S.C.C. No. 01438

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Macdonald and Pace, JJ.A.

B E T W E E E N:

HER MAJESTY THE QUEEN appellant - and - CYNTHIA VIRGINIA BLACK respondent	)	John D. Embree for appellant Joel E. Pink, Q.C. for respondent Appeal Heard: October 8, 1986 Judgment Delivered: January 28, 1987

THE COURT: Appeal allowed, conviction and sentence quashed and a new trial ordered on the same indictment per reasons for judgment of Pace, J.A.; Macdonald, J.A., concurring and Jones, J.A., dissenting.

PACE, J.A.:

This is an appeal by the Crown from the decision of Mr. Justice F.B. William Kelly, presiding with a jury, wherein he found on a voir dire that certain evidence tendered by the Crown was inadmissible having been obtained in breach of the respondent's right to counsel as guaranteed by s. 10(b) of the Canadian Charter of Rights and Freedoms.

The respondent was indicted:

> That she at or near Halifax in the County of Halifax, Nova Scotia, on or about the 11th day of October, 1985, did unlawfully cause the death of Deborah Lynn Tufts by stabbing her with a knife and did thereby commit second degree murder, contrary to Section 218(1) of the Criminal Code of Canada."

At the conclusion of the trial the jury returned a verdict of guilty of manslaughter and the accused was sentenced to a term of four years' imprisonment. The Crown has also made application for leave to appeal the sentence. Both the appeal and the application for leave to appeal the sentence was heard at the same time.

The facts may be briefly summarized as follows. At approximately 7:00 p.m. on October 11, 1985, the accused went to the apartment of Joan Stevens located at 92-B, Block, Mulgrave Park in the City of Halifax, Nova Scotia, where a party was in progress. The accused consumed some "home brew" and was dancing with Nathan Barton when an altercation arose between her and the deceased Deborah Tufts. Both combatants fell to the floor with Miss Tufts on top. During the course of their struggle the accused received bites tc

her hand and neck, as well as a cut lip. They were finally separated and the accused left the apartment shortly thereafter. The total time involved from the accused's arrival to departure was approximately one hour.

The accused then proceeded to her own apartment which was downstairs from the Stevens' apartment. She began cooking chicken, but apparently went to sleep during the course of her culinary pursuit and was only awakened when members of the Halifax Fire Department arrived on the scene in answer to a call when smoke was seen coming from the apartment. Shortly after the firemen departed, which was estimated between 11:00 to 11:30 p.m., the accused armed with a kitchen knife returned to Joan Stevens' apartment. When admitted to the apartment she walked directly over to where Deborah Tufts was seated and stabbed her with the knife. The knife entered the victim's body at the base of the neck on the right side. At the time of the stabbing the accused said to the victim, "take this you bitch", and immediately after left the apartment.

The police arrived some few minutes after the stabbing and upon hearing what had occurred Sergeant Ronald Joseph O'Neil and Constable Robert Small went immediately to the accused's apartment. After a short delay the officers were admitted by the accused; whereupon they immediately placed her under arrest on the charge of attempted murder. She was advised by Constable Small of her right to call a

laywer and was read the standard police caution. The arrest occurred at 11:40 p.m. and the accused was then transported to the police station where she was placed in the interrogation room at 11:58 p.m.

The accused advised Constable Small that she wished to speak to Mr. Bill Digby, a legal aid lawyer, whom he immediately contacted for her and gave her the telephone so that she could speak in private with him. The conversation between Mr. Digby and the accused appeared to be of short duration and concluded with the accused slamming down the telephone. The telephone was then removed from the room and the door was closed.

No one had any further contact with the accused until 1:35 a.m. when Detective Aubrey Benjamin and Constable James Griffin entered the cubicle to take photographs of her. They also had the accused change her clothing and identify certain articles thought to belong to her. At 1:45 a.m. Detective Benjamin, accompanied by Constable David Ross, entered the cubicle and informed the respondent that Deborah Tufts had died and that she would now be charged with murder. After a somewhat emotional outburst, the accused recovered her composure and was read a "secondary caution" by Constable Ross. She was again advised of her right to call her lawyer and upon expressing such a desire Constable Ross attempted to contact Mr. Digby for her. After six or eight attempts to contact Mr. Digby, Constable Ross

advised the accused that Mr. Digby's line was busy and asked her if she wanted to talk to another lawyer. She replied that she wished to talk to Mr. Digby. The accused then asked if she could call her grandmother. The telephone was provided for her and she then talked with someone for five or six minutes.

After this call a conversation commenced between the respondent and Constable Ross which concluded with the respondent giving a detailed inculpatory statement in writing. The cautioned statement was taken between 2:30 and 2:53 a.m. on October 12, 1985 after which the respondent was taken to the Victoria General Hospital for treatment and a sample of her blood taken which at 4:20 a.m. contained 220 milligrams of alcohol per 100 millilitres of blood. The respondent was taken from the hospital to her apartment where she produced a knife.

At the conclusion of the evidence adduced on the voir dire counsel for the accused submitted that the statement should be excluded because there had been a promise of bail made to the accused by a person in authority and the Crown had failed to prove beyond a reasonable doubt the statement was voluntary. Counsel also submitted the accused's right to counsel had been denied in breach of s.10(b) of the Charter.

The trial judge found that there was no inducement held out to the accused by the police officers and the

statement was "made freely and voluntarily and that at the time that it was made Miss Black was in command of her intellectual faculties sufficient to make a voluntary statement."

On the issue of the accused's right to counsel the trial judge said:

> "In the case before us Constable Small gave the police caution and advised the accused she could 'call a lawyer' when she was first arrested and at the same time he gave the grounds for the arrest, that is, attempted murder or, according to Sergeant O'Neil, stabbing. It is to be noted that the accused was not told of her full rights under section 10(b) of the Charter, only that she had the right to 'call a lawyer.' It is also to be noted that she was not asked if she wished to call the lawyer from her apartment or given the opportunity to do so. However, Miss Black was subsequently given an opportunity to talk with the counsel of her choice very shortly after she arrived at the police station. The issue here is whether she should have been given or was given a further satisfactory opportunity to consult counsel after she had been advised of the death of the victim and after she had been advised that the charge against her would be first degree murder. I have no difficulty in finding that these factors brought about such a significant change to her legal position that she was entitled to a further opportunity to consult counsel under the provisions of section 10(b) of the Canadian Charter of Rights and Freedoms if she requested such an opportunity."

Mr. Justice Kelly in finding there was a breach of s. 10(b) of the Charter adopted the four propositions

submitted by the Crown in Reginald v. Anderson (1984), 10 C.C.C. (3d) 417, and concluded thusly:

> "I adopt these propositions as being at least part of the obligation of the police officers under section 10(b) of the Charter. In determining the extent of the obligation of the police in providing the accused with her Charter rights, the circumstances of the case, particularly those relating to the capacity of the accused, are extremely relevant.
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> " Miss Black was unequivocal on her desire to consult counsel and insisting in her choice of counsel, that is, Mr. Digby. She expressed this position subsequent to the 'secondary caution' and prior to giving the statement. Constable Ross advises that he made an attempt to reach Mr. Digby and guessed that his telephone was deliberately or otherwise off its cradle or its hook. He did not check if this guess was accurate or advise Miss Black of his opinion. If she had known it was impossible to reach Mr. Digby at that time perhaps she could have made a more reasoned decision to try another counsel instead of then insisting on Mr. Digby. In any event, she did clearly and frequently insist on Mr. Digby and she had a right to counsel of her choice unless such a request was unreasonable in the circumstances. In this case, I find that such a request was not unreasonable.
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> " The evidence discloses, and the police admit, that there was not need for urgency. They could have waited to take the statement later in the same morning when contact with counsel would have been more reasonable and probable. The obligation of police authorities to facilitate access to counsel when requested is greater, in my opinion, under the present circumstances, that is circumstances where there is an unsophisticated, distraught, somewhat

> "alcohol impaired and injured woman under arrest for the most serious offence under the Criminal Code. The right to counsel is one of our most basic rights and is now the supreme law of Canada. I find in these circumstances that Miss Black, the accused, was denied this right."

The trial judge then applied S. 24(2) of the Charter and found that the admission of the statement would bring the administration of justice in disrepute and excluded the statement. Evidence with reference to the knife was also excluded on the same grounds.

The grounds of alleged error as stated by the appellant are as follows:

1. That the learned trial judge erred in law in refusing to admit into evidence a statement given by the Respondent, to the police on the ground that the Respondent's right to counsel had been infringed or denied due to her inability to contact counsel of her choice.

2. That the learned trial [judge] erred in law in refusing to admit into evidence the knife obtained from the Respondent on the ground that the Respondent's right to counsel had been infringed or denied.

Section 10(b) of the Canadian Charter of Rights and Freedoms states:

> "10 Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right."

In Clarkson v. The Queen (1986), 25 C.C.C. (3d) 207, Wilson, J., in rendering the majority judgment of the

Supreme Court of Canada stated at p. 217:

> "This right, as entrenched in s. 10(b) of the Canadian Charter of Rights and Freedoms is clearly aimed at fostering the principles of adjudicative fairness. As Lamer J. indicated in R. v. Therens (1985), 18 C.C.C. (3d) 481 at p. 490, 18 D.L.R. (4th) 655 at p. 665, [1985] 1 S.C.R. 613 at p. 624,
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> "'where a detainee is required to provide evidence which may be incriminating...s. 10(b) also imposes a duty not to call upon the detainee to provide that evidence without first informing him of his s. 10(b) rights and providing him with a reasonable opportunity and time to retain and instruct counsel.'"

Wilson J., further states at p. 219:

> "Rather, the purpose of the right, as indicated by each of the members of this Court writing in Therens, supra, is to ensure that the accused is treated fairly in the criminal process. While this constitutional guarantee cannot be forced upon an unwilling accused, any voluntary waiver in order to be valid and effective must be premised on a true appreciation of the consequences of giving up the right."

In Regina v. Therens (1985), 18 C.C.C. (3d) 481, Mr. Justice Lamer considered the rights and obligations flowing from s. 10(b) of the Charter as it applied to a charge pursuant to S. 236 of the Code. He stated at pp. 490-491.

> " I do not want to be taken here as giving an exhaustive definition of the s. 10(b) rights and will limit my comments in that respect to what is strictly required for the disposition of this case. In my view, s. 10(b)

> "requires at least that the authorities inform the detainee of his rights, not prevent him in any way from exercising them and, where a detainee is required to provide evidence which may be incriminating and refusal to comply is punishable as a criminal offence, as is the case under s. 235 of the Code, s. 10(b) also imposes a duty not to call upon the detainee to provide that evidence without first informing him of his s. 10(b) rights and providing him with a reasonable opportunity and time to retain and instruct counsel. Failure to abide by that duty will lead to the obtainment of evidence in a manner which infringes or denies the detainee's s. 10(b) rights. Short of that, s. 10(b) would be a near empty right, as remedies could seldom affect the admissibility of evidence obtained through the accused."

In R. v. Naugler (1986), 72 N.S.R. (2d) 271, Chief Justice Clarke in rendering the judgment of this Court on a charge of refusal contrary to S. 235(2) of the Code said at p. 275:

> " The test in this case is whether the appellant was given a reasonable opportunity and time to retain and instruct counsel consistent with his right guaranteed by s. 10(b) of the Charter. It is a right which must not be interpreted lightly. It is one which must be applied in a reasonable way. In my opinion the right of the appellant under s. 10(b) of the Charter was not violated. He was provided with a full and unrestricted opportunity to seek counsel. He was permitted to conduct his telephone conversations in private. When he indicated he was having difficulty reaching a lawyer, the constable offered to supply the names of some lawyers. When the appellant

> "was having difficulty operating the dialing system of the telephone, the constable offered his assistance. The appellant was able to complete a number of calls. All of this occurred over a space of one-half hour or so."

In Regina v. Anderson (1984), 10 C.C.C. (3d) 417, Mr. Justice Tarnopolsky in rendering the unanimous judgment of the court made reference to four propositions which had been submitted by counsel for the Crown with reference to the application of s. 10(b) of the Charter.

These propositions were as follows:

> (1) Upon arrest or detention there is an obligation upon a peace officer to communicate clearly to the accused that he has a right to retain and instruct counsel. In many circumstances, a question as to whether the accused understands that right ends the officer's obligation.
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> (2) A peace officer has to go further in explaining the right if there is something in the circumstances which suggests that the accused does not understand, such as a state of shock or drunkenness.
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> (3) If the accused in any manner chooes to invoke or exercise his right to retain and instruct counsel, the peace officer has two obligations: (a) to provide the opportunity without delay, and (b) to cease any questioning of the accused until after that opportunity has been provided.
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> (4) If the accused or arrested individual exercises the choice of not requesting an opportunity to retain and instruct counsel and speaks to the peace officer, the statement obtained is not inconsistent with the Charter."

I have carefully considered the judgment in Anderson and it is my view that Mr. Justice Tarnopolsky did not adopt all of these propositions as submitted by the Crown, although he made reference to them.

In regard to proposition 3, Mr. Justice Tarnopolsky said at pp. 428-429:

> " The Manninen case was not involved with the first two propositions which comprise the first right under s. 10(b), i.e., the obligation on the police to inform an accused of his right to counsel, but rather with the third, i.e., the obligation on the police to provide the opportunity without delay. MacKinnon A.C.J.O. stressed that the questioning of the accused commenced immediately after he had clearly asserted his desire to remain silent and to consult his lawyer. Moreover, this took place in premises where a telephone was immediately at hand and there was no urgency or emergency to prevent his being able to implement his right without delay. It will be recalled that the learned Associate Chief Justice asserted (at p. 12) [p. 738 O.R., p. 200 C.C.C., p. 548 D.L.R.]:
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> "' On the appellant's claiming his right to remain silent and to see his lawyer under the circumstances recited, the constables should have offered him the use of the telephone so that he might exercise his right.'"

Clearly, in R. v. Manninen 8 C.C.C. (3d) 193, the accused had asserted his right to counsel, but the police never offered him the opportunity to use it although a telephone was immediately available and there was no urgency or emergency in the circumstances surrounding the offences.

In the present appeal, the facts and circumstances are entirely different than those in Manninen in that the police did everything possible to facilitate the respondent's right to counsel. The officers not only made the telephone available to her, but also assisted her in contacting a lawyer of her choice to whom she spoke in private for some short interval of time. After the victim died the officers informed the respondent and told her that the charge would be changed from attempted murder to murder, and again they advised her of her right to counsel and attempted to contact her lawyer for her. When they were unable to contact her counsel, they then invited her to contact another lawyer, which she refrained from doing. Later she requested a telephone to call her grandmother and she spoke for five or six minutes.

The trial judge in finding the admission of the evidence would bring the administration of justice into disrepute stated:

> "In applying those comments to the facts before us, I do not feel that the police officer in question acted with flagrant lack of concern for the accused's rights, but a higher degree of concern could have been demonstrated. Of the factors to be considered as well is that this charge is the most serious under the Criminal Code, that there is other evidence available to the Crown in this matter, and that there was no great urgency in obtaining a statement."

I must confess that in using such terminology as

"a higher degree of concern" when attempting to quantify the duties and obligations of police officers under s. 10(b) of the Charter causes me considerable difficulty in that it introduces a degree of uncertainty and gives no direction as to what a police officer should do in the circumstance.

It seems reasonably clear to me that under the provisions of s. 10 of the Charter everyone upon arrest or detention has a right under s. 10(a) to be informed promptly of the reasons for his arrest or detention, and it is the obligation and duty of the police officer to so advise. Under s. 10(b) of the Charter there is an obligation imposed upon a peace officer to communicate clearly to the accused that he has a right to retain and instruct counsel without delay and to provide the opportunity to the accused to retain and instruct counsel without delay if the accused so desires. Should the accused voluntarily waive his right to counsel, the peace officer must then ascertain whether the accused did so on a true appreciation of the consequences of giving up the right. See: Clarkson v. The Queen, supra. This later determination in my view would depend to a large measure on the accused's mental condition at the time, for example, drunk, or under the influence of drugs to such an extent as to be unaware of the consequences of giving up the right.

In the present appeal, unlike Clarkson, the trial judge found the accused was in command of her "intellectual

faculties sufficient to make a voluntary statement." In arriving at that conclusion he took into account all of the surrounding circumstances such as the accused's injuries, educational background, degree of intoxication, ability to comprehend, and her emotional and mental state. It must also be remembered that the accused in the present case did consult counsel and was presented with a telephone to make the call she requested. The officers were not requested to wait for counsel nor was there any indication by the accused that she wished to remain silent until counsel was available. In fact, it would appear from the evidence that a good deal of the conversation between the accused and Constable Ross was initiated by the accused who appeared to be concerned about where she would be situate for the weekend and who would be looking after her child. The statement was given in narrative form with a few questions at the end asked by the officer.

In Regina v. Ferguson (1985), 20 C.C.C. (3d) 256, Lacourciere, J.A., in rendering the judgment of the Ontario Court of Appeal stated at p. 259:

> "The appellant was not denied counsel but, in fact, was given every assistance to obtain one. In his subsequent reasons, Judge Lovekin found what I have just stated and also found that the appellant was not a frightened teenager or neophyte; that there were no threats, promises or inducements, and that the appellant, for his own reasons, saw fit to make voluntary replies to the routine investigation questions. A suspect who has been made

> "aware of his constitutional rights under the Charter is, of course, free to remain silent but is also free to talk if he thinks that it will serve his purpose to do so."

See also: Regina v. Gordon Arthur White, British Columbia Court of Appeal; Judgment delivered November 8, 1985, Victoria Registry, CAU 20-84 (unreported).

It would appear that neither the Ontario Court of Appeal or the British Columbia Court of Appeal have adopted proposition (3) as submitted in Anderson, supra, as being "at least part of the obligation of the police officers under section 10(b) of the Charter." This ruling by the trial judge, in my respectful opinion, was in error as it sets too high an obligation on the police officers and denies the accused the freedom to speak if she so desires.

Counsel for the respondent submitted that the judgment of the Ontario Court of Appeal in Regina v. Howard and Trudel (1983), 3 C.C.C. (3d) 399, was germane to the present appeal in that the police should have refrained from taking a statement from the accused until her lawyer was present. In my opinion, the factual circumstances present in Howard and Trudel are distinguishable from those present in this appeal.

In Howard and Trudel the accused made it abundantly clear that he wanted his lawyer present before answering any questions. He contacted his lawyer in the presence of the police and advised them that his lawyer was coming and

he did not wish to answer further questions until the lawyer arrived. In the face of such knowledge by the police they continued to question Trudel in an authoritarian manner. Chief Justice Howland in rendering the judgment of the court stated at p. 414:

> "After Trudel made it clear that he wanted his lawyer to be present and had called him, Corporal McCurdy should not have continued his examination which made a mockery of Trudel's right to counsel and his right to remain silent. The probative value of the evidence was slight as compared to its potential prejudice to Trudel. In those circumstances the trial judge would properly have exercised his discretion if he had excluded it. I think in all the circumstances he should have excluded the evidence because of its tenuous probative value and its potential prejudice."

In this appeal the police officers did everything reasonably possible to secure counsel for the accused; they not only attempted to contact the lawyer of her choice, but also suggested that she contact another lawyer when her own was unavailable.

Counsel for the respondent further submitted that by changing the charge from attempted murder to murder there was a change in her legal position and she was further entitled to consult counsel on the new charge. The trial judge appears to have adopted this argument in that he found

there was "a significant change" in the accused's legal position when the charge was changed to murder. Even accepting such was the case, I cannot see in the present circumstances where it advances the respondent's cause, unless one is to say the police must obtain counsel for the accused or no statement can be taken unless counsel is obtained. Neither proposition as far as I have been able to ascertain has been adopted as the law in Canada, and I do not intend to adopt it in this appeal. In my view, there must be some denial of the right to counsel by the police officers either by omission or commission before there can be enforcement of guaranteed constitutional rights under s. 24(2) of the Charter.

In the present case I can find no such denial committed by the police officers as it would appear the accused was given all reasonable assistance by them to obtain counsel. Thus, I must respectfully conclude the learned trial judge erred in finding the accused had been denied her rights under s. 10(b) of the Charter and in ruling the evidence inadmissible under the provisions of s. 24(2) of the Charter.

Even if I had found that there was a technical breach of s. 10(b) of the Charter, which I do not, I would have had grave difficulty in concluding the evidence was inadmissible under s. 24(2) of the Charter.

In Brown v. R., S.C.C. #10473, dated January 20, 1987, (unreported), Mr. Justice Macdonald in rendering the

unanimous judgment of this Court stated at p. 28:

> " We do not have nor do we need in this country a rule that evidence obtained as a result of a breach of a Charter right must in all cases be excluded. The test under s. 24(2) of the Charter is clear and admits of no judicial discretion. Evidence obtained as a result of a breach of Charter rights is prima facie admissible. It shall not be excluded unless and only unless it is established on a balance of probabilities or by a preponderance of evidence that under all the circumstances to allow such evidence in the proceedings would bring the administration of justice into disrepute. When s. 24(2) of the Charter is utilized it has the effect, in practically all cases, of interfering with the criminal justice system's truth finding function. It follows therefore in my view that the indiscriminate application of such exclusionary power is bound to generate disrespect for our legal system and the administration of justice. See: Stone v. Powell, supra. Section 24(2) should not in my view be applied to nullify objectively reasonable law enforcement activities of the kind and nature that existed in this case."

I agree with the principle enunciated by my brother Macdonald and only wish to add that on the evidence present in this appeal I cannot conclude that the admission of the evidence would bring the administration of justice into disrepute.

The trial judge on the new trial is not bound by this opinion that the statements were voluntarily made, based

as it is on the evidence disclosed in the record before us. The issue of statement admissibility will have to be decided anew by the application of proper legal principles to the facts disclosed to the court on the new trial. See: R. v. Owen (1983), 56 N.S.R. (2d) 541, per Macdonald, J.A., at p. 557.

In the result, the appeal should be allowed, the verdict of the jury set aside, and the conviction and sentence quashed, and a new trial ordered on the same indictment.

Pace, J.A.

Concurred in: Macdonald, J.A.

JONES, J.A.: DISSENTING

The facts in this case are set out in the decision of Mr. Justice Pace. Based on those facts I cannot distinguish this case from the decision of the Supreme Court of Canada in Clarkson v. The Queen (1986), 25 C.C.C. (3d) 207. The Clarkson decision was handed down after the ruling by the trial judge on the admissibility of the statement in this case. Whether a trial judge would rule the statement voluntary in this case in the light of Clarkson is open to question. In deciding whether the statement was voluntary Mr. Justice Kelly did not consider whether the appellant was aware of the consequences of making the statement, although he apparently considered that as a factor in determining whether the statement should be excluded under s. 24(2) of the **Charter.**

In any event I do not think the finding that the statement was voluntary precluded the trial judge from excluding the statement because of a violation of the appellant's rights under s. 10(b) of the **Charter of Rights and Freedoms.** Wilson J. in Clarkson v. The Queen 25 C.C.C. (3d) 207 stated at p. 217:

> "The question whether the appellant's right to counsel has been violated may well provide an acceptable alternative approach to the problem posed by the police extraction of an intoxicated confession. This right, as entrenched in s. 10(b) of the **Canadian Charter of Rights and Freedoms** is clearly aimed at fostering the principles of adjudicative fairness. As Lamer J. indicated in **R. v. Therens** (1985), 18 C.C.C. (3d) 481 at p. 490, 18 D.L.R. (4th) 655 at p. 665, [1985] 1 S.C.R. 613 at p. 624,

> 'where a detainee is required to provide evidence which may be incriminating ... s. 10(b) also imposes a duty not to call upon the detainee to provide that evidence without first informing him of his s. 10(b) rights and providing him with a reasonable opportunity and time to retain and instruct counsel.'

This constitutional provision is clearly unconcerned with the probative value of any evidence obtained by the police but rather, in the words of Le Dain J. in **Therens, supra**, pp. 503-4 C.C.C., p. 678 D.L.R., pp. 641-2 S.C.R., its aim is 'to ensure that in certain situations a person is made aware of the right to counsel' where he or she is detained by the police in a situation which may give rise to a 'significant legal consequence'.

Given the concern for fair treatment of an accused person which underlies such constitutional civil liberties as the right to counsel in s. 10(b) of the **Charter**, it is evident that any alleged waiver of this right by an accused must be carefully considered and that the accused's awareness of the consequences of what he or she was saying is crucial. Indeed, this Court stated with respect to the waiver of statutory procedural guarantees in **Korponey v. A.G. Can.** (1982), 65 C.C.C. (2d) 65 at p. 74, 132 D.L.R. (3d) 354 at p. 363, [1982] 1 S.C.R. 41 at p. 49, that any waiver

> '...is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.' (Emphasis in original.)

There is also a wealth of case-law in the United States to the effect that an accused may waive his constitutional right to counsel only 'if he knows what he is doing and his choice is made with eyes open': **Adams v. United States** (1942), 317 U.S. 269 at p. 279. Thus, an accused must 'knowingly, intelligently and with a full understanding of the implications, waive his constitutional rights to counsel': **Minor v. United States** (1967), 375 F. 2d 170 at p. 179 (8th Cir.); **certiorari** denied 389 U.S. 882. Indeed, the Supreme Court of the United States has gone so far as to indicate that not only must an accused person be cognizant of the consequences of waiving the constitutional right

> to counsel in a general way, but he or she must be aware of the legal specificities of his or her own case such that there is a presumption against a valid waiver where the accused is not perceived at the time of the waiver to be capable of comprehending its full implications. For instance, it was stated in **Von Moltke v. Gillies** (1947), 332 U.S. 708 at p. 724:
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> > 'To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charge and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.'
>
> Whether or not one goes as far as requiring an accused to be tuned in to the legal intricacies of the case before accepting as valid a waiver of the right to counsel, it is clear that the waiver of the s. 10(b) right by an intoxicated accused must pass some form of 'awareness of the consequences' test."

How can it be said on the evidence that it was 'clear and unequivocal" that the appellant was waiving her right to counsel on the facts of this case "with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process" ? If fairness required the exclusion of the statements in **Clarkson** then surely that principle must apply to the facts in this case. With respect it was open to the trial judge to exclude the evidence which he did under s. 24(2) of the **Charter** and in view of **Clarkson** he was correct in doing so.

I would accordingly dismiss the Crown's appeal against the verdict of not guilty on the charge of second degree murder and confirm the conviction for manslaughter. In view of the decision of the Court ordering a new trial I do not think

it would be appropriate for me to comment on the appeal against sentence.

J. A.