NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. K.F.*, 2010 NSCA 45

Date: 20100521
Docket: CAC 314810
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

K.P.L.F.

Respondent

Publication Ban:	**486.4 (1) Order restricting publication – sexual offences**
Judges:	MacDonald, C.J.N.S.; Bateman and Beveridge, JJ.A.
Appeal Heard:	March 17, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed and a new trial ordered, per reasons for judgment of MacDonald, C.J.N.S.; Bateman, J.A. concurring; Beveridge J.A. concurring in the result by separate reasons.
Counsel:	James A. Gumpert, Q.C., for the appellant Robert C. Stewart, Q.C., for the respondent

486.4 (1) **Order restricting publication – sexual offences –** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(I) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(I) to (iii).

Reasons for judgment: (MacDonald, C.J.N.S.)

[1] Crawford, J.P.C. ruled inadmissible the respondent's confession regarding several sex-related charges involving the three year old son of his then common-law wife. He was subsequently acquitted. The Crown appeals the acquittals that flow from this ruling, asserting that it reflects reversible error. It abandoned its appeal on other acquittals unrelated to this confession. For the reasons which follow, I would allow the appeal and order a new trial.

[2] The complaint was investigated by R.C.M.P. officer Martin Philip Smith, who detained and questioned the respondent at the local detachment. During the videotaped interview, the respondent confessed. The videotape was tendered and viewed by the court as part of the *voir dire* hearing to decide its admissibility.

[3] The judge also heard other *voir dire* evidence, including the respondent's testimony where he confirmed being "nervous", "scared" and "kind of panicky" during the interview. He said that he did not appreciate his right to silence. Nor did he appreciate "that he did not have to go with him at that time".

[4] The judge ruled the statement to be inadmissible with the following brief decision:

> I can deal with this quite briefly. I have taken the time to re-read the **Oickle** case in order to be sure that there was nothing there that would support the Crown's position.
>
> It seems to me that the issue is quite simply dealt with. In light of the absence of any caution to the Defendant informing him of his right to silence, is there any way in which the Crown can discharge its burden to prove the statement free and voluntary beyond a reasonable doubt?
>
> The answer to that question in my opinion is no, especially when, as here, we appear to be dealing with an unsophisticated young man, if not an actually vulnerable one. I note that the course of the interview itself was unexceptional. There was no hint of coercion, intimidation or promise. But the failure to inform the Defendant in any terms, let alone ones that he could understand, that he was or was not under detention or arrest, that he had the right not to talk to the officer and that he was or was not free to leave if he wished, is fatal to the Crown's motion for admissibility.

> I find that the statement in those circumstances cannot be said to have been freely and voluntarily given and, therefore, it is not admissible at trial.

[5] One aspect of this decision, in my respectful view, reflects error. It is the judge's conclusion that there was an "absence of <u>any</u> caution to the Defendant informing him of his right to silence". Yet there was very clear evidence in this regard. In fact, at the outset of the interview, the officer read these cautions:

> Smith Okay. Um so before we get started, I'm going to read you your rights, okay.
>
> K.F.: Yeah.
>
> Smith: You have a right to retain and instruct Counsel without delay, you have the right to free and immediate legal advice by calling 902-420-8825 or 1-800-300-7772 during non-business hours. You have the right to apply for legal assistance through the Provincial Legal Aid Program. Do you understand?
>
> K.F.: Yeah.
>
> Smith: Do you want to call a lawyer now?
>
> K.F.: (Shakes his head - no)
>
> Smith: Uh no?
>
> K.F.: (Shakes his head - no)
>
> Smith: Yes or no?
>
> K.F.: No
>
> Smith: No. Okay. Anytime you do or you want to speak to someone uh you have to say that duty counsel or legal aid will be available right now, in the day time there, there free and you can talk to them if you wish, okay?
>
> K.F.: (Shakes his head - yes) Okay.
>
> Smith: So as soon as you change your mind just let me know. Uh Police Warning, *you need not say anything. You have nothing to hope from any*

> *promise or favour, and nothing to fear from any threat whether or not you say anything, anything you do say may be used as evidence. Do you understand that?*
>
> K.F.: *Yeah*
>
> [Emphasis added.]

[6] While the officer may not have mouthed the exact words “you have the right to remain silent”, the judge’s reference to “the absence of any caution” is puzzling in light of the officer’s plain warning - “you need not say anything ...”. This conclusion is also troubling because “the absence of any caution” appeared central to the judge’s decision to reject this confession. I say this because of her conclusion that otherwise “there was no hint of coercion, intimidation or promise”. In other words, this perceived shortfall (along with her impression that the respondent appeared “unsophisticated ... if not ... actually vulnerable”) would be the only motivating factor to exclude this statement.

[7] In these circumstances, I feel compelled to order a new trial.

[8] In reaching this conclusion, I am well aware that a trial judge is entitled to significant deference when exercising his or her discretion to reject such statements to persons in authority. For example, in **R. v. Oickle**, [2000] 2 S.C.R. 3 (S.C.C.), the Supreme Court of Canada cautions against appeal court interference short of a “palpable and overriding error ...”:

> ¶ 71 Again, I would also like to emphasize that the analysis under the confessions rule must be a contextual one. In the past, courts have excluded confessions made as a result of relatively minor inducements. At the same time, the law ignored intolerable police conduct if it did not give rise to an "inducement" as it was understood by the narrow Ibrahim formulation. Both results are incorrect. Instead, a court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule discussed above. Therefore a relatively minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation: see *Hoilett*, supra. On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary. *If a trial court properly considers all the*

> *relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for "some palpable and overriding error which affected [the trial judge's] assessment of the facts": Schwartz v. Canada, [1996] 1 S.C.R. 254, at p. 279 (quoting Stein v. [page45] The Ship "Kathy K", [1976] 2 S.C.R. 802, at p. 808) (emphasis in Schwartz).*
>
> [Emphasis added.]

See also **R. v. Singh**, 2007 SCC 48.

[9] Here, in my respectful view, this error was “palpable and overriding” and it obviously affected the judge’s assessment of the facts. It was palpable because the judge clearly ignored this evidence. In fact, she specifically stated that it did not exist when obviously it did. It is overriding, given its importance to the outcome. As noted, this misperception was a primary motivating factor for the decision to exclude this evidence and it is also clear from the record that this exclusion jeopardized the Crown’s case. In fact, without this confession, the only eyewitness would have been a three year old boy.

[10] Before concluding, let me add that I am aware of my colleague Beveridge, J.A.’s approach to this appeal. He agrees with the result but not with my analysis *en route*. Specifically, he sees no palpable and overriding factual error. Instead, he carefully and ably analyzes the jurisprudence surrounding police cautions, concluding with what he views as an error of law by the trial judge. In my view, because of the palpable and overriding factual error, this detailed analysis is unnecessary and respectfully may venture beyond the appeal as framed.

[11] In light of all the above, I would allow the appeal and order a new trial.

MacDonald, C.J.N.S.

Concurred in:
Bateman, J.A.

Beveridge, J.A.: (Concurring in the result by separate reasons.)

[12] I have had the advantage of reading in draft the clear and concise reasons of the Chief Justice. I agree the trial judge erred and the appropriate remedy is to allow the appeal and order a new trial, but with respect, differ as to why that is the case.

[13] The facts are simple. I need not refer to them, except where required to explain my reasoning.

[14] The Crown's sole complaint in its notice of appeal is that the trial judge erred in law in ruling inadmissible the videotaped statement by concluding that the police, prior to questioning the respondent, had failed to inform him of his right to silence, when in fact they had done so. It says the evidence of the investigating officer, and the videotape, clearly demonstrate that the respondent was properly informed of his right to retain and instruct counsel as required by s. 10(b) of the *Canadian Charter of Rights and Freedoms* and was informed of his right to silence.

[15] The video-statement, and a transcript of it, were exhibits on the *voir dire* to determine the admissibility of the interview with the investigating officer, Cst. Smith. The Crown is correct that the respondent was informed of his right to retain and instruct counsel. The respondent said he did not wish to call a lawyer. He was told that if at any time he changed his mind he could do so. Cst. Smith then 'cautioned' the respondent by saying the following:

> Police warning:
>
> You need not say anything. You have nothing to hope from any promise or favour, and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence. Do you understand that?

[16] As is obvious, the investigating officer did not in fact specifically advise the respondent that he had the right to remain silent.

[17] The Crown acknowledges that, absent an identifiable error in law, the factual findings, and the application of the legal principles to the facts, cannot be interfered with on appeal, absent palpable and overriding error. Iacobucci, J. for

the majority in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, [2000] S.C.J. No. 38, wrote of the deference owed to a trial judge as follows:

> [22] While determining the appropriate legal test is of course a question of law, applying this test to determine whether or not a confession is voluntary is a question of fact, or of mixed law and fact. See *R. v. Ewert*, [1992] 3 S.C.R. 161, at p. 161; *Ward v. The Queen*, [1979] 2 S.C.R. 30, at p. 42 (per Spence J.); *R. v. Fitton*, [1956] S.C.R. 958, at pp. 983-84 (per Fauteux J.); *R. v. Murakami*, [1951] S.C.R. 801, at p. 803 (per Rand J., Locke J. concurring). Therefore, as this Court held in *Ewert*, a disagreement with the trial judge regarding the weight to be given various pieces of evidence is not grounds to reverse a finding on voluntariness. Respectfully, I believe that the Court of Appeal did just that. Therefore, following *Ewert*, the appeal must be allowed.
>
> ...
>
> [71] Again, I would also like to emphasize that the analysis under the confessions rule must be a contextual one. In the past, courts have excluded confessions made as a result of relatively minor inducements. At the same time, the law ignored intolerable police conduct if it did not give rise to an "inducement" as it was understood by the narrow *Ibrahim* formulation. Both results are incorrect. Instead, a court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule discussed above. Therefore a relatively minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation: see *Hoilett, supra*. On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary. If a trial court properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for "some palpable and overriding error which affected [the trial judge's] assessment of the facts": *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at p. 279 (quoting *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808).

[18] Although the issue of admissibility of evidence, including an utterance made by an accused to a person in authority is, for jurisdictional purposes, a question of law, significant deference is nonetheless owed to the trial judge. This essential distinction was explained by Cromwell J.A., as he then was, in *R. v. Grouse*, 2004 NSCA 108. After reviewing the authorities, he then wrote:

> [44] In summary, I would state the applicable principles of the standard of appellate review of a finding of voluntariness in a conviction appeal as follows:
>
> 1. The judge's findings of fact, including the weight to be assigned to the evidence and the inferences drawn from the facts, are to be reviewed on the standard of palpable and overriding error: **Buhay** at para. 45.
>
> 2. The judge's statements of legal principle are to be reviewed on the standard of correctness: **Oickle** at para. 22.
>
> 3. The judge's application of the principles to the facts is to be reviewed on the standard of palpable and overriding error unless the decision can be traced to a wrong principle of law, in which case the correctness standard should be applied: **Buhay** at para. 45; **Housen** at para. 37.
>
> [45] In my view these principles were admirably and succinctly summarized by Rand, J. in **Fitton** when he stated at p. 962:
>
> > The inference [i.e., as to voluntariness] one way or the other, taking all the circumstances into account, is one for drawing which the trial judge is in a position of special advantage; and unless it is made evident or probable that he has not weighed the circumstances in the light of the rule or has misconceived them or the rule, his conclusion should not be disturbed. (Emphasis added)

[19] The Crown contends that the judge made a palpable and overriding error by finding that the respondent had not been advised by the police of his right to remain silent. With respect, I am unable to agree. The respondent's right to remain silent had no direct bearing on the admissibility of the statement. The respondent did not give notice of an application, nor advance an argument to the trial judge, that his right to remain silent was infringed or denied. *A priori*, he sought no relief under s. 24(2) of the *Charter*.

[20] Nonetheless, the respondent adduced evidence from Cst. Smith that he did not advise the respondent until in the interview room why he had been "picked up", nor that the respondent did not have to speak with the officer. The respondent testified on the *voir dire* he did not know that he did not have to go with the officer, nor answer Cst. Smith's questions.

[21] There is no need to trace the complete history of the so-called 'police caution'. It certainly gained prominence as a result of the "Judges' Rules". Although first formulated in 1912, they were apparently not well known before A. T. Lawrence J. in *R. v. Voisin* (1918), 13 Cr. App. R. 89 set them out. They were:

> 1.– When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
>
> 2.– Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any question or further questions as the case may be.
>
> 3.– Persons in custody should not be questioned without the usual caution being first administered.
>
> 4.– If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words ("against you") of such caution should be omitted, and that the caution should end with the words "be given in evidence."

[22] In the course of giving his reasons for judgment, Justice Lawrence wrote (p.96):

> In 1912, the judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law, they are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.

[23] The Judges' Rules were amended from time to time. Some of the history is set out by the Honourable Fred Kaufman in *The Admissibility of Confessions*, 3rd ed. (Toronto: Carswell, 1979) pp. 150-1. (See also *R. v. Esposito* (1985), 53 O.R. (2d) 356, [1985] O. J. No. 1002.) In the 1964 revision to the Rules five principles were set out, followed by six rules. Principle (e), and related commentary, provided:

> That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.
>
> The principle set out in paragraph (e) above is overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

[24] Rule II stated that where a police officer has evidence affording reasonable grounds to suspect a person has committed an offence, he shall caution that person before putting any questions, or further questions to him. The caution was directed to be "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." (See Kaufman, *ibid* p. 384).

[25] The law in Canada with respect to the significance of the presence or absence of a 'police caution' was, for a relatively brief period of time, unsettled. In *Gach v. The King*, [1943] S.C.R. 250, Taschereau J., for the majority, was emphatic that a caution, where the accused was detained, was a precondition to admissibility. He wrote (p. 254):

> There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given. This rule which is found in Canadian and British Law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority.

[26] Six years later, the court distanced itself from this statement of principle in *R. v. Boudreau*, [1949] S.C.R. 262 where Kerwin J., for the majority stated (p. 267):

> Again with great respect, I think it advisable that it should now be stated clearly what this Court considers the law to be. My view is that it has not been changed from that set out in *Ibrahim v. Rex* [[1914] A.C. 599.] and *Rex v. Prosko* [63 S.C.R. 226.]. The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not

> necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.

[27] This statement as to the role of a caution was recently affirmed by the Supreme Court in *R. v. Singh*, 2007 SCC 48 at para. 31.

[28] There does not appear to be any uniformity in Canada as to the content of the 'police caution'. This was remarked upon by J. L. Salterio in "Form of Warning to the Accused" (1949), 27 *Canadian Bar Rev*iew 67. He there wrote (p. 68):

> There is no uniformity in the form of warning used in the different provinces of Canada. It seems that each province has more or less its own form, directed for use by the Attorney-General of the province, and there are quite a variety in use.

[29] The one used by the RCMP in Saskatchewan at that time was:

> You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence against you at your trial.

[30] As can be seen, this wording is almost, but not quite, identical to the caution given by Cst. Smith to the respondent in this case. In my opinion, the giving of a caution in these, or similar words, appear more geared toward ensuring any utterances made by a suspect are not motivated by a fear of disadvantage or hope of advantage than a clear communication to a suspect that he or she has a right to remain silent. Professor Lee Stuesser in his article " The Accused's Right to Silence: No Doesn't Mean No" (2002), 29 Man. L.J. 149 writes of this distinction:

> **14** The "police caution" -- as noted above -- is given as a matter of course along with the right to counsel. The issue then is largely moot. But Professor Quigley does make the point that a "caution" is not the same thing as a "right." It is fair to say that having a "right to silence," would instil in the accused a greater awareness that statements need not be made to the police. A "caution" informs accused that they need not speak and of the consequences of so doing, but it does not carry the same power or weight as affirming a "right" to remain silent. Ours is

> a rights based society. We understand what a right means. We speak in terms of rights. As the law now stands, the accused has the right to retain and instruct counsel, and "advice" with respect to the choice to speak. It would be a small, but important step to inform the accused of the right to remain silent. The current caution is too tied to the common law wording.

[31] In *R. v. Williams* (1992), 75 C.C.C. (3d) 525, [1992] B.C.J. No. 1783 (B.C.C.A.) statements were excluded pursuant to s. 24(2) of the *Charter* on the basis of an infringement or denial of the accused's rights under s. 9, 10(a) and his right to remain silent. Although the accused had been cautioned he need not say anything, the British Columbia Court of Appeal concluded the trial judge did not err that this was insufficient in the circumstances. The reasons for judgment were by the court. They said:

> **40** The first submission of counsel for the Crown was that in arriving at the conclusion that the police should have informed the respondent of his right to remain silent, the judge was creating a new constitutional right.
>
> **41** Unlike the constitutional right envisaged by s. 10(b) of the Charter to retain and instruct counsel without delay, there is in s. 7 no positive duty imposed upon the police authorities to warn an arrested person of the right to remain silent; and, in relation to that right, there are no words comparable to the concluding words of s. 10(b): "and to be informed of that right."
>
> **42** We agree that s. 10(b) imposes an absolute obligation upon investigating police officers to inform detained or arrested persons of their right to retain and instruct counsel.
>
> **43** The right of a detained person to remain silent, was recognized as a principle of fundamental justice envisaged by s. 7, in Hebert v. The Queen, supra. The jurisprudence has not yet developed to the extent that it can be said with assurance that in every case, and under all circumstances before detained persons are questioned by police officers they must be advised they have the right to remain silent. However, we agree with the judge in this case that more was required than the secondary warning given by Corporal Dalen when taking statement number two; and by Corporal Barkman, when taking statement number three.

[32] There are no shortage of cases where the police have specifically advised the suspect that he or she has the right to remain silent as well as the warning or caution that anything they may say may be used in evidence (see for example *R. v. Lyons* (1996), 173 N.B.R. (3d) 321 at para. 70, aff. 191 N.B.R. (2d) 267 (C.A.); *R.*

v. O'Donnell, [1996] N.B.J. No. 230 (Q.B.) at para 6; *R. v. Strebakowski*, [1995] B.C.J. No. 1722 (B.C.S.C.), at para. 39; *R. v. McColeman* (1991), 5 B.C.A.C. 128, at para. 16).

[33] In *R. v. O'Donnell*, Riordon J. set out the 'caution' found on the form used to take statements as follows (para. 6):

> ...After that took place, the officer gave the usual police caution or warning which is stated on the form to be [the] official warning:
>
> > You need not say anything, you have the right to remain silent. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence. Do you understand?

[34] The purpose of this brief review is to illustrate that whether a suspect has or has not been informed of his or her right to remain silent is essentially a question of fact, driven by the circumstances established by the evidence before the trial judge. The phrase contained in the caution " you need not say anything" may bring home to some that they have a right to remain silent. Here the trial judge did not say there was an absence of ***any*** caution. After all, she had just heard the tape played in court where the officer's words were repeated, and had the transcript of the tape before her. Rather, what she found was an absence of any caution that informed this accused of his right to silence.

[35] The respondent testified he did not know he did not have to go with Cst. Smith or answer his questions. The Crown did not challenge this evidence in cross-examination. It is implicit in the trial judge's reasons that she accepted the respondent's evidence. Indeed, Cst. Smith, in cross-examination, acknowledged he had not told the respondent that he did not have to talk to the officer. Furthermore, it was obvious to the trial judge that the police knew they were dealing with an unsophisticated, if not vulnerable, individual. In my opinion, in these circumstances, the trial judge did not commit a palpable or overriding error in her conclusion that the respondent had not been informed of his right to remain silent.

[36] With respect, where the trial judge fell into error is the significance she placed on the failure by the police to inform the respondent of his right to silence. Let me explain.

[37] As detailed above, the absence of an appropriate caution can be an important factor for a trial judge to consider in assessing whether the Crown has proven beyond a reasonable doubt that the utterances by a suspect were free and voluntary. It may well lead to a conclusion by a trial judge that he or she is not satisfied, in all of the circumstances, a statement by an accused is free and voluntary. An example of this can be found in *R. v. Worrall*, [2002] O.J. No. 2711. The accused was a suspect in the overdose death of his stepbrother. He was not cautioned nor told he was not required to answer police questions. Watt J., as he then was, concluded:

> **105** Despite this admission and its communication to Detective Scott by Detective Constable Chiasson before the video statement began, neither officer thought it appropriate or prudent to caution Joseph Worrall. He was never told that he was not required to answer police questions, or that anything he did say would be taken down and could be used in evidence.
>
> **106** Voluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them. Neither Detective Constable Chiasson nor Detective Scott told Joseph Worrall (after this disclosure) that what he said could be used in his prosecution for an offence arising out of his conduct in connection with the death of Brendan Carlin. This informational deficit assumes an added importance when there is factored in the implicit suggestion that the identification process must await the interview of Joseph Worrall.
>
> **107** In the result, I am simply not satisfied in all the circumstances that Crown counsel has proven beyond a reasonable doubt that the remarks and interview that took place after this disclosure to Detective Constable Chiasson were voluntary. They are inadmissible on that basis in these proceedings.

See also *R. v. J. R.*, [2003] O.J. No. 718.

[38] But the issue of the caution should not be elevated to such an extent as to exclude a proper consideration of all of the relevant factors. The correct approach on a *voir dire* is that set out by Iacobucci J. in *R. v. Oickle, supra*, where he wrote:

> 68 While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, **a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness**. Both the traditional, narrow *Ibrahim* rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable

> conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.
>
> 69 The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J.'s concurrence in *Rothman, supra*, both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process": J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 339. 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.
>
> ...
>
> 71 **Again, I would also like to emphasize that the analysis under the confessions rule must be a contextual one**. In the past, courts have excluded confessions made as a result of relatively minor inducements. At the same time, the law ignored intolerable police conduct if it did not give rise to an "inducement" as it was understood by the narrow *Ibrahim* formulation. Both results are incorrect. **Instead, a court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule discussed above.** ...
>
> [emphasis added]

[39] Rather than consider all of the circumstances and consider if the Crown had been able to prove voluntariness beyond a reasonable doubt, in my opinion, the trial judge foreclosed that conclusion. After finding that there was no caution to the respondent informing him of his right to remain silent, she posed the question:

> [I]s there any way in which the Crown can discharge its burden to prove the statement free and voluntary beyond a reasonable doubt ?

[40] She answered this question as follows:

> The answer to that question in my opinion is no, especially when, as here, we appear to be dealing with an unsophisticated young man, if not an actually vulnerable one. I note that the course of the interview itself was unexceptional. There was no hint of coercion, intimidation or promise. But the failure to inform the Defendant in any terms, let alone ones that he could understand, that he was or was not under detention or arrest, that he had the right not to talk to the officer and that he was or was not free to leave if he wished, is fatal to the Crown's motion for admissibility.
>
> **I find that the statement in those circumstances cannot be said to have been freely and voluntarily given** and, therefore, it is not admissible at trial.
>
> [emphasis added]

[41] The trial judge found the interview to be unexceptional – that there was not even a hint of coercion, intimidation or promise. It was the failure to advise the respondent that he was not under arrest, of his right to remain silent, and whether he was or was not free to leave if he wished, she viewed as being fatal to admissibility. Most significant is the statement by the trial judge that, given these circumstances, the statement cannot be found to be freely and voluntarily given. She did not say she was not satisfied beyond a reasonable doubt – rather she concluded that these circumstances precluded such a finding.

[42] Reasons should, of course, not be held to an abstract standard of perfection (*R. v. Sheppard*, 2002 SCC 26, at para. 55), and while it may be dangerous to parse too closely reasons for judgment given by busy provincial court judges, I am satisfied by the actual words used, and by the whole tenor of the reasons, that she erred in her approach to the admissibility of the statement. The trial judge appeared to conflate concerns over facts relevant to a consideration of a possible breach of the respondent's rights under s. 10 of the *Charter*, or the right to remain silent, as being determinative of voluntariness. As noted by Iacobucci J. in *Oickle*, it is a mistake to confuse the protections offered by the common law confessions rule with the protections guaranteed by the *Charter*.

[43] That is not to say that facts relevant to a possible breach of the right to remain silent are not relevant to the issue of voluntariness, broadly defined. But once having found the respondent had not been properly informed of his right to silence, the trial judge failed to ask herself the correct question: in light of all of

the circumstances, had the Crown proved beyond a reasonable doubt that the statement was free and voluntary? Instead she decided that such a result was precluded. With respect, this is an error in law.

[44] There is no issue that the exclusion of the statement had a material bearing on many, but not all of the charges for which the respondent was acquitted. The Crown is therefore entitled to a new trial, should it exercise its discretion to proceed again. If it does, the admissibility of the respondent's statement will then be decided by the new trial judge according to the issues raised and evidence adduced.

[45] I would therefore allow the appeal and order a new trial, as requested by the Crown, on those counts affected by the exclusion of the respondent's statement.

Beveridge, J.A.