

2019 BCPC 15
British Columbia Provincial Court

R. v. Thompson, 2019 BCPC 15

2019 CarswellBC 222

REGINA v. JENNIFER YVONNE THOMPSON

G.M. Rideout Prov. J.

Heard: October 18, 2018; October 19, 2018; December 10, 2018

Judgment: February 7, 2019

Docket: New Westminster 80096

Counsel: Christina Godlewska, for Crown
Molly Shames, for Accused

Subject: Contracts; Criminal

G.M. Rideout Prov. J.:

I. INTRODUCTION

1 Jennifer Yvonne Thompson (the “accused”) is charged with eight **fraud** related offences involving five different credit cards over a time frame of November 22, 2015, through to March 8, 2016.

II. BACKGROUND

2 In each case, the Crown alleges that an unknown male co-perpetrator would phone a representative at Toronto Dominion Bank purporting to be the primary account holder of a Toronto Dominion Bank Visa card.

3 After answering various security questions, the co-perpetrator would request that a secondary user be issued a Visa card. It is alleged that the secondary user is the accused. It was part of his modus operandi that the co-perpetrator would use variations of the accused’s name, such as: Jennifer Thompson, Yvonne Thompson, Jennifer Yvonne Thomson, etc.

4 By slightly altering the name of the secondary user, a distinct profile would be established in the bank software system that would bypass any security software that would normally trigger a **fraud** alert, which would result in the credit card being deactivated.

5 The co-perpetrator would ask that the secondary Visa card be sent to a Toronto Dominion Bank branch for pickup by the secondary user. These telephone conversations between the co-perpetrator and the bank representatives were audio recorded and played in court.

6 Closed Circuit Television recordings retrieved from various Toronto Dominion Bank branches purportedly identify the accused entering the bank and picking up four of the five credit cards. These four credit cards were purportedly activated and then used by the accused at the Starlight Casino in New Westminster.

7 Count 1 of the Information alleges that between November 21, 2015, and November 28, 2015, the accused fraudulently possessed, used, trafficked in or permitted another person to use credit card data contrary to s. 342(3) of the *Criminal Code* of Canada (the “Code”). The credit card in relation to this allegation was never picked up by

anyone. This credit card was never activated.

III. ISSUE

8 The Court has to determine whether or not the circumstances surrounding the four activated credit cards should be classified as similar fact evidence and admitted in relation to Count 1 of the Information.

IV. POSITION OF THE PARTIES

9 The Crown position can be summarized as follows:

- That the accused “must have been working in some kind of concert” with the male co-perpetrator as he used personal information of the accused, such as her actual address and date of birth, in his telephone calls with representatives of the Toronto Dominion Bank;
- That the mannerisms and tone of voice of the co-perpetrator are similar in relation to all of the recorded conversations;
- That the content of the conversations between the co-perpetrator and the bank representatives are similar;
- That it was significant that the secondary cards were to be sent to specific Toronto Dominion Bank branches;
- That it could not be a coincidence that the personal information of the accused used by the co-perpetrator in requesting a secondary card in relation to Count 1 was replicated with minor alterations to personal information of the accused some three weeks later in a second call by the co-perpetrator to a representative of the Toronto Dominion Bank; and,
- That it is also objectively improbable that, by coincidence, another person not connected to the accused and not connected to the activated credit cards contacted the Toronto Dominion Bank in November 2015 to add the accused to the primary Visa account.

10 The defence position can be summarized as follows:

- The fact that the male co-perpetrator used personal information pertaining to the accused cannot support an inference, standing alone, that the accused was somehow a party to the **fraud**;
- While there is an inferential link that the co-perpetrator and the accused are linked to the four activated Visa credit cards, there is no action whatsoever by the accused that would inferentially link her to the un-activated Visa credit card in Count 1;
- It is the absence of similarities that drives any cogency, being an absence of any evidence of a relationship between the accused and the co-perpetrator, that is the point in this case; and,
- Other than the co-perpetrator somehow being privy to personal information of the accused, there remains a total absence of any similarity in the actions of the accused in Count 1 consistent with her actions in the remaining **fraud** counts.

V. ANALYSIS

11 The Supreme Court of Canada (the “SCC”) has established that similar fact evidence is presumptively inadmissible as it is propensity reasoning: *R. v. Perrier*, 2004 SCC 56, at para. 17.

12 The onus falls on the Crown to satisfy the court, on a balance of probabilities, that the probative value of the

evidence in relation to a particular issue outweighs its prejudicial effect.

13 Where similar fact evidence is being adduced on the issue of identification, the court must satisfy itself that there is a high degree of similarity between the acts for the evidence to be admissible: *ibid*, at para. 19.

14 The SCC has also directed that courts “ . . . must be cautious when using propensity evidence in the context of identity” to be sure, on a balance of probabilities, that the same person committed the acts in question such that we can safely say it is not a coincidence nor a case of mistaken identity: *ibid*, at para. 20.

15 The SCC has provided guidance in relation to factors to consider in connecting the similar facts to the circumstances set out in the charge(s) in *R. v. Handy*, 2002 SCC 56, at para. 82:

82. The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:

- (1) proximity in time of the similar acts: *D. (L.E.)*, *supra*, at p. 125; *R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), at p. 345; *R. v. Huot* (1993), 16 O.R. (3d) 214 (C.A.), at p. 220;
- (2) extent to which the other acts are similar in detail to the charged conduct: *Huot*, *supra*, at p. 218; *R. v. Rulli* (1999), C.C.C. (3d) 465 (Ont. C.A.), at p. 471; *C. (M.H.)*, *supra*, at p. 772;
- (3) number of occurrences of the similar acts: *Batte*, *supra*, at pp.227-28;
- (4) circumstances surrounding or relating to the similar acts (*Litchfield*, *supra*, at p. 358);
- (5) any distinctive feature(s) unifying the incidents: *Arp*, *supra*, at paras. 43-45; *R. v. Fleming* (1999), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.), at paras. 104-5; *Rulli*, *supra*, at p. 472;
- (6) intervening events: *R. v. Dupras*, [2000] B.C.J. No. 1513 (QL) (S.C.), at para. 12;
- (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

16 I find that it is an important “other” factor in this case that the male co-perpetrator is a fraudster. This factor requires a pressing need to exercise caution in applying propensity evidence in the context of identification of the accused in relation to Count 1.

17 The concept of **fraud** has been defined in the Shorter Oxford Dictionary (3rd Edition) to include in part: 1. The quality of being deceitful; 2. Criminal deception; to use a false representation to obtain an unjust advantage or to injure the rights or interests of another; 3. An act or instance of deception, a dishonest trick; 4. An act or instance of deception

18 I find that the personal information of the accused provided by the co-perpetrator to the Toronto Dominion Bank representative in relation to Count 1 does contain personal information similar to personal information of the accused provided by the co-perpetrator to bank representatives in the remaining counts.

19 In its submissions, the Crown theorizes that the accused “must have been working in some kind of concert” with the male co-perpetrator as he had her personal information including her real address and date of birth.

20 The Crown further submits that the actions of the accused in relation to the activated credit cards “is circumstantial evidence of some kind of contact and collusion” with the male co-perpetrator.

21 The Crown has not identified where, when or how, the accused is “working in some kind of concert and in “some kind of contact and collusion” with the male fraudster co-perpetrator.

22 I find that it is likely the accused was a party to the offence charged in Count 1. The question then turns to determine whether or not the Crown has established on a balance of probabilities that there is a link between the accused and the similar acts.

23 The SCC in *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 54, emphasized the importance of linking the evidence of similar facts and the accused:

54 A link between the accused and the alleged similar acts is, however, also a precondition to admissibility. This requirement was set forth in *R. v. Sweitzer*, [1982] 1 S.C.R. 94, at p. 954:

Before evidence may be admitted as evidence of similar facts, there must be a link between the allegedly similar facts and the accused. In other words there must be some evidence upon which the trier of fact can make a proper finding that the similar facts to be relied upon were in fact the acts of the accused for it is clear that if they were not his own but those of another they have no relevance to the matters at issue under the indictment.

Similarly, in *Harris v. Director of Public Prosecutions*, [1952] A.C. 694 (H.L.), it was held, at p. 708, that “evidence of ‘similar facts’ cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime”.

24 I do not find that the Crown has clearly established the necessary link between the alleged similar facts and the accused in relation to Count 1. It is the conduct of the co-perpetrator that inculcates the accused in relation to Count 1 solely from personal information apparently in his hands. How he came into the possession of the accused’s personal information remains a mystery.

25 I cannot be sure on a balance of probabilities that it is the accused acting in concert or in collusion with the male co-perpetrator in requesting the issuance of a secondary Visa card from the Toronto Dominion Bank representative in relation to Count 1.

IV. DISPOSITION

26 I find that it would be dangerous to admit the similar fact evidence in this case where identification is in issue. This is particularly so as the evidence that inculcates the accused originates from a fraudster.

27 The application by the Crown to admit similar fact evidence in relation to Count 1 is dismissed.

Provincial Court of British Columbia