
CANADA / JUDGMENT

R. v. Duberry

2013 BCSC 2514

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2514 R. v. Duberry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Duberry,

2013 BCSC 2514

Date: 20131115

Docket: 157040

Registry: Victoria

Regina

v.

Shawn Ray Duberry

Restriction on Publication: Pursuant to 486.4(2) C.C.C.

Before: The Honourable Mr. Justice Bracken

Oral Ruling on Voir Dires

Counsel for the Crown:

P. Cheema, Q.C.

Counsel for the Accused:

T. Russell

Place and Dates of Trial/Hearing:

Victoria, B.C.

July 15, 16 and 18, 2013

July 22 - 26, 2013

Place and Date of Judgment:

Victoria, B.C.

November 15, 2013

- [1] THE COURT: There are four voir dres for decision this morning and I will deal with them in order of the 9-1-1 call, the witness support person -- actually, there are five -- the surveillance video from McDonald's, which I do not think is under challenge, and the challenge for cause with respect to the jury, and then the voluntariness and Charter issues respecting the statement.
- [2] Just before we start, Mr. Russell, are you committed somewhere in the next -- at 9:30?
- [3] MR. RUSSELL: I alerted the 101 clerks that I may be late.
- [4] THE COURT: All right.
- [5] MR. RUSSELL: So I think we're okay, thank you.
- [6] THE COURT: I will try and go as fast as I can.
- [7] With respect to the 9-1-1 call, the Crown seeks to enter a recording and transcript of a 9-1-1 call made by Mr. Lumsden, who made certain observations of a male who was allegedly acting aggressively towards a female in the downtown area of Victoria on the late afternoon of April 15, 2012. In the call, Mr. Lumsden told the 9-1-1 operator that he saw what he described as abusive behaviour by the male toward the female, and saw the male grab the female, and that he was yelling and screaming at her.
- [8] Mr. Lumsden will be called as a witness at the trial, and it is expected that he will be able to describe what he saw and what he reported to the police. There is no suggestion that Mr. Lumsden is under any disability, under any difficulty with respect to coming to court, and it is my understanding he will be a Crown witness, regardless of my ruling here.
- [9] The Crown's main submission is that the recording and transcript of the call provide a description of the events as they were happening, and include a description of the angry demeanour of the male and the immediate reactions and observations of the witness. The Crown suggests that the recording can be admitted as part of the res gestae.
- [10] The accused objects to the admission of the recording, as there is no necessity to admit the recording and transcript when the witness will attend at the trial and testify himself. He says the requirements for admissibility have not been met.

- [11] Generally evidence of what a witness reported to the police is admissible only in certain circumstances. Such evidence has been admitted to show the witness was sober at the time of the call: *R. v. Young*, 2003 BCSC 1590. In *R. v. Stapleton*, 2003 BCCA 444, a 9-1-1 call recording was admitted to rebut a suggestion of recent fabrication by the witness.
- [12] A recording of a 9-1-1 call was admitted as part of the *res gestae* exception to the hearsay rule in *R. v. Nicholas*, [2004] O.J. No. 725 (Ontario Court of Appeal). In that case, however, the witness who made the call was too mentally unstable to testify at the trial. The evidence was admitted as being necessary and reliable. That case is distinguishable from this on the ground that there is no suggestion that Mr. Lumsden cannot testify fully as to what he saw and what he did.
- [13] A 9-1-1 call recording was admitted for the same reasons in *R. v. Rahmanzadeh*, [2005] O.J. No. 925. The Crown referred to several other cases where the evidence met the test for the *res gestae* exception, but the evidence served another purpose, such as to illustrate the emotional state of the caller or where the truth of the content of the call was challenged.
- [14] The Crown also referred to the decision in *R. v. Zurkoski*, 2000 BCPC 194, where the recording of the call was admitted as a "contemporaneous recording of the events as they unfolded" in a dangerous driving case. The recording was effectively a running narrative of the details of the offence of dangerous driving as it was taking place. While this appears to be a stronger authority for the Crown, the nature of the driving that was being described as it happened was no doubt the best evidence of the detail of the offence. There is no such reason to admit the recording here.
- [15] The Crown also points out that any danger that might arise from the inability of the defence to be able to cross-examine the witness is removed because the witness will be available for cross-examination. Nevertheless, there still must first be a proper basis upon which to admit the evidence.
- [16] The defence referred to the decision of *R. v. Grahovac*, 2008 ONCJ 211, where the complainant made a 9-1-1 call, but at trial did not remember calling or reporting an assault upon her. The recording of the call was thus the only evidence against the accused. The court dismissed the application to admit the recording as it did not constitute a *res gestae* statement, in that there was nothing spontaneously uttered during the call. The court referred to McWilliam's *Canadian Criminal Evidence*, Fourth Edition, Canada Law Book, 2003, Volume 7 at para. 73, where the rationale for the rule was that the caller was "so emotionally overpowered by a contemporaneous event that the possibility of concoction or distortion can be disregarded". See also on that point, *R. v. Fattah*, 2006 ABQB 85.
- [17] Here I see no purpose to the admission of the recording, other than to support the evidence of Mr. Lumsden by way of what is essentially a prior consistent statement. There is nothing in the recording to suggest panic or excitement that would lead to greater reliability, and there is no evidence of necessity.

[18] In the result, the recording will not be admitted.

[19] With respect to the s. 486.1(1) application, this is an application by the Crown pursuant to s. 486.1(1) of the Criminal Code to allow a support person to be present with the complainant in a trial of the accused on charges of assault causing bodily harm on January 1st and 15th, 2012, assaults simpliciter on March 19th, April 8th, and April 15th, 2012, and uttering a threat to cause death or bodily harm to the complainant on April 15th, 2012. April 15th was the date that the accused was arrested on these offences.

[20] The matter is scheduled for a jury trial to commence December 2, 2013.

[21] The complainant in this matter was 14 years of age at the time of the alleged offences and she is now 17. The Crown wishes to have her testify by closed-circuit television at the trial, as she did, notwithstanding defence objections, at the preliminary inquiry. At the time of the alleged offences, the accused was 20 years old.

[22] Section 486.1(1) provides:

In any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who has a mental or physical disability, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

[23] Section 486.2 provides:

(1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

[24] Section 486.2(7) stipulates that if an order allowing the complainant to testify from a place outside the courtroom is made, arrangements must be made to allow the accused and his counsel to communicate while watching the testimony. Crown counsel assures me those arrangements have or can be made.

[25] The only test the Crown must meet upon an application of this nature is to show that the witness is under the age stipulated by the Criminal Code and that the arrangements will not interfere with the administration of justice.

- [26] There is nothing in this case that would suggest the proper administration of justice will be interfered with if the Crown application is allowed. It seems to me that the Crown has satisfied the two requirements set out in the provisions of the Criminal Code, and therefore, subject to any technical difficulties that result in an interference with the proper administration of justice, the Crown application is allowed.
- [27] I turn now to the challenge for cause.
- [28] This is an application for directions with respect to a challenge for cause in the selection of a jury where the accused is a member of a visible minority.
- [29] The Crown has agreed that challenge for cause is appropriate, and the appropriate question or questions have been or will be settled by counsel prior to the selection of the jury on December 2, 2013.
- [30] The defence has elected to have rotating triers, and wants the jury panel to be excluded while each prospective juror is questioned.
- [31] Section 640(2.1) and (2.2) of the Criminal Code state:
- (2.1) If the challenge is for cause and if the ground of the challenge is one that is not mentioned in subsection (1), on the application of the accused, the court may order the exclusion of all jurors -- sworn and unsworn -- from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.
- (2.2) If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until 12 jurors -- or 13 or 14 jurors, as the case may be, if the judge makes an order under subsection 631(2.2) -- and any alternate jurors are sworn.
- [32] Those sections were added as amendments to s. 640 to allow the use of static triers in 2008.
- [33] The issue came before this court in Victoria on two prior occasions. On April 15, 2013, Mr. Justice Johnston made an order in *R. v. Planes*, 2013 BCSC 897, that if an application is made under s. 640(2.1) to exclude jurors, the language of that section requires the challenge to be tried by two jurors to be chosen. The two jurors would try each juror on the challenge until a full jury and any alternates were selected. This is a provision for what is now commonly referred to as static triers.
- [34] On May 3, 2013, in *R. v. Nelson*, 2013 BCSC 1075, Madam Justice Power decided that the court retained its inherent jurisdiction to exclude the panel while each juror is tried on the challenge, even though rotating triers are being used.
- [35] In both cases, the decisions were considered decisions, and I am left in the somewhat awkward position of choosing the decision to follow.

- [36] Absent the decision in *R. v. Swite*, 2011 BCCA 54, I may have been inclined to follow the procedure the trial judge in that case did and assume that if there is to be a challenge for cause, it results from the application by the accused pursuant to s. 640(2.1). If so, the triers would be static triers; that is, the same two triers would test all of the prospective jurors on the challenge question until a full jury was chosen. Under that procedure, the court has the discretion to exclude the panel during the challenge process.
- [37] The new amendments removed or did not create any reference to the use of rotating triers. The Court of Appeal in *R. v. Swite* clearly followed decisions in Ontario to state that the use of rotating triers is still available to counsel in the selection of a jury in a challenge for cause situation.
- [38] The purpose of excluding the panel is so that prospective jurors will not have the opportunity to observe others answer the question or questions put to them, and thus use that knowledge to avoid jury service when they have no bias, or perhaps to engineer selection for the jury when they do. Obviously, it cannot be known whether any prospective juror would violate their oath, no matter how many times they watched others answer the questions. However, the practice seems to be developing to simply "be on the safe side" and exclude the panel when counsel requests that it be done.
- [39] I leave for another day the question of what, if any, evidence might be required to support the application under s. 2.1 if it is resisted by the Crown.
- [40] In *Swite*, the Court of Appeal clearly contemplated the use of rotating triers under s. 640(2) and static triers will only result if the defence makes an application under s. 640(2.1).
- [41] In this case, it is common ground that the defence has not made such an application under subsection (2.1) and does not intend to do so. The defence wishes to have rotating triers and submits that the court retains the inherent jurisdiction to exclude the panel.
- [42] In *Nelson*, Madam Justice Power held that the court does retain that jurisdiction to exclude the panel on the ground that the jurisdiction of the court as it was prior to the amendments still exists and cannot be seen to be taken away, except by means of clear language in the Criminal Code. Thus, in her decision, it is still at the court's discretion in the case of rotating triers to exclude unsworn members of the jury panel while prospective jurors are tried on the challenge question.
- [43] Madam Justice Power relied, in part at least, on *R. v. Sandham*, [2009] O.J. No. 1853, where, after considering the provisions of s. 640, Mr. Justice Heeney said at para. 42:

On a plain reading of these subsections, it is clear that the accused (but not the Crown) is presented with an option. If he chooses to make an application under s. 640(2.1) for an order excluding all of the sworn and unsworn jurors, the new procedure will apply, and the challenge for cause will utilize two static triers. On the other hand, if he chooses not to make an application under s. 640(2.1), the old procedure will apply, and the challenge for cause will utilize two rotating triers.

- [44] In the result, applying *R. v. Swite* and considering *R. v. Sandham*, I will follow the decision of Madam Justice Power in *R. v. Nelson* and direct that, absent an application by the defence under s. 640(2.1), the jury in this case will be selected using rotating triers and the panel will be excluded while prospective jurors are challenged for cause.
- [45] The next is the admissibility of the surveillance tapes from McDonald's Restaurant. I did not take it that, Mr. Russell, there was a serious challenge to that at the end of the voir dire.
- [46] MR. RUSSELL: No, I believe I virtually conceded that point.
- [47] THE COURT: All right. With that, then, I will simply make the direction that that evidence will be admissible.
- [48] I turn now then to the issue of the voluntariness of the statement given by the accused to the Victoria Police on April 16, 2013, and the defence application to exclude it pursuant to s. 24(2) of the Charter.
- [49] The accused makes application pursuant to s. 24(2) of the Charter of Rights and Freedoms for the exclusion of a statement made to the Victoria Police on April 16, 2012, following his arrest on charges of assault, assault causing bodily harm, sexual interference, uttering threats, and mischief. Three charges related to the sexual assault, sexual interference, and possession of child pornography were severed from this indictment and will proceed separately.
- [50] The statement given by the accused commenced at 1122 hours on April 16th and ended at 1221, something just slightly under an hour. The Crown seeks to prove that the statement was voluntary, and the defence submits that the police acted in a manner to intimidate the accused, and submits that the statement was not voluntary. The defence also asserts that the rights of the accused pursuant to ss. 7 and 10(b) of the Charter were violated by police conduct.
- [51] The key point in the submission of the defence is that the police officer who took the statement misinformed the accused about the availability of a face-to-face meeting with a lawyer, rather than receiving legal advice over the telephone.
- [52] The background facts giving rise to the arrest are that the accused was the subject of a 9-1-1 call suggesting that he was acting aggressively towards a female. Police attended and initially treated the matter as an assault investigation and perhaps an uttering threats investigation, but later took on a more extensive investigation.

- [53] In the course of the investigation, it emerged that the accused and the female were in a romantic relationship, and while he was 20, she was only 14 years of age. The accused was arrested at approximately 1655 hours on April 15th. He was taken to the Victoria Police Station and placed in an interview room. He was described as somewhat angry and, when given a direction by one of the officers, the officer said that the response by the accused was to tell the officer to "fuck off".
- [54] The accused is described as a large, well-muscled man. The police clearly considered him to be a threat to behave aggressively by his demeanour, and thus ensured there were a number of police officers nearby in the cellblock in the event of any trouble. As it turned out, the accused did not act in any way that could be called physically aggressive, although he did not display a compliant and cooperative attitude towards the police. I will say more about that in a moment.
- [55] The accused was offered a telephone and advised that he could speak to counsel. There is no suggestion he was not properly advised of his right to counsel prior to his contact with legal aid duty counsel. Initially a police officer made contact with duty counsel by telephone, advised the person who answered that the plan of the police was to hold the accused overnight for a court appearance the next morning. The officer then passed the phone to the accused and allowed him to speak privately with duty counsel.
- [56] At the end of the conversation, the officer said that he asked the accused if he was satisfied with the call. The accused said that he was; however, I note that the call commenced at some point after 6:45 p.m., and was fully completed by 6:57 p.m., so the call lasted only a very few minutes.
- [57] Following the telephone call, one of the officers indicated that he wanted the accused to provide his fingerprints and the accused reacted somewhat angrily. He said that he would not comply, referred to the process as being, as he put it, "bullshit". As he was at that point expressing some anger and frustration toward the officer, other officers remained in the area, including Sergeant Tolmie, a supervisor, who was in possession of a taser. There were no threats or aggressive movements made toward the accused by the police or by the accused toward them; however, it was submitted that the atmosphere was intimidating. All of the events, or virtually all of them, were captured on a video-only cellblock camera.
- [58] The accused suggests that some of the police evidence was embellished or that the evidence of the officers lacked credibility respecting the perceived threat from the accused.
- [59] There was no aggressive behaviour by the police, other than a strong show of force. The video of the accused in the cellblock indicates nothing that would suggest the accused was in a rage, as one officer described him, or that he was physically confrontational. The evidence of the officers is that they feared he may get violent, and the presence of several officers in the cellblock is perhaps evidence of that fear. However, I emphasize there was no gesture of violence or gesture of threat by the accused towards the police, or likewise by the police towards the accused, at least not that could be seen on the video.

- [60] Counsel for the accused suggests that what the police claimed was happening is overstatement or embellishment, and he submits that that suggestion is confirmed by the cellblock video. While I agree, to the extent there was no obvious difficulty with the accused, it is difficult to measure the attitude of the accused from a video. The quality of the video is not sufficient to discern all of the behaviour that may have prompted the police to have such a strong presence in the cellblock.
- [61] Whatever it was, it was clear that there was no confrontation, nor was there any obvious resistance to police direction by the accused. There was one point in the video where it appeared that the accused was responding somewhat slowly to a direction of one of the officers, but he did respond as directed and there was nothing more than that.
- [62] It was suggested that one of the officers, Sergeant Tolmie, told the accused that he had no intention of becoming engaged in any physical contact with the accused, but that if the accused acted out, he would be tasered. That was denied by the officer, but certainly from the video and the police evidence, there was a clear perception that they acted as though they had something to fear from the accused, even though there was no physical indication of aggression from the accused or obvious resistance by him.
- [63] Equally, there was a clear indication from the police that, should there be any aggressive act on his part, the taser would likely be used, as well as whatever physical force the officers believed to be reasonable and necessary.
- [64] In the end, the police chose to defer the taking of fingerprints until the next day, rather than attempt to force the issue. The point was discussed with the accused by one of the officers, and it was apparently accepted by him that his fingerprints would be taken and they were taken the next morning without any difficulty.
- [65] I will deal with the issue of voluntariness first. The Crown accepts that it has the burden to prove beyond a reasonable doubt that the statement was given voluntarily. The Crown referred to *R. v. Oickle*, [2000] 2 S.C.R. 3, for the principle that the issue is whether there was a threat or promise from a person in authority that might induce the accused to make an untrue statement. At para. 51, the court in *Oickle*, canvassed a broad range of circumstances where improper inducements or threats took place, or where statements of an accused might be ruled involuntary. The issue of oppressive conduct towards an accused by the police was discussed at para. 69, where the court commented:

Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.

Wigmore perhaps summed up the point best when he said that voluntariness is "shorthand for a complex of values": Wigmore on Evidence I also agree with Warren C.J. of the United States Supreme Court, who made a similar point in *Blackburn v. Alabama* at p. 207:

[N]either the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, "The abhorrence of society to the use of involuntary confessions also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.

- [66] Here it is not alleged that there was any physical violence upon the accused by the police at any time, nor is it suggested that the accused did anything that was overtly threatening toward the police. I suspect that the size and obvious strength and fitness of the accused, coupled with a somewhat surly attitude, put the police on the alert, so that in the event there was difficulty, it could be managed.
- [67] After the accused was placed in a cell for the night, he was approached by one of the officers. The issue of fingerprints was discussed, and in a general way it was suggested by the officer that cooperation was easier than confrontation. Whether the accused would have acted inappropriately at any time is not known. The fact is, he did not. He was likely angry and somewhat surly, but beyond that, there is nothing to suggest he would have caused problems for the police. The police wisely held off, rather than force the issue of fingerprints, and the conduct of the police following that was professional. The accused was offered refreshment and allowed to sleep through the night.
- [68] I find that the strong police presence was designed to ensure that there were no problems in managing the accused within the cellblock. There is no evidence the accused was tasered or that the weapon was deployed toward the accused or at all. There is nothing to suggest that the conduct of the police caused the accused to be intimidated in any way, and no evidence that anything that happened the night of his arrest between him and the police resulted in his providing a statement to the police the following day that was the result of threats, violence, threats of violence, oppression, or intimidation by the police or any inducement.
- [69] As noted, at one point in the evening, while the accused was in the cellblock and in the presence of several police officers, he was directed by one of the officers to do something. His response to the officer was said to be to utter the words "fuck off" towards the officer. That is hardly the sign of a man cowed and intimidated by the police.
- [70] I find that there is no merit to the submission that the accused was intimidated by the police to a degree that would make his statement to the police the next day involuntary. I find that the Crown has proven the statement to be voluntary beyond a reasonable doubt.

- [71] I turn next to the application of the accused to exclude the statement because of a violation of his rights under s. 7 and s. 10(b) of the Charter.
- [72] The evidence is that the morning after the accused's arrest, he was approached by Constable Lastiwka and invited out of his cell and taken to an interview room. The interview was recorded. The officer introduced himself and inquired whether the accused had eaten his breakfast. The accused was advised that the conversation was being recorded. He was advised why he was in custody, and it was confirmed that he had a brief conversation with legal aid counsel the night before.
- [73] At one point in the statement, on p. 8, line 179 of the transcript, after the accused was told of the likely charges he was facing, Constable Lastiwka advised the accused that he had the right to speak to a lawyer. The accused was then asked if he wanted to speak to a lawyer. The conversation that took place thereafter was as follows:

Okay, um, or if I was to, you know, take this table and, you know, start

[The accused]: That's understood

Q Start breaking pieces, okay, so that's mischief, all right, so now those are the five offences. You had an opportunity to speak to legal aid on, on the four of them, yesterday, um, there's also a mischief part of it as well, so, um, you have a right to speak to a lawyer today. If you would like to, to do that, you can also speak to legal aid. You know you can speak to any lawyer that you want or legal aid you spoke to yesterday. You could, it's, it's your choice, if you want to talk to a lawyer or not. Would you like to talk to a lawyer?

[The accused]: Yeah, sure.

Q So okay, so we'll head downstairs. Do you have a particular lawyer that you'd like to talk to or that we could try to get you in contact with or what? What would you like to do?

[The accused]: Just legal aid's fine.

Q Okay, so let's head downstairs then. We'll get you set up with that, okay. Did you want to bring your apple with you?

[The accused]: Mmm.

Q Okay, so the conversation that you have with legal aid, we'll set that up. Excuse me, it's going to be in private and, um, if you remember, there are five different offences, so do you think you can recall those or did you want me to run through those with you one more time?

A No, I can recall.

Q You know them, got them. Okay, or I can write them down for you too if you wanted, so okay.

Q Okay, let's go over to the left here and we can have -- and we have some interview rooms for making phone calls. Uh here, yeah, just come in, on in here, there Shawn, and I'll grab a phone for you. Okay.

A I'd rather do it in person than a phone call.

Okay, well, you get, you get a phone call 'cause we don't have them here.

[Accused] Okay, then I won't bother 'cause the last one didn't really help, he was

Q Okay, well, uh, you do have a right to talk to a lawyer, but it would be by telephone, so you're, you're telling me that you'd rather, you'd rather not talk to a lawyer?

A Uh, yeah, 'cause the over the phone doesn't really do anything for me. They don't really help.

Q Okay, so just so that I understand, do you at this point in time, do you want to talk to a lawyer, yes or no?

A In person.

Q Okay, I -- I can't offer it to you in person, so the option to speak to a lawyer would be -- would be by telephone. I don't have --

A I guess there's no point.

Q Pardon me?

A Then I guess there's no point.

Q Okay, all right, well, um, let's head back upstairs then, I guess then. Yeah, whenever somebody is, is under arrest and brought in, they get an opportunity to speak to a lawyer and that's by telephone.

A They don't really help.

Q Okay, well, I'm just covering these things off with you 'cause they are your rights, so

A Pretty shitty rights.

Q Pardon me?

A They're pretty shitty rights.

Q Well, it's the Charter of Rights, it's what you're entitled to as a Canadian citizen, so

[74] That is the end of the main part of the quotation. The conversation carried on through pp. 9 and 10, where the accused returned to the interview room with the officer, his rights were repeated to him, the fact that he had been offered a telephone call to a lawyer was confirmed with him, and the conversation then took place. After that, the officer continued the conversation by asking the accused a series of questions, which the accused for the most part answered.

- [75] Counsel for the accused submits that in restricting the accused to telephone access, the officer misinformed the accused as to his right to speak with counsel and effectively defeated his expressed right to discuss the matter with counsel in person.
- [76] Counsel argued that it was not uncommon for local lawyers to attend at the police station to speak with persons in custody, and established that there is a room designed specifically for that purpose. Counsel also pointed out that the accused said that he wanted to discuss possible pleas of guilty to some of the charges, but wanted to contest others.
- [77] The accused says that Constable Lastiwka should have advised the accused that legal advice might be available to him in person at the police station, if he could contact a lawyer willing to attend. He also submits that even if the accused could not locate a lawyer willing to attend at the police station, it was possible for a lawyer to see the accused once he arrived at the courthouse and before he made a court appearance. He argues that by failing to give that advice to the accused, the police breached the informational component of the Charter of Rights, s. 10(b), and the accused was not able to attempt to have counsel see him at the police station or the courthouse prior to his appearance in court.
- [78] The accused argues that therefore the statement was obtained in violation of the accused's Charter rights and that the admission of the statement would impact trial fairness and bring the administration of justice into disrepute if it were to be admitted at the trial. He argues that the statement should be excluded pursuant to s. 24(2) of the Charter.
- [79] Counsel for the accused referred to several cases. None are directly on point, but each of them confirmed the importance of proper advice respecting the right to contact counsel and the requirement to provide an opportunity to implement that right.
- [80] In *R. v. D.T.H.*, [2004] O.J. No. 824, the Ontario Superior Court of Justice excluded the statement where a lawyer had arrived at the police station, but was not permitted to have a meeting with the accused in private and the police continued with the interview. At para. 16 of that decision, Mr. Justice O'Connor stated:

Of far more concern is Detective Corey's prohibiting Mr. D.T.H.'s further private consultation with his lawyer after Mr. Sakran's phone calls [Mr. Sakran being the lawyer]. This conduct clearly amounts to a serious infringement of his Charter rights. I find Detective Corey's reasons for doing so, as he explains in his evidence above, to be unconvincing and without merit.

- [81] In that case, the lawyer was at the police station and could have had a meeting with the accused, but the police prevented it. That is not the situation here.

- [82] In *R. v. Balgobin*, 2011 ONCJ 108, the court excluded a statement where the officer told the accused that he could take as much as two hours before he was able to talk to duty counsel, and he would wait in a jail cell in the meantime. The context of the issue was an impaired driving prosecution. The accused chose to supply breath samples rather than wait in the jail cell. The court found a serious violation of the accused's right to counsel under s. 10(b) and excluded the evidence of the breath test. Again, that is not the situation in this case.
- [83] Here, the accused was offered the opportunity to contact counsel but wanted a meeting in person. He was not prevented from calling a lawyer.
- [84] In *R. v. Veness*, 2007 ABQB 283, the accused was detained in the context of a murder investigation. The accused was initially advised of his Charter rights and he had spoken with a lawyer by telephone. There was some confusion as to whether a lawyer was coming to the police station to speak with him. The officer who was to conduct the investigation, in a similar position to Constable Lastiwka in this case, made it clear that the accused could call a lawyer at any time during their interview.

[85] At para. 33, the court said:

The issue of whether a face to face meeting with counsel is a right guaranteed by the Charter has been addressed by case law. It was suggested by Defence counsel in argument that surely if there is a right to a face to face meeting, it should apply to a murder charge, the most serious of all offences. Counsel pointed to a comment on page 5 of *R. v. Sadownik*, [1988] A.J. No. 101 (C.A.) to suggest a meeting may be mandated for some offences. The quotation is a statement by Harradance J.A. speaking for the majority as follows:

It remains to be decided whether in the case at bar the Respondent was given a reasonable opportunity to retain and instruct counsel. I observe at the outset that *prima facie* there is no obligation on the police to provide the accused in a breathalyser situation with a face-to-face meeting with his counsel. There may be circumstances where that opportunity is necessary. No attempt was made to show that those circumstances existed in the appeal at bar. In my view, in the circumstances of this appeal, had the police denied the Respondent's request for an in-person consultation with his lawyer, they would have been entitled to proceed with the demand.

[86] Further at para. 50 of the same decision, the court said:

This all has to be reviewed contextually. The overriding concern is that the accused understands his rights, especially the right to silence. It should be that if the detainee speaks, it is by his own choice. Has police conduct deprived the suspect of exercising his right to counsel and his understanding of his choices? Here we have an alert, responsive and seemingly intelligent accused. He had spoken to a lawyer. He was obviously aware of his right to remain silent, as after some innocuous discussion, as soon as the detectives got close to a question about the offence, on page 12 of exhibit 40, he clearly indicated "I do not have to answer that."

This is not a situation where the detectives are involved in harsh or invasive questioning. It is a situation where an accused, having received some legal advice on the telephone, displays some confusion about his need or right to have counsel there. The requirement on the police at this point is informational to allow him the ability to call and clear up the misunderstanding. He was clearly given that right. He was also clearly told he could interrupt or stop at any time if he wanted to call counsel. When I review the interaction in total, I am satisfied that the accused understood he had a right to remain silent, his options and he effectively waived any right to contact counsel at that time. At the point this was done and in the subsequent discussions, the accused did not seem confused, in fact, he appeared clear on his right to silence. He later took control and dictated the only manner in which he was willing to give any information to the police, despite their wish to have him answer their questions.

- [87] In its submission, the Crown suggests that the purpose of the right to counsel is to ensure that the person in custody is given a reasonable opportunity to consult with counsel before the police, through questioning, seek evidence from him through a statement: *R. v. Brydges*, [1990] 1 S.C.R. 190, and *R. v. Bartle*, [1994] 3 S.C.R. 173.
- [88] The authorities establish that the purpose of the duty to inform an accused of his s. 10(b) Charter rights is to allow him to make a decision not to give evidence that might incriminate him and how he could exercise that right: *R. v. Therrien*, 2006 BCSC 1739. The obligations upon the police under s. 10(b) is to ensure that a detainee is advised of his right to counsel and to allow a reasonable opportunity to exercise that right: *R. v. Sinclair*, 2010 SCC 35.
- [89] Here, Constable Lastiwka provided the warning required by *R. v. Prosper*, [1994] S.C.J. No. 72, and gave the accused the opportunity to consult with counsel by telephone. It is clear from the interview that the officer was prepared to stop the interview, so that the accused could exercise his right. The accused was not obliged to accept the officer's view that it was unlikely that a lawyer would come to the police station to talk to him. It is also clear on the evidence that the informational component of s. 10(b) was satisfied by advice to the accused upon his arrest, through his contact with duty counsel the night of his arrest, and through the advice given again on the day of the statement by Constable Lastiwka at the commencement of the interview.
- [90] There is no suggestion that the accused did not understand what his rights were or that he was operating in circumstances where he did not have an operating mind.
- [91] In my view, there is no obligation upon the police to ensure that the advice received from the accused's counsel, either legal aid, duty counsel, or private counsel, is adequate and satisfactory: *R. v. Sinclair*, 2010 SCC 35 at para. 32, where the court said:

We conclude that in the context of a custodial interrogation, the purpose of s. 10(b) is to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation he is facing. This is achieved by requiring that he be informed of the right to counsel and, if he so requests, be given an opportunity to consult counsel.

- [92] In this case, the evidence satisfies me that the accused was provided with the appropriate advice respecting his right to contact counsel and was given an opportunity to exercise that right. He spoke to duty counsel the night of his arrest, although the conversation was brief. He was again advised of his rights the following morning, before the interview got underway. He said that he wanted to exercise his rights, indicating at least that he understood them.
- [93] When he was told that he could have access by telephone, he chose to decline that avenue of contact, as he was apparently not pleased with the advice he received from duty legal aid the night before, but he knew his rights and was advised specifically by Constable Lastiwka that he could call any lawyer he chose. He still, having elected not to pursue any telephone contact with counsel, chose to speak with Constable Lastiwka. He could have declined to do so. There was no pressure put upon him by the officer, and the interview was conducted from the outset in a courteous and professional manner.
- [94] I conclude that the police in this case satisfied the informational and implementational components of s. 10(b) of the Charter. I am satisfied that the accused was, as a result of that information, aware of his right to contact counsel and aware of his right to remain silent. He chose not to contact duty counsel and did not take up the invitation to contact his own counsel. Instead, he participated in the interview with the officer and, in all of the circumstances, I cannot find there was a violation of the accused's s. 7 or s. 10(b) rights under the Charter.
- [95] Therefore, the statement is found to be admissible as being both voluntary and not taken in circumstances that result in a violation of the Charter of Rights and Freedoms.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

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