

**SUPREME COURT OF CANADA**

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| **Citation** : R. *v.* Dorfer, 2011 SCC 50, [2011] 3 S.C.R. 366 | **Date** : 20111021  **Docket** : 33952 |

Between:

Franklin Shane Dorfer

Appellant

and

Her Majesty The Queen

Respondent

**Coram :** McLachlin C.J. and LeBel, Fish, Rothstein and Cromwell JJ.

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| **Reasons for Judgment** :  (para. 1)  **Dissenting Reasons:**  (para. 2) | McLachlin C.J. (Rothstein and Cromwell JJ. concurring)  LeBel J. (Fish J. concurring) |

R. *v.* Dorfer, 2011 SCC 50, [2011] 3 S.C.R. 366

Franklin Shane Dorfer *Appellant*

v.

Her Majesty The Queen *Respondent*

**Indexed as:  R. *v.* Dorfer**

2011 SCC 50

File No.:  33952.

2011:  October 21.

Present:  McLachlin C.J. and LeBel, Fish, Rothstein and Cromwell JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Charge to jury — Use of criminal record of third party suspect — Trial judge erring in his instruction about the limited use of third party suspect’s criminal record but error did not occasion substantial wrong or miscarriage of justice — Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).*

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(*b*)(iii).

APPEAL from a judgment of the British Columbia Court of Appeal (Prowse, Lowry and Frankel JJ.A.), 2010 BCCA 440, 293 B.C.A.C. 300, 496 W.A.C. 300, 262 C.C.C. (3d) 59, 80 C.R. (6th) 169, [2010] B.C.J. No. 1984 (QL), 2010 CarswellBC 2730, affirming the accused’s convictions for breaking and entering and sexual assault. Appeal dismissed, LeBel and Fish JJ. dissenting.

*Timothy J. Russell*, for the appellant.

*M. Joyce DeWitt-Van Oosten*, *Q.C.*, for the respondent.

The judgment of McLachlin C.J. and Rothstein and Cromwell JJ. was delivered orally by

1. The Chief Justice — The majority of the Court would dismiss the appeal, LeBel and Fish JJ. dissenting. While we are persuaded that the presiding judge erred in law in his instruction about the limited use of Mr. Babcock’s criminal record, we are of the view that this error did not occasion any substantial wrong or miscarriage of justice, given the fact that propensity reasoning relative to Mr. Babcock’s record was never placed before the jury either implicitly through the examination of witnesses or explicitly through the submissions to the jury, and given the absence of any evidentiary foundation to support a propensity instruction with respect to Mr. Babcock’s record.

The reasons of LeBel and Fish JJ. were delivered orally by

1. LeBel J. (dissenting) — With respect, I agree with Prowse J.A., dissenting, that the trial judge erred in law in instructing the jury on the use of the criminal record of a third party suspect. More particularly, the judge misdirected the jury in saying that such evidence could be used only to test the credibility of the third party. In my opinion, this error of law cannot be cured by the application of s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. The evidence against the accused was not overwhelming. The error of law was clear and significant. In the context of this trial, it could not be considered to be harmless. For these reasons, I would allow the appeal, quash the conviction and order a new trial on the same charges.

*Judgment accordingly.*

Solicitors for the appellant:  McCullough Blazina Dieno & Gustafson, Victoria.

Solicitor for the respondent:  Attorney General of British Columbia, Victoria.