NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacDonald-Pelrine***, 2014 NSCA 6

Date: 20140117
Docket: CAC 324159
Registry: Halifax

Between:

Natalie MacDonald-Pelrine

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Oland, Hamilton and Beveridge, JJ.A.
Appeal Heard:	September 23, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	Luke Craggs, for the appellant William Delaney, Q.C., for the respondent

Reasons for judgment:

INTRODUCTION

[1] The appellant's first day back from maternity leave was April 24, 2006. It was far from routine. She was called to a meeting with her supervisor, David Burke. Accountants from Grant Thornton were present. Unbeknownst to the appellant, the purpose of the meeting was to see if she had an explanation for 25 transactions where money had been received for payment of Summary Offence Tickets at the Dartmouth Provincial Court office, but not properly credited. She did not. In fact, she agreed that the discrepancies could not be explained by simple clerical error. Suspension with pay followed.

[2] An eight-month period was selected for further audit. An additional 25 transactions were discovered with the same suspicious characteristics. All 50 transactions had been processed by user ID WZ158, the code assigned to the appellant. All 50 transactions involved apparent misappropriation of monies.

[3] A two-month period, contiguous to the time that the suspicious transactions occurred, was also examined. No abnormalities were found. The difference was – the appellant was not at work.

[4] Charges of fraud, theft, and breach of trust ensued, as did her termination from her employment.

[5] The appellant elected trial by judge and jury. Her trial before the Honourable Justice John D. Murphy, with a jury, lasted 16 days. The jury found her guilty of fraud and breach of trust, but somewhat surprisingly, not guilty of theft. Both counsel recommended a 12-month conditional sentence plus probation with conditions. The recommendation was accepted.

[6] The appellant appeals from conviction. Initially, her grounds of appeal were two: that the trial judge erred in applying the law as it relates to the admissibility of a statement given to a person in authority; and that the verdicts were inconsistent. By the time the appeal was heard, there was but one issue – claimed legal error by the trial judge in finding the appellant's statements to be admissible.

DID THE TRIAL JUDGE ERR IN FINDING THE STATEMENTS ADMISSIBLE?

[7] Before identifying and analyzing how the appellant says the trial judge erred, it is necessary to set out additional details about the evidence heard by the trial judge, the arguments made to him, and his reasons.

[8] Immediately after jury selection, the trial judge held a *voir dire* to determine the admissibility of utterances made by the appellant during the meeting with David Burke and representatives from Grant Thornton on April 24, 2006. The Crown called four witnesses: D/Cst. James MacVicar of the Halifax Regional Police Service; David Burke; Susan D. MacMillan, FCA, CFE, CFI; and Joyce McGeehan, CMA, CIA, CFI, both from Grant Thornton. The appellant also testified.

[9] D/Cst. MacVicar offered no evidence directly relevant to the admissibility of the appellant's statements. He was not present at the meeting of April 24, 2006. In fact, his evidence was that he was the first officer assigned to the file, an event that did not happen until March 2007.

[10] David Burke was the court administrator for provincial courts in metropolitan Halifax at the time of these events. Due to irregularities in a number of transactions, he recommended an audit. The firm of Grant Thornton was retained. The auditors from that firm were Ms. MacMillan and Ms. McGeehan.

[11] Mr. Burke arranged for the auditors to meet with the appellant first thing on April 24, 2006. He planned to suspend the appellant from her job at the end of the meeting. No notice was given to the appellant about the jeopardy she faced.

[12] The meeting was in the first floor boardroom in the building housing the Dartmouth Provincial Courts. It lasted somewhere between two and three hours.

[13] Mr. Burke's evidence was that he introduced the auditors to the appellant. After that, he had very little involvement. He took no notes. He testified that at the end of the interview, he told the appellant she was suspended with pay pending the outcome of the audit. At no time before or during the meeting did he advise the appellant of her rights under the *Charter*.

[14] Ms. McGeehan and Ms. MacMillan gave similar evidence. They had prepared the questions they wanted to ask the appellant. First, they would have her confirm her understanding of policies and procedures, then they would seek her explanation for the 25 irregular transactions.

[15] Ms. MacMillan asked the questions while Ms. McGeehan took notes on her laptop. They were both impressed with the appellant's knowledge of the policies and procedures. They described the appellant as calm and cooperative. They said she easily understood the problems presented by the 25 irregular transactions, but could offer no real explanation as to how they had happened.

[16] Both testified that there were no threats made to the appellant nor inducements offered. They agreed that, at some point during the meeting, the appellant became upset, as she believed she was being accused of theft.

[17] From the Crown's point of view, the important outcome of the interview was that the appellant agreed that her handwriting was present on documents associated with all 25 irregular transactions, and there were too many for them to be merely clerical errors; she had no explanation for the irregular transactions.

[18] There was no formal statement as such taken from the appellant. Ms. McGeehan's rough notes taken during the meeting were revised and then reduced to a polished, more organized record of what was asked, and the appellant's responses. Both were reviewed by Ms. MacMillan later that day and adopted by her as accurate.

[19] The appellant also made exculpatory statements. She said she had not stolen any money, and at one point insisted that the irregular transactions were the result of mistakes.

[20] Oral submissions on admissibility were made. The judge took a brief recess, and then returned with a bottom line oral decision, with the intention of giving reasons later. He expressed the bottom line as:

> My decision on the *voir dire* is that statements made at the meeting of April 24th, 2006, by the accused are admissible. In my view, I find that the Crown has met its burden of establishing beyond a reasonable doubt that the statements were made voluntarily, and I don't find that there was any **Charter** violation. So, the jury

> may hear evidence about what transpired and what was said at that April 24th, 2006, meeting from the persons who attended the meeting.

[21] The trial judge also found that the rough and finished notes of Ms. McGeehan were not "statements" made by the appellant. The notes would not be admitted as trial exhibits. He invited submissions from counsel as to what use could be made of the notes at trial. Defence counsel conceded that he could not conceive of a basis under which Ms. MacMillan could not refer to the notes when she testified.

[22] As a consequence, the trial judge had no difficulty in concluding that both Ms. McGeehan and Ms. MacMillian could refer to the notes to refresh their memory.

[23] On October 21, 2009, in the course of the trial, the judge gave oral reasons. I will refer to these in more detail later. For now, it is sufficient to highlight what he said. First, he framed the issues he needed to address as follows:

> The issues to be determined are ultimately whether the statements were voluntary and whether any of the accused's **Charter** rights were violated. Resolution of those issues requires assessing whether the persons attending the meeting representing the Department of Justice and Grant Thornton were persons in authority and whether the accused was detained and then ultimately whether the statements were voluntary and whether **Charter** rights were infringed.

[24] The trial judge found that the thrust of the April 24 meeting was investigatory. It was to give the appellant an opportunity to provide explanations for activities that were suspicious, and she was not being pressed for a confession. Nonetheless, the judge found that Mr. Burke and the auditors were persons in authority.

[25] He concluded that there was nothing to suggest that the indices of involuntariness normally guarded against were present in any form at the meeting. There were no threats nor promises made. There was no trickery and the appellant had an operating mind. In short, the Crown had met its obligation to establish voluntariness beyond a reasonable doubt. He added there was no *Charter* violation.

ISSUES

[26] The appellant framed her ground of appeal in her Notice of Appeal and factum as:

> During the *voir dire*, the trial judge erred in applying the law as it relates to the admissibility of a statement taken by a person in authority.

[27] The appellant's arguments about how she says the trial judge committed legal error shifted at the hearing from those advanced in her factum. In her factum, she argued her utterances should not have been admitted because they were not the product of an informed choice or free will, and due to concerns regarding the accuracy and reliability of her statements.

[28] At the hearing of the appeal, the appellant advanced submissions that the trial judge erred in not finding that the appellant had been detained, and in not finding that there had been an implied inducement rendering the statements involuntary.

[29] With all due respect to the appellant, I am unable to find merit in any of these submissions. I will explain.

Product of an Informed Choice

[30] The appellant suggests that the content of the interview of April 24 was involuntary in the legal sense because she did not know her job was in jeopardy or that she was suspected of committing a crime in the course of her employment. Had she been aware, she would have either not attended the meeting, or made arrangements to be accompanied by a union representative or perhaps counsel. With more information, perhaps a different choice would have been made – that is, no statement.

[31] This suggestion, without explicit reference, seeks to rely on notions emanating from the right to silence recognized by the Supreme Court of Canada in *R. v. Hebert*, [1990] 2 S.C.R. 151. The reliance is not tenable. In *Hebert*, the accused was in police custody. He consulted with counsel and advised the police that he did not wish to give any statement. The police obtained incriminating utterances when they used an undercover police officer to actively elicit

information from the accused. This conduct undermined his choice not to give a statement to the police. It was found to have violated his right to silence guaranteed under s. 7 of the *Charter*.

[32] I have searched the record. I could find no indication the appellant argued that her rights under the *Charter* were infringed or denied. I could find no argument that the appellant was detained, a state of affairs which would have, of course, triggered a number of *Charter* rights. The trial judge found as a fact that the appellant was not detained. The appellant did not argue in her factum that the trial judge erred in any way in making that finding.

[33] As pointed out by the respondent, the appellant's interview was not conducted by agents of the state; the police did not become involved until almost 11 months afterwards. The trial judge specifically found that there were no promises, inducements, threats, oppressive conduct or tricks, and the appellant had an operating mind. For the purpose of dealing with the appellant's complaint of error, the following excerpt from the trial judge's reasons is relevant:

> The dominant purpose of the meeting, I find, was not to trick or obtain a confession. It was part of a continuing investigation and Ms. MacDonald-Pelrine was asked to clarify examples of problems to see if she could provide a reason for errors which might influence the continuation of the investigation. Matters were a long way from prosecution at that time. The case was not referred to the police until approximately 11 months later. Investigation was taking place in an employment, not a prosecution environment.

[34] The leading decision on the common law requirement of proof of voluntariness of statements to persons in authority is *R. v. Oickle*, 2000 SCC 38. Iacobucci J., writing for the majority, acknowledged that the contemporary confessions rule is broader than the core requirement that the Crown must establish beyond a reasonable doubt that a confession was not induced by threats or promises. Admission of statements may also fail due to the involuntary nature of the putative statements if the authorities have engaged in unacceptable police trickery, oppressive conduct or the absence of an operating mind.

[35] The Courts' overriding concern is with voluntariness, but this overlaps with reliability, and extends to protecting the accused's rights, and fairness of the

criminal process. All relevant circumstances must be considered in a contextual inquiry of voluntariness (¶47, 69, 71).

[36] The trial judge was well aware that the appellant was not told before the meeting what was on the agenda, nor informed of her potential jeopardy. Although he found the participants at the meeting to be persons in authority, thereby triggering the need for the Crown to prove voluntariness for admission, he was satisfied beyond a reasonable doubt that the appellant's responses were voluntary.

[37] He found no inducements, promises or threats, nor trickery, oppressive conduct and that the appellant had an operating mind. The following is an excerpt from his comprehensive reasons:

> The evidence, both oral and the notes provided at the *voir dire*, does not suggest that the indices of involuntariness normally guarded against by the courts were present in any form at the meeting. No threats or promises were made. No trickery was used. I don't consider the failure to fully describe the purpose of the meeting or potential consequences as trickery, when the questions put to the accused appeared straightforward.
>
> Nothing in the evidence suggests that the accused was oppressed or that she did not have an operating mind, although Ms. MacDonald-Pelrine testified she had less recollection of what happened during the latter part of the meeting when her conduct was the focus of the questioning. There is nothing to suggest that her answers were influenced by the questioner's conduct or that her competence was ever compromised.
>
> The notes and the testimony of those in attendance suggest no lack of an operating mind. The accused answered questions and participated throughout the meeting and her somewhat less detailed recollection of the last part of the meeting does not suggest that her participation ceased to be voluntary or that she was coerced.
>
> I have carefully considered the evidence, particularly that of the accused and while it is clear she was not in a comfortable situation she did not request that the meeting stop, did not show any indication of an unwillingness to participate or a lack of confidence.
>
> The questioners, as well as the accused, indicate that she was taken by surprise as the meeting developed. However, that does not make a situation involuntary. The Crown's obligation is to establish voluntariness beyond a reasonable doubt and in the circumstances of the April 24th meeting I am satisfied they have done so and the outcome of the meeting, including the accused's reaction and responses, may be the subject of testimony before the jury.

[38] There was no need for the Crown to prove that the appellant made a fully informed choice to attend the meeting or participate.

[39] The findings by a trial judge, untainted by error in legal principle, can only be disturbed if marred by palpable and overriding error in factual matters (*Oickle*, at ¶22*; R. v. Grouse*, 2004 NSCA 108 at ¶44). I see no error in principle, nor in any findings of fact or mixed fact and law, let alone any that are palpable and overriding. With respect, the decision by the trial judge on voluntariness is sound.

Accuracy of the notes

[40] The appellant argued that the existence of significant concerns about the accuracy and reliability of her statements during the April 24 interview made them inadmissible. She put it this way in her factum:

> 67. It is respectfully submitted that there are significant concerns regarding the accuracy and reliability of the Appellant's statement of April 24, 2006 making it inadmissible whether provided as evidence by way of exhibit or viva voce testimony. Concern of accuracy and reliability was acknowledged by the trial judge. It is respectfully submitted that the Honourable Trial Judge erred in admitting viva voce testimony regarding the content of the April 24, 2006 meeting.

[41] With respect, I am not persuaded that there is any substance to the argument by the appellant. The Crown is required to prove beyond a reasonable doubt that putative statements by an accused to a person in authority were voluntary. To state the obvious: if the Crown's evidence about the circumstances surrounding the taking of the statement is marred by a lack of accuracy as to what was said to, and by, an accused, the Crown is at substantial risk of being unable to meet its burden on the issue of voluntariness or ultimate admissibility.

[42] However, if a trial judge, applying the correct legal principles, and absent palpable and overriding error, determines that he or she is satisfied beyond a reasonable doubt that putative statements by an accused were made voluntarily, then disputes about the accuracy and existence of an utterance by an accused is generally for the trier of fact in the trial proper.

[43] These principles were succinctly summarized by Hill J. in *R. v. Menezes*, [2001] O.J. No. 3758 (¶27-29). To similar effect are the observations by Charron

J.A., as she then was, in *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493 (Ont. C.A.) (¶58-60). Code J., in *R. v. Learning*, 2010 ONSC 3816, after referring to these, and other authorities, wrote of the distinction between accuracy and completeness of notes or a statement on a *voir dire*, as opposed to at trial as follows:

> [62] Accordingly, the current state of the law is that the accuracy and completeness of the record of a voluntary statement is an issue of weight that is determined at trial. However, the accuracy and completeness of the record of the circumstances surrounding the making of the statement can relate to proof of voluntariness on the *voir dire*. This is not an easy distinction to apply, especially in a case like the one at bar where no evidence is called by the defence on the *voir dire*. It may be unclear in such a case whether the defence is raising issues of voluntariness or issues of accuracy.

[44] The appellant testified on the *voir dire*. At no time did she suggest that the rough or final version of the notes made by Ms. McGeehan were inaccurate or incomplete, with but one exception, which I will set out below. Significantly, at no time did she suggest that she made any of the statements attributed to her due to any threats or promises.

[45] Her evidence in direct examination was that she recalled just about every detail of the meeting. Later, in cross-examination, she maintained she had a good recollection of the first half of the meeting, but then "went into a black hole" after which she did not recall most of what followed.

[46] The one exception about the accuracy of the notes was revealed when her trial counsel (not counsel on appeal) referred the appellant to the notes made by Ms. McGeehan (Ex. VD-6 and VD-7). The appellant recalled making some exculpatory statements, which were recorded in McGeehan's notes, but then disagreed with the accuracy of one entry. The full exchange is as follows:

> Q. We do have some notes, VD-6 and VD-7. At the top of page seven of Exhibit Number VD-6, there's a quotation in quotation marks, "Natalie asked: 'Do you think I stole the money?'" Did you actually say that during the meeting?
>
> A. I said, "Do you think I stole money?"
>
> Q. "I certainly didn't take any money." Do you remember saying that?
>
> A. I do.

> Q. Okay.
>
> A. I don't know if I said those exact words but.
>
> Q. And then the next sentence, "My husband wasn't working and I was concerned about money." Did you say that?
>
> A. No.
>
> Q. Why do you say you didn't say that?
>
> A. Because my husband was working at the Halifax Piers at that point and he was making more than enough money.
>
> Q. What is it that you did say, or are you able to recall today?
>
> A. I would have said, My husband is working and we are not concerned about money.
>
> Q. And then, finally, "No, I would never take the money."
>
> A. Yes, probably.

[47] The alleged inaccuracy in the notes had nothing to do with inducing the appellant to give a statement by offering inducements or making threats. In these circumstances, which version was accurate was up to the trier of fact to decide.

[48] As to the overall accuracy and reliability of the notes, the trial judge accepted that Ms. McGeehan took contemporaneous notes, which, while not verbatim, were comprehensive. The judge acknowledged that the notes were not a precise recording, but were sufficiently accurate and contemporaneous to be used as an *aide memoire*. He found:

> The notes' reliability as a precise or near verbatim account of what took place is in doubt. I am satisfied however, that the notes address the information conveyed and are sufficiently contemporaneous and accurate to be used as aide-memoires by the Grant Thornton representative, Ms. McGeehan, who took the notes during the initial meeting and who prepared a reorganized and expanded version later that day, which she may also refer to at trial. Defence counsel have agreed that the other Grant Thornton representative, Ms. MacMillan, who reviewed and adopted the notes may also refer to them as an aide-memoire.

[49] I would not give effect to this argument.

Detention/ Implied inducement

[50] At the hearing of the appeal, the appellant argued that the trial judge erred by not finding that the appellant was detained during the April 24 meeting, and this error tainted his ruling on voluntariness. She also contended that the statements were the product of an implied inducement, and hence involuntary. I will address these two arguments together.

[51] These arguments are unsupported by authority or by the record. The appellant did not suggest to the trial judge that she had been detained or that the statements attributed to her were the product of any explicit or implicit inducements.

[52] It is easy to see why such arguments were not made to the trial judge: the appellant did not testify that she was physically or psychologically detained, or that she perceived any implicit inducements, let alone ones that induced her to make the statements in issue. These complaints are, with respect, without merit.

[53] Accordingly, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.