000	January 2, 2001	90 days' Intermittent Sentence 2 years' Probation
CC. 733.1 Breach	December 1, 2000	January 2, 2001	90 days' Intermittent Concurrent Sentence 2 years' Probation
CC. 117.(01)	December 1, 2000	January 2, 2001	90 days' Intermittent Concurrent Sentence 2 years' Probation
CC. 145(2)(b) Fails to Attend Court as Directed	June 16, 1998	October 21, 1998	1 month Consecutive Sentence 2 years' Probation
CC. 87 Poss. Of Weapon or Imitation	December 20, 1997	October 21, 1998	4 months' Consecutive Sentence 2 years' Probation
CC. 733.1 Breach	December 20, 1997	October 21, 1998	1 month Consecutive Sentence 2 years' Probation
CC. 264.1(1) Uttering Threats	August 13, 1996	March 4, 1997	4 months Sentence 2 years' Probation
CC. 145(1)(b) Unlawfully at Large	March 24, 1995	April 19, 1995	1 day Concurrent Sentence
CC. 271(1)(b) Sexual Assault	March 29, 1994	March 7, 1995	60 days' Sentence 1 year Probation

CC. 145(3) Escape/Being at Large	October 28, 1993	August 31, 1994	45 days' Sentence
CC. 264.1(1)(a) Uttering Threats	October 3, 1993	August 31, 1994	30 days' Consecutive
CC. 264.1(1)(a) Uttering Threats	September 27, 1993	August 31, 1994	$400.00 Fine 2 years' Probation
CC. 380(1)(a) Fraud	Nov 1, 1989 – May 31, 1990	October 16, 1991	Suspended Sentence 18 months' Probation
CC. 249(1)(a) Operate Motor Vehicle in a Manner Dangerous to the Public	April 10, 1991	September 11, 1991	$400.00 Fine
CC. 145(4)(b) Fails to Appear on Summons	January 9, 1991	June 5, 1991	$100.00 Fine
CC. 259(4)(b) Operate Motor Vehicle, Vessel or Aircraft or Railway Equipment While Disqualified	December 29, 1990	June 5, 1991	$100.00 Fine
CC. 145(2)(b) Fails to Attend Court	December 12, 1990	June 5, 1991	$100.00 Fine

[138] During oral submissions at trial, counsel agreed to curtail his cross-examination to two types of charges: uttering threats/conduct and assault. On the other hand, he appropriately resisted the Crown's counter application to adduce the appellant's criminal record.

[139] Crown counsel argued against the appellant being able to cross-examine on dated convictions as they were too remote and that the Crown be permitted to adduce the appellant's criminal record to permit the jury to have a balanced view.

[140] The trial judge reserved. On June 8, 2015, he gave oral reasons. The trial judge described the defence application as follows:

> Defence counsel has applied to cross-examine the victim on his prior criminal record which, if allowed, would tend to show evidence of his bad character. Such evidence is intended for use in not only challenging the victim's credibility but also to support the Defence's position that the victim, not the accused, was the

> aggressor, thus supporting the accused's contention that he was acting in lawful self-defence.

[141] The judge applied the test for admission of character evidence in a *Scopelliti* scenario. That is, he ruled he had a discretion to deny the appellant the opportunity to adduce evidence of prior acts of violence by the complainant if probative value were outweighed by prejudicial effect. He reasoned that the "victim's" criminal record for non-violent offences was not probative to self-defence and therefore, the appellant could not delve into those offences.

[142] Part of his reasoning reveals a fundamental misapprehension of the right of an accused to cross-examine. He infused his analysis with a requirement to balance probative value and prejudicial effect:

> . . . The victim's criminal record for non-violent offences is generally not probative to the issue of self-defence and should therefore not be delved into by Defence counsel during cross-examination.
>
> **There is no question that counsel for the accused is permitted to put in evidence the victim's criminal record as long as it is relevant and probative of an issue in dispute**. That right, however, is not unfettered. It is not open season on the victim. The same can be said about a Prosecutor's right to cross-examine an accused, should he take the stand in his own defence, to ask questions of his criminal history. There is support for this in the *Criminal Code*, the *Canada Evidence Act* and in the case law. Section 661 ... pardon me, 666 for instance of the *Criminal Code of Canada* reads:
>
> > "Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed."
> >
> > [Emphasis added]

[143] At the end, the judge said he took a principled approach. He granted latitude to the appellant to delve into the criminal record of the complainant and for the Crown to lead evidence of the accused's criminal history in chief. In this way, he declared he was striking a balance. His said this:

> I have decided to grant some latitude to both Defence and Crown counsel to delve into the criminal record, first of the alleged victim, Richard (Ricky) Borden and to grant Crown counsel to lead evidence of the accused's criminal history in its case in chief. By taking a principled approach, I hope to strike a fair balance between the two competing values which again are, and this is the third time I've repeated

> it so I hope you can bear with me, those ... those competing values are: 1) a concern that the accused's defence not be effectively nullified by the introduction of any sort of bad character evidence in reply and conversely, the concern that the jury does not receive a distorted picture which could deprive the triers of fact of the ability to make a fair and meaningful assessment of the defence raised.

[144] The trial judge then directed defence counsel was only permitted to cross-examine Ricky Borden on convictions post 2000, and "specifically forbid" any reference to his conviction for sexual assault in 1994. For the post-2000 offences, he hoped counsel would only ask particulars that were relevant and probative.

[145] The convictions that defence counsel could cross-examine the complainant on were reduced to the following:

Section and Description of Offences	Offence Date	Sentencing Date	Sentence or Custodial period
CC. 264.1 Uttering Threats	December 1 – 15, 2000	January 2, 2001	90 days' Intermittent Sentence 2 years' Probation
CC. 264.1(1)(a) Uttering Threats	March 16, 2001	June 19, 2001	16 months' Sentence
CC. 264.1(1)(a) Uttering Threats	March 16, 2001	June 19, 2001	16 months' Concurrent Sentence
CC. 264.1(1)(a) Uttering Threats	March 16, 2001	June 19, 2001	16 months' Concurrent Sentence
CC. 264(2)(d) Engaging in Threatening Conduct	March 16, 2001	June 19, 2001	3 months' Consecutive Sentence
CC. 264.1 Uttering Threats	December 21, 2003	February 1, 2005	12 months' Sentence 18 months' Probation
CC. 129(a) Resists/Obstructs Peace Officer	April 5, 2006	January 9, 2007	8 months' Concurrent Sentence 18 months' Probation
CC. 264.1 Uttering Threats	April 5, 2006	January 9, 2007	8 months' Concurrent Sentence 18 months' Probation
CC. 129(a) Resists/Obstructs Peace Officer	April 30, 2009	April 1, 2010	60 days Intermittent Sentence 12 months' Probation

[146] With respect to the appellant, the trial judge ruled that the Crown as part of its case in chief could introduce, as an exhibit, a summary of 10 prior convictions. They were:

Section and Description of Offences	Offence Date	Sentencing Date	Sentence or Custodial Period
CC. 266 Assault	August 17, 2000	November 6, 2000	30 days' Consecutive Sentence
CC. 264.1 Uttering Threats	May 22, 2000	September 11, 2002	8 months' Sentence
CC. 270(a) Assaulting a Peace Officer	May 1, 2003	May 31, 2004	3 months' Consecutive Sentence
CC. 129(a) Resists/Obstructs Peace Officer	February 1, 2004	May 31, 2004	3 months' Concurrent Sentence
CC. 266 Assault	February 1, 2004	May 31, 2004	3 months' Concurrent Sentence
CC. 266 Assault	February 1, 2004	May 31, 2004	3 months' Concurrent Sentence
CC. 268 Aggravated Assault	March 20, 2004	October 12, 2004	12 months' Sentence
CC. 267(a) Assault with a Weapon	August 25, 2006	February 13, 2007	2 months' Sentence
CC. 264.1(1)(a) Uttering Threats	April 24, 2009	August 21, 2009	30 days' Sentence $50.00 Fine
CC. 264.1(1)(a) Uttering Threats	August 19, 2011	November 8, 2012	30 days' Sentence $50.00 Fine
CC. 264.1(1)(a) Uttering Threats	April 24, 2009	June 14, 2010	Suspended Sentence $30.00 Fine

[147] As a consequence, the appellant was precluded from cross-examining the complainant on his criminal record, amounting to some 41 prior convictions. Some were dated. Some were recent. Some involved crimes of dishonesty.

[148] I do not doubt that a trial judge has some discretion to curtail abusive cross-examination (*R. v. Lyttle*, *supra* at para. 44). But to limit the ability of the defence to cross-examine on relevant issues, including issues of credibility, requires the

probative value to be significantly outweighed by prejudicial effect (*R. v. Seaboyer*, [1991] 2 S.C.R. 577).

[149] In this case, there was no request by the Crown or intervention by the trial judge to limit harassing, abusive or improper cross-examination of the complainant. The appellant had the common law right to cross-examine the complainant on his character, including putting to him the full extent of his criminal record—and to prove those convictions if denied. There was no need to establish they were "relevant and probative of an issue in dispute".

[150] The trial judge drastically reduced the appellant's right to cross-examine by applying an erroneous approach and engaging in a balancing exercise that resulted in the appellant being restricted to asking questions about nine criminal convictions as opposed to 41.

[151] The application by trial counsel was misguided. Trial counsel's submissions and evidence in cross-examination before us reveal: his belief that he needed permission to cross-examine on the character of Ricky Borden; and because the appellant would testify, the Crown would inevitably apply for "adoption of his [the appellant's] criminal record for the purposes of propensity".

[152] Whatever the motivation for the application, the trial judge erred in law to restrict the appellant's right to cross-examine the complainant and then to permit the Crown to introduce, as an exhibit, bad character evidence of the appellant—demonstrating 11 prior convictions, some for the very offences he was on trial for.

[153] The common law rules concerning admissibility of evidence proffered by an accused as opposed to evidence the Crown wishes to advance are not linear. For example, an accused is always at liberty to call evidence of his good character. The Crown is precluded from advancing good character evidence of its witnesses.

[154] There are four generally accepted ways that a jury may hear bad character evidence of an accused outside the incident alleged in the indictment: 1) a successful application by the Crown to adduce similar fact evidence (*R. v. Handy*, 2002 SCC 56); 2) by the accused having put his character into issue—usually by calling evidence of his or her good character (*R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.) at p. 352, leave to appeal granted on other grounds, [1981] S.C.C.A. No. 187, (1981) 56 C.C.C. (2d) 576 (S.C.C.); 3) if the evidence is relevant to a key element of the Crown's theory of the case, such as motive, opportunity or means (see *R. v. Davison, DeRosie and MacArthur, supra*; *R. v.*

Hinchey, [1996] 3 S.C.R. 1128, at para. 135; *R. v. Lewis*, [1979] 2 S.C.R. 821); or 4) by testifying, thereby permitting cross-examination on prior convictions pursuant to s. 12 of the *CEA*.

[155] In the first three cases, the prejudicial effect of the proffered evidence must be outweighed by its probative value. In the last, a trial judge has a discretion to limit or even preclude Crown cross-examination on the accused's criminal record to protect his fair trial interests (*R. v. Corbett*, [1988] 1 S.C.R. 670).

[156] The Crown argues that trial fairness was not jeopardized by the Crown introduction of the appellant's criminal record. Hence, there was no miscarriage of justice. With respect, I am unable to agree.

[157] In support, it advances two propositions. First, the appellant, by suggesting the complainant's criminal record revealed a violent disposition, put the appellant's character in issue—thereby opening the door for the Crown to lead evidence about the appellant's violent disposition. Second, the jury would have inevitably heard about the appellant's criminal convictions because he had to testify to have any hope of success in his intended reliance on self-defence.

[158] The Crown cites no case law standing for the proposition that outside a true *Scopelliti* situation, cross-examination of a Crown witness on prior discreditable conduct, including criminal convictions for violent behaviour, crosses the Rubicon into putting the accused's character into issue. There is high authority that says the opposite (see *R. v. Butterwasser*, [1948] 1 K.B. 4 (C.C.A.) cited with approval in *R. v. Corbett, supra* at p. 696; *R. v. A.(W.A.)*, [1996] M.J. No. 556 at para. 14).

[159] In Sopinka, the authors refer to *Scopelliti* type scenarios merely creating a potential that introduction of a victim's violent character may impliedly put the accused's own character in issue, but accept that in a non-homicide case, it does not. They write:

> §10.102 By introducing evidence of a victim's character for violence where the defence is self-defence, the accused may be impliedly adducing evidence of good character and thereby put his or her own character in issue. However, in *R. v. Butterwasser*, the English Criminal Court of Appeal considered a case where the accused was charged with wounding with intent to do grievous bodily harm. The accused's counsel cross-examined the victims called as Crown witnesses on their previous convictions, including convictions for violent offences, in order to show that they were more likely to have been the aggressors than the accused. The accused did not testify and the issue was whether the Crown could lead evidence

> of the accused's bad character and previous convictions. The Court held that, merely by attacking the witnesses for the prosecution and suggesting they were unreliable, the accused did not put his own character in issue. This decision appears to be eminently sound if the right of an accused to make full answer and defence is to be preserved. On the other hand, a distorted picture of events should not be permitted to go before the jury, as can occur where the accused seeks to leave the erroneous impression that he or she is a peaceful person. The trial judge must weigh the evidence and balance a variety of factors in the particular circumstances of the case. The weighing process involves an exercise of judgment or discretion and is not an application of a bright line. The trial judge may limit or exclude proffered evidence of the deceased's bad character if its potential prejudice outweighs its probative value.

[160] There is certainly authority for the proposition that in true *Scopelliti* situations the door may be open to lead evidence of the accused's violent character (*R. v. Jackson*, 2013 ONCA 632). But even then, the law is not as clear as the Crown suggests (per Rosenberg J.A. in dissent in *R. v. Jackson*, *supra* at para. 134; *R. v. Wilson*, [1999] M.J. No. 239 at para. 45).

[161] The most that can be said is that in true *Scopelliti* situations, a trial judge may be called upon to determine if the probative value of an accused's criminal record exceeds the prejudicial effect. Admission of bad character evidence as part of the Crown's case or in rebuttal is by no means automatic (*R. v. Williams*, 2008 ONCA 413).

[162] As noted earlier, this case was the farthest thing from being a "*Scopelliti*" scenario. There was no deceased. The complainant and the appellant had known each other their whole lives. The appellant was well aware of the reputation of the complainant for violence. There was no danger that the jury might view the demise of the victim as a civic improvement (*R. v. Varga* (2001), 150 O.A.C. 358).

[163] The complainant was alive and well, fully able to respond to questions about his past discreditable conduct, including those that demonstrated his violent disposition.

[164] This case, like so many, was all about credibility. It was not about whether the appellant acted peremptorily in self-defence, being fearful of the complainant's violent disposition.

[165] There were two diametrically opposed versions of what happened outside the house party. The complainant, somewhat supported by other Crown witnesses, described an unprovoked knife attack by the appellant before throwing him to the

ground. The appellant said he fought the much bigger complainant. He was being pummelled by the complainant when he used his knife to stop the attack. If his version were believed, or at least raised a reasonable doubt, self-defence could relieve him of criminal liability.

[166] As to the second proposition advanced by the Crown, that the jury would inevitably have learned of the appellant's criminal record, I am inclined to accept that the jury would have likely heard at least some of the appellant's criminal antecedents. But I am not persuaded this excuses the detrimental impact of the trial judge's ruling on trial fairness.

[167] I say this for two reasons. First, the jury hearing of some or even all of the appellant's criminal convictions only addresses one side of the problem. It omits the fact that the appellant was precluded from cross-examining the complainant on the full extent of his criminal record.

[168] Some debate the probative value of criminal convictions for matters outside of perjury or offences of dishonesty, particularly where it is the accused who is facing cross-examination. But that is not the traditional view. Nor does it stand up to the rationale that permits wide scope for cross-examination of ordinary witnesses.

[169] Evidence of prior criminality is circumstantial evidence about character that bears on credibility. It may lead to inferences that because a witness is not a law-abiding individual, his or her conscience may not be engaged by the oath to tell the truth, or possess fear of criminal consequences should they lie under oath. The fact, number and type of convictions may bear on the willingness of a jury to draw the inference that the witness may not be trustworthy.

[170] The reason criminal convictions are relevant is explained in a number of cases. Martin J.A. in *R. v. Stratton* [1978] O.J. No. 3536 (a case challenging the ability of the Crown to cross-examine an accused on his criminal record) explained:

> [41] Unquestionably, **the theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial reliability of the witness**: see *R. v. Dorland* (1948), 92 C.C.C. 274, [1948] O.R. 913, 6 C.R. 485; *R. v. Goldhar* (1957), 117 C.C.C. 404, [1957] O.W.N. 138; *United States Express Co. v. Donohoe* (1886), 14 O.R. 333 at pp. 347-8; Cross on Evidence, *supra*, p. 341.

[42] In *Gertz v. Fitchburg R. Co.* (1884), 137 Mass. 77, Holmes, J., said at p. 78:

> On the other hand, when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit. 1 Gilb. Ev. (6th ed.) 126.
>
> [Emphasis added]

[171] This recognition of how proof of prior criminality can impact credibility was repeated by Dickson C.J.C. in the seminal decision of *R. v. Corbett*, *supra*, pp. 685-686:

> [22] The history of the *Canada Evidence Act*, s. 12 and its predecessors is set out in La Forest J.'s reasons and in the judgment of Martin J.A. in *R. v. Stratton* (1978), 42 C.C.C. (2d) 449 (Ont. C.A.). Cross-examination of an accused with respect to prior convictions has been permitted in Canada since an accused first became competent to testify on his own behalf in 1893: *R. v. D'Aoust* (1902), 5 C.C.C. 407 (Ont C.A.). What lies behind s. 12 is a legislative judgment that prior convictions do bear upon the credibility of a witness. In deciding whether or not to believe someone who takes the stand, the jury will quite naturally take a variety of factors into account. They will observe the demeanour of the witness as he or she testifies, the witness' appearance, tone of voice, and general manner. Similarly, the jury will take into account any information it has relating to the witness' habits or mode of life. There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, but it is a fact which a jury might take into account in assessing credibility.
>
> [23] This rationale for s. 12 has been explicit in the case law. See, e.g., *R. v. Stratton*, *supra*, at p. 461, per Martin J.A., "Unquestionably, the theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or [page 686] convictions, is a relevant fact in assessing the testimonial reliability of the witness."
>
> [24] Similarly, in *R. v. Brown* (1978), 38 C.C.C. (2d) 339 (Ont. C.A.), at p. 342, per Martin J.A., "The fact that a witness has been convicted of a crime is relevant to his trustworthiness as a witness."
>
> [25] An American court identified the rationale behind a similar rule in the following language:

> What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know. So it seems to us in a real sense that when a defendant goes onto a stand, "he takes his character with him...." Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey, as in the case at bar, though the violations are not concerned solely with crimes involving "dishonesty and false statement."
>
> (*State v. Duke*, 123 A.2d 745 (N.H. 1956), at p. 746; quoted with approval in *State v. Ruzicka*, 570 P.2d 1208 (Wash. 1977), at p. 1212).

[172] As noted earlier, the complainant had amassed a record of some 41 convictions. Some were offences of dishonesty such as fraud and multiple breaches of undertakings to judicial officials to abide by court orders. The convictions for violent behaviour also went to his character and hence indirectly to his credibility.

[173] It is well accepted that the best predictor of how a person behaves is his or her past behaviour. In everyday life, we look at the character or disposition of how people act to help inform us—the law is no different (see: *R. v. McMillan*, *supra* at paras. 25-27).

[174] A witness who denies having committed a break and enter may well be disbelieved by a jury who hears of his eight prior convictions for that very offence. Not only are the prior convictions ones of dishonesty, they demonstrate his character to engage in that very activity.

[175] Past acts of violence committed by a witness may well help a trier of fact decide how the incident in question unfolded, regardless if self-defence is a live issue (see: *R. v. Sims* (1994), 87 C.C.C. (3d) 402 (B.C.C.A.) at paras. 68-70).

[176] Now, if that witness were an accused, there are concerns over moral and reasoning prejudice if a jury hears of his or her criminal antecedents. The evidence of prior criminal acts, particularly for the same offence, are inadmissible, not because of lack of relevance, but based on policy. That policy is discussed by Justice Binnie, in the context of proffered similar fact evidence in *R. v. Handy*, *supra*. Writing for the full Court, he explained the risk of prejudice to an accused:

> [31] The respondent is clearly correct in saying that evidence of misconduct beyond what is alleged in the indictment which does no more than blacken his character is inadmissible. Nobody is charged with having a "general" disposition or propensity for theft or violence or whatever. The exclusion thus generally prohibits character evidence to be used as circumstantial proof of conduct, i.e., to allow an inference from the “similar facts” that the accused has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence. The danger is that the jury might be confused by the multiplicity of incidents and put more weight than is logically justified on the ex-wife’s testimony (“reasoning prejudice”) or by convicting based on bad personhood (“moral prejudice”): Great Britain Law Commission, Consultation Paper No. 141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996), at s. 7.2.
>
> [32] This is a very old rule of the common law. Reference may be made to seventeenth-century trials in which the prosecution was scolded for raising prior felonious conduct, as for example to Lord Holt C.J. in Harrison’s Trial (1692), 12 How. St. Tr. 833 (Old Bailey (London)), at p. 864: “Are you going to arraign his whole life? Away, Away, that ought not to be; that is nothing to the matter.”
>
> [33] Subsequently, and most famously, the general exclusionary rule was laid down by Lord Herschell L.C. *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 (P.C.), in these terms, at p. 65:
>
> > It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.
>
> [34] The court spoke there of “criminal acts”, but this has been broadened to include any proffered “similar facts” of a discreditable nature (*Robertson*, *supra*, at p. 941; *B. (L.)*, *supra*, at pp. 45-46), a category which includes the conduct alleged by the ex-wife in this case.
>
> [35] The dangers of propensity reasoning are well recognized. Not only can people change their ways but they are not robotic. While juries in fourteenth-century England were expected to determine facts based on their personal knowledge of the character of the participants, it is now said that to infer guilt from a knowledge of the mere character of the accused is a “forbidden type of reasoning”: *Boardman*, *supra*, at p. 453, per Lord Hailsham.
>
> [36] The exclusion of evidence of general propensity or disposition has been repeatedly affirmed in this Court and is not controversial. *See Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Morin*, [1988] 2 S.C.R. 345*; R. v. B. (C.R.)*, [1990] 1 S.C.R. 717; *R. v. Arp*, [1998] 3 S.C.R. 339.

[177] It was the existence of this potential for prejudice to an accused’s fair trial right that animated the Court in *R. v. Corbett* to recognize a trial judge’s discretion

to preclude or limit the Crown's cross-examination of an accused on his or her criminal record (per La Forest J., in dissent at pp. 727-728).

[178] Although Justice La Forest dissented in result, his analysis was accepted by the majority judgment written by Dickson C.J.C. Both jurists referenced the decades long recognized duty on the trial judge to instruct the jury on the limited use they can make of the evidence of the accused's criminal record. LaForest J. explained:

> [118] To mitigate against this risk of prejudice, the law came to require that the judge give a limiting instruction to the jury to the effect that while such evidence could be used to impeach the accused's credibility, it could not be used as proof of the accused's guilt: see, e.g., *R. v. Fushtor* (1946), 85 C.C.C. 283 (Sask. C.A.), at p. 354. Additionally, it was held that the trial judge may, and sometimes must, where appropriate, provide guidance to the jury respecting the tenuous probative value of some convictions in relation to credibility; see *Brown* and *Stratton, supra*.
>
> (p. 722)

See also pp. 690 and 692 per Dickson C.J.C.

[179] This leads me to my second reason for rejecting the Crown's suggestion that the judge's ruling did not impact trial fairness—what the jury heard about the use they could make of the appellant's criminal record.

The trial judge's directions

[180] The trial judge gave mid-trial instructions about how the jury could use evidence of prior convictions. The first was at the end of Ricky Borden's evidence. He told the jury:

> So ladies and gentlemen of the jury, you have heard that Ricky Borden has previously been convicted of a number of different criminal offences. You may use the fact, number and nature of those convictions to help you decide how much or little you believe of or rely upon Ricky Borden's evidence in deciding this case. Some convictions, for example, convictions for events that involved dishonesty, if there were any, may be more important than others in deciding how much or how little you will believe of or rely upon the testimony of a witness in deciding a case. Other factors that may be appropriate to consider include the number of convictions and whether they are recent or happened a long time ago.
>
> A previous conviction does not necessarily make Ricky Borden's evidence unbelievable or unreliable. A previous conviction or convictions are only one of

> the many factors for you to consider in assessing Ricky Borden's testimony. Okay? And I'll get ... I'll repeat that when I give you my final instructions as well.

[181] Nothing was said about the evidence of the character of the complainant bearing on who the likely aggressor was in the altercation.

[182] During the cross-examination of the appellant, the Crown squarely raised the violent past of the appellant and his tendency to be "quick to anger". Crown counsel presented the appellant's edited criminal record:

> Q. So, Mr. Borden, you have recent convictions for uttering threats in the last five or six years for which you've done periods of time in custody. Correct?
>
> A. Yes, sir.
>
> Q. And you have a conviction for assault with a weapon in 2007 for which you did some jail time.
>
> A. Yes, sir.
>
> Q. And a conviction from 2004 for aggravated assault for which you did a year in jail?
>
> A. Yes, sir.
>
> Q. That was in this province, I think ... in another part of the province, was it?
>
> A. In Yarmouth.
>
> Q. Yarmouth. And in May of 2004, several assault convictions and an assault ... assaulting a peace officer. And you did jail time then.
>
> A. Yes, sir.
>
> Q. Okay. And an uttering threats charge in 2002 for which you did eight months jail. You recall ... do you recall that matter, sir?
>
> A. I think there's something else supposed to be there, too. Yes. It's there, so ...
>
> Q. And an assault in 2000 for which you did jail time.
>
> A. Yes.

[183] The Crown then concluded with the suggestion that the appellant is someone with a temper, and quick to anger, which had led to him being convicted for crimes of violence:

> Q. Okay. Fair to say that, on occasion, you can be quick to anger?
>
> A. Yes, sir.

Q. Okay. You have a bit of a temper?

A. Yes, sir.

Q. Okay. And that's led to you having convictions for crimes of violence in the past?

A. Yes, sir.

[184] The trial judge then gave his second mid-trial instruction on the relevance of this evidence:

> So you have heard that John Arthur Borden has previously been convicted of a number of criminal offences. You must not use any prior convictions to conclude or to help you decide that because Mr. Borden has committed crimes in the past, he must have committed the crimes of which he has been charged. You may only use those convictions to help you decide how much or little you will believe of or rely upon Mr. Borden's testimony in deciding this case. Previous convictions do not necessarily make the evidence of Mr. Borden unbelievable or unreliable. It is only one of many factors for you to consider. And, again, as I mentioned, in my final instructions, you will hear that repeated.

[185] After jury addresses, there were pre-charge discussions. I will return to these later.

[186] With respect to the criminal convictions of the complainant, the judge, in his final instructions, told the jury that they could use those to help them decide how much to rely on his evidence, and in helping to decide who the aggressor might have been in the altercation with the appellant:

> This next instruction applies to Ricky Borden, who admitted that he has previously been convicted of various criminal offences. It does not apply to John Borden. I will give you separate instructions about how you may use his prior convictions to help you reach your decision. You may only use the fact, number, and nature of those convictions to help you decide how much or little you will believe of and rely upon the testimony of Ricky Borden in deciding this case. You may also use his evidence in helping you to decide who the aggressor might have been in the altercation between Ricky Borden and John Borden. Some convictions, for example, ones that involve dishonesty, may be more important than others in deciding how much or little you will believe of and rely upon the testimony of a witness in deciding this case. Other convictions, for example, of driving offences, may be less important.
>
> Consider, as well, whether the previous convictions are recent or happened a number of years ago. An old conviction may be less important than a more recent one. Use your common sense and experience in considering their impact. A

> previous conviction, even many of them, does not necessarily mean that you cannot or should not believe or rely upon the testimony of Ricky Borden to help you decide this case. The prior convictions are just one of many factors for you to consider. Use your common sense and experience.

[187] The trial judge then turned his attention to the criminal record of the appellant. Unfortunately, he gave confusing and contradictory instructions.

[188] He told them:

> This next instruction applies to John Borden. John Borden admitted that he previously has been convicted of criminal offences. You must not use the fact that John Borden has committed offences in the past or the number or nature of the offences he has committed as evidence that he committed the offences for which he is now charged or is the sort of person who would commit these type of offences. You may only use the fact, number, and nature of those convictions to help you decide how much or little you will believe and rely upon the testimony of John Borden in deciding this case. **You may also use this evidence in helping you to decide who the aggressor might have been in the altercation that took place between John Borden and Ricky Borden.**
>
> [Emphasis added]

[189] Shortly later, the trial judge added:

> It is important that you understand that you must not use the fact, number, or nature of the prior convictions to decide or help you decide that John Borden is the sort of person who would commit the offences charged or that he is a person of bad character and, thus, likely to have committed the offences charged.

[190] The respondent says that the trial judge recognized that he had to give a limiting instruction regarding the appellant's prior convictions and that while the instructions could have been clearer, there was no error. With respect, I am unable to agree.

[191] As pointed out by Dickson C.J.C. in *Corbett*, "…the best way to balance and alleviate these risks is to give the jury all the information, but at the same time give a clear direction as to the limited use they are to make of such information" (p. 691).

[192] With respect, the instruction by the trial judge was anything but clear. As Justice Fichaud mused in *R. v. Greenwood*, 2014 NSCA 80 at para. 144, when faced with inconsistent jury instructions about the use the jury could make of certain evidence: "What was the jury to make of this instruction?"

[193] Here, the trial judge told the jury that they could use the appellant's prior convictions for assault in determining who was the aggressor in the altercation. I agree with the appellant's submission:

> It is difficult to imagine a scenario where evidence could not be used to determine that one is "the sort of person to commit the offences" yet could be used to determine if he was the aggressor – presumably, on the basis of the sort of person he was.

[194] That proposition is precisely what Crown counsel suggested to the jury in his cross-examination of the appellant and in his closing address. Counsel pointed to the fact that Ricky Borden had only been convicted of uttering threats, whereas the appellant had been convicted of a number of assaults. I earlier quoted the relevant portion of the Crown's jury address. It is convenient to repeat it:

> John Borden did admit that he was angry inside only for a minute, but he was angry. And I would submit to you that, in reality, John Borden's evidence that he was not the aggressor outside is just not supported and it's not believable. And, indeed, you can consider in determining who the aggressor in this fight was. **And they can put before you evidence of prior convictions of both Ricky Borden and John Borden.**
>
> My friend put to Ricky Borden the fact that he had been previously convicted of uttering threats and he acknowledged that. **You did not hear of Ricky Borden being convicted of an assault ever. You did hear of John Borden being convicted of a number of assaults and this is from a man who has, by his own admission, a temper.**
>
> [Emphasis added]

[195] Indeed, during the pre-charge discussions the Crown urged exactly the instruction that suggested the jury could use the appellant's record as evidence of his aggressive nature and likelihood of assaulting the complainant without provocation. The following exchange illustrates:

> MR. MURRAY: My Lord, with respect to the use of the record ... criminal record, I know Your Lordship has given the pre ... mid-trial charges about the use of record as it relates only to character but, really, the application that was brought by **Defence was to adduce Mr. Ricky Borden's record not just ... well, not for character, per se, but also to show a propensity for violence and that he was more likely the aggressor. And the Court allowed the Crown to adduce portions of John Borden's record for the same purpose.**
>
> So I would think that there would need to be some direction given to the jury that they can use the records for that purpose as well as simply, you know, leaving it at

> an assessment of credibility. I don't know if you have to go to a full explanation of character evidence, but that's really what it ... I think what the case law said that it was. But, certainly, an instruction to say that you can consider it to determine who was the aggressor in the altercation. Use it in their deliberations in that regard.
>
> . . .
>
> MR. MURRAY: I mean this is ... certainly, assessing credibility in that they each gave different versions of what happened and each suggested the other was the aggressor, I see what Your Lordship is saying. You kind of ... you know, the jury is going to have to sort that out. But my understanding was the *Scopelliti* application was specifically to adduce Ricky Borden's record to say that he had a propensity for violence and was more likely the aggressor and to support self-defence. That was the whole nature of the application. And the corollary of that was that John Borden's record could be put forward to ... in that regard, too. So I think it's a little more than just credibility.
>
> THE COURT: Right. **But it is a sauce ... what's sauce for the goose is sauce for the gander, too. I mean it applies to both Ricky Borden and John Borden.**
>
> MR. MURRAY: Right. Should apply the same to both, yes.
>
> THE COURT: Yeah.
>
> MR. TAN: Yes, I agree, My Lord. I think that was the application. Ultimately, the balancing act that the Court underwent does ... my friend has accurately stated what I think we had agreed upon.
>
> [Emphasis added]

[196] The jury instructions were flawed. The jury were told they could and could not use the appellant's criminal record for an impermissible purpose. As Justice Fichaud reasoned in *R. v. Greenwood*:

> [148] In *Daley*, *supra*, Justice Bastarache (para. 32) said: "The trial judge must set out in plain and understandable terms the law the jury must apply when assessing the facts." In my view, the Chief Justice's instructions on the permissible and impermissible uses of the Lynds' excerpts were, in the circumstances of this case, inconsistent, and not plain and understandable.

[197] The ruling by the trial judge on the misguided "*Scopelliti* application" and the flawed jury instructions are sufficient to mandate a new trial.

[198] Although not necessary in light of this conclusion, I will briefly address another flaw—the lack of any direction by the trial judge about prior statements.

PRIOR STATEMENTS

[199] The trial judge gave no legal instructions to the jury about prior statements. There were three witnesses that were cross-examined on prior statements: the complainant, Ricky Borden; Marcus Timmons; and Norman Borden.

[200] I will focus only on the statement of Marcus Timmons and how it related to the evidence of Ricky Borden.

[201] Marcus Timmons was a friend of the complainant. He was to be a Crown witness. The defence had to call him. Mr. Timmons was referred to his recorded police statement. In the statement, he told the police that the complainant described to him how the appellant had used a knife to stab him when he was on top of the appellant "getting the better of him".

[202] During his testimony, Mr. Timmons professed to have no memory of the events of June 28, 2013, nor even of giving a recorded statement to the police on July 3, 2013. After a successful application to have Mr. Timmons declared an adverse witness, defence counsel was permitted to cross-examine.

[203] Mr. Timmons then said he remembered the complainant, in the ride to the hospital, telling him that he had said to the appellant, "Let's go outside and settle this like men". As to Ricky Borden describing that he was getting the better of the appellant when stabbed, Timmons was either pretty sure or might have said that—he would not say for certain:

> Q. Okay. Do you recall Ricky Borden saying to you that he was getting the better of John-John when he got stabbed?
>
> A. I can't remember.
>
> Q. You don't remember that. Okay.
>
> A. I'm pretty sure he.... He might have. I'm not gonna say for certain.

[204] He denied a recollection that Ricky Borden told him he was on top of the appellant when the knife was produced:

> Q. Okay. Do you have any recollection of Ricky Borden saying to you that he was on top of John-John, John Borden, during the fight, before Mr. John Borden pulled his knife?
>
> A. No, I have no recollection of that.

[205] Defence counsel then played portions of Mr. Timmons' recorded police statement that documented those very details. Timmons confirmed that it was his voice on the audio recording, and that it refreshed his memory a little bit. His evidence was:

> Q. Having heard that, does that refresh your memory at all?
>
> A. A little bit, yes.
>
> Q. Okay. And so do you now have any recollection of Ricky Borden reporting that to you?
>
> A. Still no, not really, but if I said it, it happened.

[206] Two things stand out. First, Mr. Timmons acknowledged that his recorded statement did refresh his memory, albeit "a little bit". Second, he made an utterance that a trier of fact could use to conclude that he adopted what he had told the police as true.

[207] The only things the trial judge said to the jury about the evidence of Marcus Timmons was he "had very little independent recollection of what had happened at the party"; and "Mr. Timmons couldn't remember giving the statement to Corporal Thompson", but he did "identify his voice in the audio recording of an interview he gave to RCMP Corporal Thompson on July 3rd, 2013".

[208] More was needed to assist the jury in assessing what had been adopted by Marcus Timmons, and how, if at all, that evidence could impact on the key issue at trial: the credibility of the complainant and the appellant.

[209] Ricky Borden denied he had told Marcus Timmons that the appellant had stabbed him when he was either on top of the appellant or when he was "getting the better of" the appellant. If the jury accepted that Ricky Borden had said either of these things to Marcus Timmons, this was relevant to the jury's assessment of the credibility of Ricky Borden.

[210] The only reference to inconsistencies is found in the judge's general instructions to the jury about credibility assessment. He said this:

> There is no magic formula for deciding how much or how little to believe of a witness's testimony or how much to rely on it in deciding this case. But here are a few questions that you might keep in mind during your discussions: Did the witness seem honest? Is there any reason why the witness would not be telling the truth? Did the witness have any reason to give evidence that is more

> favorable to one side than to the other? Did the witness seem able to make accurate and complete observations about the event? Did he or she have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine? Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which he or she testified? Did any inability or difficulty that the witness had in remembering events seem genuine or did it seem made up as an excuse to avoid answering the question? Did the witness seem to be reporting to you what he or she saw or heard or simply putting together an account based on information obtained from other sources rather than personal observation? **Did the witness's testimony seem reasonable and consistent as he or she gave it? Is it similar to or different from what other witnesses said about the same events? Did the witnesses say or do something different on an earlier occasion? Do any inconsistencies in a witness's evidence make the main point of the testimony more or less believable and reliable? Is the inconsistency about something important or is it a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? A deliberate lie is always serious and may taint all of the witness's evidence. Is the inconsistency because the witness said something different or because he or she failed to mention something?** Is there any explanation for it? Does the explanation make sense? What was the witness's manner when he or she testified? How did he or she appear to you?
>
> [Emphasis added]

[211] There is of course nothing wrong with this general direction. But it was just as much about internal inconsistencies or inconsistencies as between witnesses. It provided no assistance on the potential for the jury to find that Ricky Borden had said something entirely different about how he had been stabbed, and the impact that prior inconsistent statement could have on their credibility assessment of the key crown witness on a significant detail.

CURATIVE *PROVISO*

[212] The Crown invites us to conclude that whatever missteps were made by the trial judge in his rulings or jury instructions, we should nonetheless dismiss the appeal because there has been "no substantial wrong or miscarriage of justice". That is how the Court's power in s. 686(1)(b)(iii) of the *Criminal Code* is defined.

[213] I would decline that invitation. To uphold a conviction pursuant to s. 686(1)(b)(iii), the burden is on the Crown to establish that the error is either harmless—it could not have had any impact on the verdict; or if there were serious errors that would otherwise justify a new trial or an acquittal, the evidence against

the accused was so overwhelming that a conviction was inevitable. (see: *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697; *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86; *R. v. Trochym*, [2007] 1 S.C.R. 239, 2007 SCC 6; *R. v. Van*, 2009 SCC 22).

[214] Justice Moldaver restated the guiding principles succinctly in *R. v. Sekhon*, 2014 SCC 15:

> [53] As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error . . . not been made" (*R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617, aff'd in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28). Flowing from this principle, this Court affirmed in *Khan* that there are two situations where the use of s. 686(1) (b)(iii) is appropriate: 1) where the error is harmless or trivial; or 2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31).

[215] The trial judge's ruling on the "*Scopelliti*" application limited the appellant's right to cross-examine the complainant. It is inappropriate to invoke the *proviso* where the legal error impacts trial fairness. The error was exacerbated by flawed jury instructions that suggested they could use evidence of the appellant's propensity to engage in violence to decide the credibility contest between the complainant and the appellant. Furthermore, the jury was not given important instructions about the potential impact of the prior inconsistent statement allegedly made by the complainant on a very significant matter.

SUMMARY AND CONCLUSION

[216] There were two versions of events about a violent encounter outside a house party. The complainant said the appellant stabbed him with a knife. The appellant said that when he was confronted by the complainant, a fight ensued. Only while being pummelled by the complainant did he stab the complainant in self-defence.

[217] Appellant's trial counsel believed that he needed the trial judge's permission to cross-examine the complainant about his violent character as evidenced by numerous criminal convictions for uttering threats or similar conduct. The trial judge erred by ruling that the appellant could only cross-examine the key Crown witness on nine of his 41 convictions and the Crown could introduce in its case in chief an exhibit demonstrating the appellant's convictions for violent offences.

[218] The Crown argued to the jury that the appellant had a violent disposition as evidenced by his convictions. The judge told the jury they could use the appellant's criminal convictions to help them decide who was the aggressor in the altercation, yet also told them the convictions could not be used to reason he committed the offences charged or that he is a person of bad character and, thus, likely to have committed the offences charged.

[219] The trial judge also gave inadequate assistance to the jury in these circumstances about the potential impact if they found that a witness had adopted a prior statement.

[220] I would dismiss the appellant's motion to adduce fresh evidence. The trial judge's instructions on self-defence could have been clearer, but did not amount to reversible error.

[221] In light of the impact on trial fairness, it is not appropriate to apply the *proviso*. I would therefore allow the appeal, quash the convictions and order a new trial, to be undertaken at the discretion of the Crown.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Scanlan, J.A.