NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Grouse*, 2004 NSCA 108

Date: 20040916
Docket: CAC 201543
Registry: Halifax

Between:

Draper Grouse

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Roscoe, Cromwell and Fichaud, JJ.A.

Appeal Heard: June 16, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Fichaud, JJ.A. concurring.

Counsel: Lonny Queripel, for the appellant
Daniel MacRury, for the respondent

Reasons for judgment:

I. Introduction and Overview:

[1] Constable Susan Foster was shot while riding in a police vehicle. Shortly after, Draper Grouse was arrested and detained. After some interrogation, he told the investigators that: he "... just aimed at the car and bram." He was charged in connection with the shooting and convicted by Murphy, J. of intentionally causing bodily harm to Constable Foster and other related offences. Mr. Grouse appeals, submitting that the judge should not have admitted his statement to the investigators into evidence because it was not voluntary and he was not properly informed of his *Charter* right to counsel.

[2] In my view, the police adequately informed Mr. Grouse of his right to counsel and the judge did not make any reviewable error in finding his confession voluntary. I would dismiss the appeal.

II. Summary of the Facts:

[3] Early on June 23rd, 2002, the appellant's sister was arrested for creating a disturbance and resisting arrest. A crowd gathered. Additional police arrived. The appellant became angry and belligerent with the police, saying to them something to the effect that "you do what you have to do and I'll do what I have to do." Eventually things calmed down and the police left.

[4] Constable Foster was in the last vehicle to leave. As it turned on to Brunswick Street, a rifle bullet tore through the passenger front door, striking her high in the right thigh. It penetrated her leg, struck her in the left hand and then ricocheted into the dashboard. She was seriously wounded and was lucky not to have been killed.

[5] Suspicion quickly fell on the appellant. He was arrested and taken into custody. The police told him that he was under arrest for attempted murder of a police officer, advised him of his *Charter* rights and gave him the usual cautions. The appellant said he wanted to contact his lawyer, Peter Mancini, who was with Legal Aid. A police officer contacted on-call duty counsel, and the appellant was given time alone to speak with duty counsel over the 'phone. Approximately

fourteen hours later the appellant was interrogated. The interrogation lasted for approximately three hours and twenty minutes. It was conducted by two pairs of constables acting in sequence. During his interview by the second pair, the appellant made inculpatory statements including an admission that he had shot at the police car.

[6] At trial, Murphy, J. made two evidentiary rulings, both in relation to the appellant's statement to the police. He concluded that the appellant had been properly advised of his right to counsel while detained and that the Crown had established beyond a reasonable doubt that his statement to the police was voluntary. The statement was therefore ruled to be admissible.

III. Issues:

[7] The appellant appeals his conviction arguing that the judge erred in admitting his statement. The submission, as at trial, is that Mr. Grouse was not properly informed of his right to counsel and that his statement was not voluntary. On either or both bases, according to the appellant, the judge ought to have excluded the statement and entered acquittals.

IV. Analysis:

1. Right to Counsel:

[8] The precise issue is a narrow one. The police told Mr. Grouse, among other things, that he had "... the right to retain and instruct a lawyer without delay..." but did not tell him in so many words that he had the right to retain and instruct counsel "of his choice". The appellant submits that the omission of these three words, or words like them, resulted in a breach of his rights under s. 10(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 and ought to have led to the exclusion of his statement.

[9] Section 10 (b) of the *Charter* provides:

> **10. Arrest or detention —** Everyone has the right on arrest or detention

...

> (b) to retain and instruct counsel without delay and to be informed of that right; ...

[10] This section imposes two types of duties on the police. The first, which flows from its opening words, is to afford detained persons the right to retain and instruct counsel. This has been referred to as the facilitation or implementation aspect of s. 10(b). It requires the police to provide a detainee who has indicated a desire to exercise the right to counsel with a reasonable opportunity to do so and to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity: **R. v. Bartle** , [1994] 3 S.C.R. 173 at 191-192. The second type of duty, which flows from the concluding words of the section, has been referred to as the informational component. It requires the police to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel.

[11] It is important to understand that this appeal relates only to the second of these two types of duties. The question raised is whether the appellant was properly informed of his right to counsel. I mention this point because the arguments on appeal sometimes lost sight of it and confused the issue of whether proper information had been given with the question of whether Mr. Grouse exercised his right to counsel diligently. But issues of diligence are not relevant if there has been a failure to properly advise the detainee of the right to counsel. This is because a failure to properly advise the detainee is, in itself, a breach of the *Charter* and a failure on the part of the detainee to exercise the right to counsel diligently after such a breach is irrelevant: **R. v. Bartle**, **supra** at 198. This, of course, is consistent with common sense: a person who is not told about the right to counsel cannot be expected to exercise it diligently: **R. v. Evans**, [1991] 1 S.C.R. 869 at 891. So the analysis here must focus exclusively on the question of whether the information given to Mr. Grouse satisfied the informational duty of the police under s. 10(b); any failure on his part to act diligently in pursuit of his right cannot cure a breach of the duty to give him proper information about it.

[12] The trial judge concluded that the case law does not require the police to state in so many words that the detainee may contact the lawyer of his or her choice. The judge also, in effect, held that use of the precise words advocated by the appellant would not have added anything to the appellant's understanding in

this case because it was clear that Mr. Grouse understood the substance of the officer's message that he had the right to speak to counsel of his choice. I agree with the judge on both points.

[13] Turning to the second point first, I am persuaded that the judge was right to find that Mr. Grouse understood from what he was told and how the police acted that he had the right to retain and instruct counsel of his choice. For reasons I will set out in a moment, the police, in my opinion, have no duty to be more explicit in the informational component as regards counsel of choice than to advise of the right to retain and instruct counsel. However, if I am wrong about that, the appeal would still fail on this ground.

[14] The question of whether Mr. Grouse was properly informed of his right to counsel should not be assessed simply by looking at the precise words in the formal statement which the police read to him. While the formal statement read to the detainee is of course very important, the informational component of s. 10(b) is not simply concerned with a ritualistic incantation, but with whether the substance of the right was adequately communicated in all of the circumstances. Thus, as was said in **R. v. Latimer**, [1997] 1 S.C.R. 217 at 236, the question of whether the police have complied with their informational duty "... must always be determined with regard to all the circumstances of [the] case ...". In light of all of those circumstances, what must be considered is whether "the essence" of the detained person's right was "adequately communicated to him": **Bartle** per Lamer, C.J.C. at 202.

[15] It will helpful to review in more detail the evidence before the judge on this issue.

[16] Shortly after having been taken into custody, Mr. Grouse was told that he was under arrest for the attempted murder of a police officer. He was given the following cautions:

> Cst. COYLE: Just ... Just wait one second okay. **You have the right to retrain, retain and instruct a lawyer without delay and you also have the right to free and immediate legal advise okay**. We can call ahhh ... duty Legal Aid on your behalf ...
>
> ...

Cst. COYLE: Okay. I wish to give you the following warning. **You must clearly understand that anything said to you previously should not influence you or make you feel compelled to say anything at this time. Whatever you felt influenced or compelled to say earlier your (sic) not obligated to repeat nor are you obligated to say anything further but whatever you do say may be used in evidence.** Do you understand that.

[Emphasis in original]

[17] Mr. Grouse was asked each time if he understood and said he did. He seemed intent on talking to the police, but the officer interrupted him to ask if he wanted to talk to a lawyer and to advise him that he got to talk to his lawyer first:

Cst. COYLE: Just ... let me finish ... Let me finish what I got to say to you first. Then you can ask me questions okay. Mmmm ... do you have a lawyer or would you want us to call (UNINTELLIGIBLE) ...

Mr. GROUSE: Yeah I got Peter MANCINI.

Cst. COYLE: Peter MANCINI okay

...

Cst. COYLE: Do you have ... Do you have ... Do you want me to get a hold of a lawyer for ya?

Mr. GROUSE: My Lawyer is Peter MANCINI.

Cst. COYLE: Okay so you want ... I'll call him okay ...

Mr. GROUSE: Yeah.

Cst. COYLE: ... and you get to talk to him first.

Mr. GROUSE: Yeah.

. . .

Cst. COYLE: ... Do you know Peter MANCINI's number?

Mr. GROUSE: No.

Cst. COYLE: Okay well I'll get it. Do you know the law firm he works for?

Mr. GROUSE: Pardon.

Cst. COYLE: What law firm ...

Mr. GROUSE: Legal Aid.

Cst. COYLE: Legal Aid.

Mr. GROUSE: Yeah.

Cst. COYLE: Okay I'll see if I can get a hold of him for ya okay.
(Emphasis added)

[18] This occurred just after 7:00 a.m. on Sunday morning. Having ascertained that Mr. Grouse's counsel of choice was with Legal Aid and being aware that it was outside normal business hours, Constable Coyle called the on-call duty counsel number. His evidence was that when an accused in custody asks for a lawyer with Legal Aid, he calls the on-call lawyer and either the on-call lawyer talks to the accused or the lawyer talks to the officer and tells him that the accused still wants to speak to a specific lawyer.

[19] In this case, Josh Judah answered and the constable informed him that the appellant was in custody, charged with attempted murder and wanted to speak to Peter Mancini. Mr. Judah stated that he would speak to the appellant. Constable Coyle then gave the 'phone to the appellant, telling him that it was Mr. Judah, a lawyer with Legal Aid, and that he could speak with him. Constable Coyle turned off the video and audio recording equipment and left the room. Video monitoring, without audio, was maintained and after about ten minutes Constable Coyle noticed the appellant had ceased speaking on the phone. The constable entered the room and video and audio recording was resumed. There was no suggestion to the officer from either Mr. Judah or Mr. Grouse that Mr. Grouse wanted to speak to any other lawyer. The officer, in fact, testified that he did not know whether Mr.

Mancini had been included in the call after he turned the ’phone over to Mr. Grouse.

[20] To return to the question on appeal, I conclude that the judge did not err on this record in finding that Mr. Grouse understood from what the police said and did that he had the right to speak to counsel of his choice. As the trial judge found, both Mr. Grouse and the officer proceeded on this basis. Immediately after reading Mr. Grouse his right to retain and instruct counsel, the officer asked him if he had a lawyer. Mr. Grouse immediately named his lawyer (“I got Peter Mancini”). In other words, Mr. Grouse immediately asserted the right to consult with a lawyer of his own choice. The subsequent words and actions of the police could only have confirmed in Mr. Grouse’s mind that this was indeed his right and that it would be respected by the police. The officer, after reading the other cautions, told Mr. Grouse that he would call Mr. Mancini and that Mr. Grouse had the right to “... talk to him first.” There was then discussion of how to contact Mr. Mancini and the officer asked what firm he was with. When advised that he was with Legal Aid and recognizing that it was outside normal business hours, the officer contacted the duty counsel number and advised the lawyer who answered that Mr. Grouse wanted to speak to Mr. Mancini.

[21] The words and actions of the officer and of Mr. Grouse amply support the judge’s conclusion that, if the police had the duty to advise him that he had the right to counsel of choice, Mr. Grouse was adequately informed of that right in all of the circumstances here.

[22] However, I am also of the view, subject of course to implementation duties, that the law did not require the police to do anything to communicate Mr. Grouse’s right to counsel of choice beyond advising him of his right to retain and instruct counsel without delay as mandated in the leading cases from the Supreme Court of Canada. I say this for three reasons: the authorities do not require more, no additional information would be conveyed by adding more express information about counsel of choice and doing so would not help fulfil the purpose of the informational component of s. 10(b).

[23] The cases from the Supreme Court of Canada make it clear that there are three elements of the informational duty. The detained person must be told: (1) that they have the right to retain and instruct counsel without delay; (2) about

access to counsel free of charge where the individual meets prescribed financial criteria set by provincial legal aid plans; and (3) about access to duty counsel and the means available to access such services: **Bartle** at 194-195; **Latimer** at para. 33. The additional requirement advocated by the appellant is not supported by authority.

[24] Moreover, the addition of a more explicit reference to counsel of choice as advocated by the appellant would add nothing to the information conveyed to the detainee. The right to retain and instruct counsel means, at least, the right to hire a lawyer of the detainee's choice. This is the understanding of the right on which the cases defining the informational requirements have been based. The requirements that have been engrafted onto the informational component in **R. v. Brydges**, [1990] 1 S.C.R. 190 and **Bartle** were added to recognize that, absent information about legal aid and duty counsel, detained persons may think they cannot get legal advice other than through retaining counsel of their choice. For example, in **Brydges**, the detainee had expressed an interest in consulting a lawyer but assumed that would not be possible because he could not afford to pay. In **Bartle**, the detainee had assumed that a lawyer would not be available out of office hours and had no idea of how to contact a lawyer at the time of his detention.

[25] Implicit in these cases is that the right to retain and instruct counsel is understood to refer to privately retained counsel of the detained person's choice. Addition of the words advocated by the appellant would, therefore, not add anything.

[26] Moreover, the addition of this sort of language would not help to achieve the fundamental purpose of the duty to advise detained persons of their right to retain and instruct counsel. The purpose of this informational component is to enable a detained person to make an informed choice about whether to exercise the right to counsel and other *Charter* rights such as the right to silence: **R. v. Latimer**, **supra**, at para. 33. The focus of the informational component, therefore, is the immediate need of the detainee for legal advice. The practical problem addressed by the cases is not that detainees fail to understand that they may hire a lawyer of their choice, but rather that they assume this right will be of no help in getting the sort of immediate advice they require upon detention. As Lamer, J. (as he then was) said in **R. v. Brydges, supra** at 206:

> ... A detainee is advised of the right to retain and instruct counsel without delay because it is upon arrest or detention that an accused is in immediate need of legal advice. ... [O]ne of the main functions of counsel at this early stage of detention is to confirm the existence of the right to remain silent and to advise the detainee about how to exercise that right. It is not always the case that immediately upon detention an accused will be concerned about retaining the lawyer that will eventually represent him at a trial ... . Rather, one of the important reasons for retaining legal advice without delay upon being detained is linked to the protection of the right against self-incrimination. ...
> (Emphasis added)

[27] In my view, the addition of the words advocated by the appellant would not advance the purpose for which a detainee is told of the right to retain and instruct counsel without delay.

[28] The law on the informational component has, for the most part, opted for simplicity rather than technicality, leaving the precise demands of the right to counsel in a particular case to be worked out as part of the implementational duties of the police rather than by insisting that detainees be given a detailed statement of what the right to counsel means. The cases requiring additional information beyond that contained in the words of the *Charter* itself have added information which the courts thought was essential to make the right meaningful in light of the detained person's need for immediate access to legal advice. These additions are designed to meet the practical needs of the detained person, not to assure that the detainee receives a minute exposition of the intricacies of the right itself. In my view, no such rationale can be advanced for the addition proposed by the appellant.

[29] I recognize, as the appellant points out, that many of the forms of caution in use across the country appear to have explicit words to the effect that the detainee has the right to counsel of choice. I am not suggesting that these cautions are therefore inappropriate. I simply conclude that there is no constitutional requirement that the detainee be advised of his or her right to retain and instruct counsel in a way that more explicitly points out that, as is undoubtedly the case, the right is to counsel of choice.

[30] I conclude, therefore, that the judge was right to find that there had been no violation of the appellant's rights under s. 10(b) of the *Charter*.

2. Voluntariness:

[31] The second issue concerns the voluntariness of the appellant's statements. Before turning to the appellant's submissions, I must say a word about the standard of appellate review, provide an overview of the facts relating to the taking of the statement and a summary of the judge's reasons for admitting it.

(a) Standard of Review:

[32] At first glance, some of the statements about the standard of review in confession cases seem inconsistent with each other and with the law respecting appellate review in other contexts. For example, it has been said that the ruling on the admissibility of a confession is a matter of applying legal principles to the facts and is therefore a question of mixed law and fact or a question of fact: see for example **R. v. Oickle**, [2000] 2 S.C.R. 3 at para. 22 and, in another context, **R. v. Buhay**, [2003] 1 S.C.R. 631 at para. 45. However, the Supreme Court has also said in confessions cases that the admissibility of evidence is always a question of law: see e.g. **The Queen v. Fitton**, [1956] S.C.R. 958 at 983 - 4 cited with approval in **R .v. Ward**, [1979] 2 S.C.R. 30 at 34. Moreover, in other contexts, the Supreme Court has said that the application of a legal standard to the facts is a question of law alone: see **Araujo v. The Queen**, [2000] 2 S.C.R. 992 at para. 18; **R. v. Biniaris**, [2000] 1 S.C.R. 381 at para. 22.

[33] These apparent contradictions, however, are resolved by keeping in mind the difference between appellate jurisdiction and the scope of appellate review. The former concerns which cases may be considered while the latter concerns what should be done with them when they are. An issue may be characterized as a question of law, of fact, or of mixed law and fact as part of the analysis of both of these questions. The critical point is that the purposes of the characterization in these two settings are quite different and the characterization of an issue for one purpose does not necessarily inform its characterization for the other.

[34] I turn first to questions of jurisdiction. This appeal comes under s. 675 (1) of the **Criminal Code**, R.S.C. 1985, c. C-46, as am. which provides for a right of a person convicted of an indictable offence to appeal from that conviction on questions of law, or with leave of the court, questions of fact or mixed law and fact

or on any other ground that appears to the court of appeal to be a sufficient ground of appeal: see s. 675 (1) (a) (I), (ii), (iii). A broader right of appeal would be hard to articulate. This right of appeal, however, must be read in light of the powers of the court to allow an appeal when of the opinion that the verdict is unreasonable, there has been a wrong decision on a question of law or there has been a miscarriage of justice.

[35] Other rights of appeal in criminal matters, however, are restricted to questions of law alone: see for example the Crown right of appeal in an indictable case in s. 676 of the **Code** or appeals to the Supreme Court of Canada under s. 691. On the question of whether an appeal raises a question of law alone for jurisdictional purposes, there has been some controversy about whether a ruling concerning the voluntariness of a confession raises a question of law. While in general, a question concerning the admissibility of evidence is considered a question of law (see, e.g. **Fitton, supra** and **Buhay, supra**), it has been said that the judge's application of the legal principles to the facts in a confessions case does not raise such a question: see e.g. **Oickle** at para. 22. But while **Oickle** cites cases in this regard which were concerned with appellate jurisdiction, the proposition is clearly stated in relation to the standard of appellate review. In the context of appellate jurisdiction, I think it is now settled that the application of a legal standard to the facts found at trial is a question of law.

[36] For example, in **Araujo v. The Queen**, **supra**, the accused argued that the Court of Appeal did not have jurisdiction over a Crown appeal. The appeal was from an acquittal and raised the issue of the legality of a wiretap authorization. The accused argued that the appeal did not raise a question of law alone. This submission was rejected by the Supreme Court of Canada. Lebel, J. speaking for the Court said:

> 18 It is clear that this argument must fail. The interpretation of a legal standard has always been recognized as a question of law: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 21. <u>Moreover, our Court has recently recognized that if a question is about the application of a legal standard, that is enough to make it a question of law</u>: *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 23. In the case before us, the Court of Appeal examined the combined interpretation and application of the legal standard of investigative necessity. It also discussed the interpretation and application of the standard of review for a judge reviewing a wiretap authorization. There is no question that the Court of Appeal was dealing with questions of law. Thus, there was no jurisdictional bar to the Crown's appeal.

(Emphasis added)

[37] In **Biniaris**, to which Lebel, J. refers in **Araujo**, the issue was whether the question of the reasonableness of a verdict was a question of law alone. In answering the question in the affirmative, Arbour, J. for the Court said this:

> 21 The terminology "question of fact", "question of law", "question of mixed fact and law", "question of law alone", as used in the *Criminal Code* and in the case law in relation to rights of appeal has created serious difficulties of interpretation that are best resolved by a broad, purposive interpretative approach, adopted by Iacobucci J. in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 (quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87):
>
> ...
>
> 22 The sole purpose of the exercise here, in identifying the reasonableness of a verdict as a question of fact, law or both, is to determine access to appellate review. One can plausibly maintain, on close scrutiny of any decision under review, that the conclusion that a verdict was unreasonable was reached sometimes mostly as a matter of law, in other cases predominantly as a matter of factual assessment. But when that exercise is undertaken as a jurisdictional threshold exercise, little is gained by embarking on such a case-by-case analysis. Rather, it is vastly preferable to look at the overall nature of these kinds of decisions, and of their implications. Ideally, threshold jurisdictional issues should be as straightforward and free of ambiguity as possible. Otherwise, as these and many similar cases illustrate, courts spend an inordinate amount of time and effort attempting to ascertain their jurisdiction, while their resources would be better employed dealing with the issues on their merits.
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> 23 Whether a conviction can be said to be unreasonable, or not supported by the evidence, imports in every case the application of a legal standard. The process by which this standard is applied inevitably entails a review of the facts of the case. I will say more about the review process below. As a jurisdictional issue of appellate access, the application of that legal standard is enough to make the question a question of law. It is of no import to suggest that it is not a "pure question of law", or that it is not a "question of law alone".

(Emphasis added)

[38] **Biniaris** suggests that for jurisdictional purposes, little is to be gained by embarking on a minute examination of whether the particular case of applying law to facts involves predominantly legal or predominantly factual issues. However,

this is not the case when the issue is characterized for the purposes of determining the appropriate standard of review.

[39] This is clear, in my view, in **R. v. Buhay**, **supra**. While not a confessions case, the Court was there concerned with determining the standard of appellate review of a trial judge's decision to exclude evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. The Court noted at para. 42 that the s. 24(2) issue was an issue of admissibility of evidence and "...like any question of admissibility, a question of law from which an appeal will generally lie." Thus, for jurisdictional purposes, the question was characterized as a question of law. However, the Court went on at para. 45 to characterize the precise issue for the purposes of determining the applicable standard of review. The Court stated:

> 45 ... The appreciation of whether the admission of evidence would bring the administration of justice into disrepute is a question of mixed fact and law as it involves the application of a legal standard to a set of facts. In *Housen*, at para. 37, Iacobucci and Major JJ., for the majority, held that "[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law".
> (Emphasis added)

[40] In **Buhay**, the Court referred to its leading decision on standards of appellate review in civil cases, **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235. The standard of review analysis in **Housen** turns in large part on the characterization of the question before the court as one of law, fact or mixed law and fact. In this context, the characterization is conducted quite differently than in the jurisdictional context. The object of the standard of review analysis is to identify the appropriate level of deference to the initial decision-maker and requires more particular examination of the nature of the precise issue raised in the case.

[41] There is no controversy that a trial judge's decision on pure questions of law, that is respecting the applicable legal rules, is reviewed on the standard of correctness. Thus, as stated in **Oickle**, the determining of the appropriate legal test is a question of law reviewed on the correctness standard: at para. 22; see also **R. v. Tessier**, [2002] 1 S.C.R. 144. There is also no question that determining the facts, drawing inferences from them and assessing the weight to be given to the

evidence are to be treated with great deference on appeal even where, as in the case of appeals from conviction, the court has appellate jurisdiction in relation to questions of fact: see **Buhay**; **Fitton**. These principles are set out by Charron, J.A. (as she then was) in **R. v. Moore-McFarlane** (2001), 160 C.C.C. (3d) 493 (Ont. C.A.) at para. 68 where she stated that the judge's finding of voluntariness is entitled deference on appeal and "... should not be interfered with in the absence of legal error in determining the test, or overriding and palpable error with respect to the facts." (Emphasis added)

[42] More difficult is the question of the applicable standard of review for questions concerning the application of the principles to the facts. It is clear after **Oickle** that, for standard of review purposes, the application of the principles of voluntariness to the facts is either a mixed question of law and fact or a question of fact: **Oickle** at para. 22 With respect to mixed questions of law and fact, the applicable standard of review was adopted in **Buhay** from **Housen**: the palpable and overriding error standard should be applied "... unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law": **Housen** at para. 37 as adopted in **Buhay** at para. 45.

[43] In **Housen**, the majority of the Court held that the standard of review on mixed questions of law and fact, such as the application of a legal standard to the facts, lies along a spectrum: para. 36. Where the decision is traceable to some "extricable error in principle", the standard of review is correctness: para. 37. This may occur, for example, if the legal test requires consideration of certain factors but they are not all considered by the judge: **Housen** at para. 27 citing **Canada (Director of Investigation and Research) v. Southam Inc.**, [1997] 1 S.C.R. 748 at para. 39. Otherwise, mixed questions of law and fact should be reviewed on the palpable and overriding error standard.

[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)

(b) Overview of the *voir dire* evidence:

[46] It will now be helpful to give a brief summary of the evidence adduced on the *voir dire*. In addition to reviewing a complete videotape of the interrogation, the judge heard from the various police officers who had dealings with the accused, from the accused himself, his mother and a psychiatrist called on his behalf.

[47] After speaking with duty counsel, the appellant continued to be held in custody. At approximately 5:00 p.m., the appellant was processed for physical evidence by Constables Pembroke and Auld. The appellant was presented with a general warrant, his clothes were seized, and he was processed using a gun shot residue kit.

[48] An interrogation strategy was developed by an officer experienced in conducting interrogations. The first team would be the 'bad cop' team, followed by the second team that would be the 'good cop' team. Police interrogation of the appellant began at 8:18 p.m. and continued for approximately three hours and 20

minutes, with about 25 minutes in breaks. During his time in custody, the appellant was given and ate food once and was offered a meal but refused on a second occasion. He was taken to the washroom at his request.

[49] The interrogation began with Constables Auld and Carlisle. They continued until shortly before 10 p.m. with a brief break between 9:03 and 9:15. The second team, Constables Astephen and Hussey, took over shortly after 10 p.m.

[50] Constables Auld and Carlisle began their interview of the appellant by informing him that he was under arrest for attempted murder and by giving him a secondary caution. Prior to the break, the bulk of the questioning was conducted by Constable Auld. Constable Auld repeatedly asserted that the appellant had shot the police officer and the appellant repeatedly denied guilt. The questioning was at times aggressive, profane and confrontational. The questioning employed references to the appellant as "bitch", "little girl" and "coward", and the appellant's behaviour as a sibling and as the shooter was impugned. The appellant was confronted with the possibility (later presented as a fact) that the physical evidence taken from him earlier in the day would reveal the presence of gun shot residue and he was challenged to explain it.

[51] The appellant made a number of statements which are indicative of defiance or resistance to the interrogation. For example, he informed the constables that he was glad that someone had shot at the police:

> Cst Auld: So you're the only guy up there that doesn't care what his reputation is. Is that what your [sic] tellin' us? **(Short pause)**... So why don't we talk about why that car. What not the other cars. Why did you shoot at that particular car? Why don't we talk about why somebody would shoot at that Police car. Why do you think somebody would shoot at that Police car?
>
> Mr. Grouse: I don't know (unintelligible)...whoever did it. I'm, I'm glad he did it.
>
> Cst. Auld: Your [sic] glad he did it.
>
> Mr. Grouse: Yeah. I don't care. It wasn't me.
>
> Cst Auld: But your [sic] glad that they shot at the Police.

Mr. Grouse: I don't care.

Cst. Auld: Well you just told us you were glad that they shot at the Police.

Mr Grouse: Yeah to think you guy's are glad that you got, got your...that I pick my sister up. I'm glad whoever did that there too and I didn't even know until this morning. I'm lookin' at attempted murder.

[52] The defiant tone of these excerpts is consistent with comments made by the appellant prior to the interview, just after having contacted legal counsel, and having been left alone by Constable Coyle:

Mr. Grouse. ... I didn't hit no fuckin' cop man. How the fuck... I didn't fight no fuck... I didn't fuck man... **(Pfff)**.... They would have fuckin' draw their fuckin'... They (**UNINTELLIGIBLE**) ... fuckin' gave me about an attempted murder (**UNINTELLIGIBLE**)...I must of got him by himself then. Had to had get him by himself. I should have broke his neck then. It was a fuckin' attem... you guy's better get the fuck out of my face MAN talkin' fuckin' shit to me some fuckin' attempted murder of some fuckin' Police Officer. Your [sic] lookin' for the wrong fuckin' man. Do you think your [sic] fuckin' bad or somethin' [a police officer]. Who fuck you know. He will (**UNINTELLIGIBLE**)... Graham was scared. I told him that I was comin' for him. It was this guy that was fucked. ...

[53] After the break at approximately 9:00 p.m., the character of the interview was less confrontational. The questioning and discussion were directed to obtaining details of what the appellant had done in the period of time from his sister's arrest until after the shooting. The appellant was challenged again with the gun shot residue evidence on his clothing, although unlike before, the constables were more forceful and suggested that the evidence actually existed, which it did not. In response, the appellant initially denied having fired any weapon, but later he explained that he had fired a rifle in target practice on the day before his sister's arrest. The constables challenged the credibility of the appellant's narrative generally. In particular, the constables asked the appellant to view matters from the perspective of a hypothetical jury deciding his guilt or innocence. The constables tried to persuade the appellant that the jury would find him guilty.

[54] The character of the interrogation changed when Constables Astephen and Hussey took over from the first team. The questioning employed was far less confrontational and profane, a contrast which was consistent with the interrogation strategy. The appellant seemed to be more co-operative in his exchanges with the second team.

[55] A majority of the questioning and discussion was concerned with the appellant's narrative for the period following his sister's arrest and the shooting. The second team repeatedly referred to the supposed gun shot residue evidence as a means of challenging the veracity of the appellant's version of events. The appellant was asked to explain the residue and the appellant asserted that he had been engaged in recreational target practice the previous day. The constables pointed out problems with the plausibility of this explanation. At some length, the constables suggested that the appellant had not aimed at the police car or intended to shoot the police officer but that he had simply "pounded a round off" to "send a message". They told the appellant that they had discussed the shot with a police sniper who felt that the shot was highly improbable, thus implying that the officer had not been shot intentionally. The second team pointed out the difference in possible sanctions between the crimes associated with intending and not intending to wound the officer. They said to him, "Right now its all Draper. So its either ... five (5) years for Draper because he shot at a Police car ... or its twenty (20) years because he premeditated to shoot at a Police woman in the car."

[56] After about an hour, the appellant confessed to shooting at the police car. After the confession, the appellant, as noted by the trial judge, was co-operative with the constables in answering questions and providing further details. In addition to admitting to taking the shot, the appellant described having someone dispose of the weapon, identified the calibre of the weapon and admitted to lying about his alibi. Further, after the constables left the room, leaving the appellant by himself, the appellant, apparently as relaxed as if he were at the beach, stated "Oh hmmm ... goin' to jail. I won't see my dogs for a while ... You gotta do crime, You gotta do the time" .

[57] At the *voir dire* regarding voluntariness, the appellant was questioned with respect to the effect of the interrogation on him. The following are excerpts from the cross-examination of the appellant by the Crown:

Q. The yelling and the raised voice, the sort of physical approach to you and the pointing on you and you indicated touching your foot, [i.e. during questioning by Constables Auld and Carlisle] it didn't have any particular affect [sic] on you in terms of causing you to confess, did it?

A. At some point it – – like they were getting close to – – like getting in front of – – they were getting mad. They're only going to take so much.

Q. But it didn't cause you to confess to Constable Auld or Carlisle.

A. No

[58] The appellant was also cross-examined with respect to physical contact that the appellant alleged took place during his interrogation with the first team, Constables Auld and Carlisle. The passage is indicative of the effect of the interrogation techniques on the appellant:

Q. Actually, I'm just going to stop there. And it's at this particular passage that you say we can see Constable Auld making contact with you? Is that right? It's at this time?

A. Rewind it?

Q. Isn't it after he moves in?

[VIDEOTAPE PLAYBACK VD-13 NOT TRANSCRIBED]

BY MR. CARVER:

A. Was it there?

A. Yeah. And before that.

Q. And am I right? Am I hearing you correctly? Are you saying to the officer you're going to put charges on him if he doesn't stop?

A. Yeah.

Q. So you knew you had the right to do that?

A. What?

Q. You knew you had a right to do that?

A. Yeah. Anyone got a right to do that [inaudible] make a charge, right.

Q. So you figured if he makes physical contact with you, you could have him charged?

A. Yeah.

Q. And just to be curious, did you?

A. Did I what?

Q. Charge him?

A. No.

Q. You said he made contact with you.

A. Well, if I wanted to charge him I would have charged him. It wasn't – – he didn't – – it isn't like they hurt me. They didn't punch me in the eye or nothing like that there.

...

[59] There is evidence suggesting that the appellant had the presence of mind to make choices in answering questions, making statements and in providing information both true and false. At points during the interrogation, Constables Hussey and Astephen told the appellant he had been ratted out by people in his neighbourhood. In cross-examination, the appellant indicated that he did not feel compelled to confess when confronted by these allegations. Further, during questioning the appellant prevented Constables Astephen and Hussey from obtaining the phone number of the appellant's girlfriend with whom the police could have verified his alibi. During the interview and after stating that he had shot the police car, the appellant admitted to actively lying to the police regarding his alibi.

[60] There was also evidence that the appellant had no understanding that he had been promised anything in exchange for his statement. After he had confessed, he said to the officers, "I helped you guys out. Could you help me out? ... Tell me who ratted me out." This question, of course, is inconsistent with any understanding on the appellant's part that he had been promised anything in exchange for his statement.

[61] The appellant also called expert witness evidence on the *voir dire* from Dr. Semrau, a psychiatrist. He testified that he saw a substantial risk that a person in circumstances similar to the appellant's might be convinced that his only viable option was to confess. He conceded, however, that individuals vary in their vulnerability to the circumstances of a particular interrogation, that there would be "enormous" variability within the pool of people described by the hypothetical person he was asked to address and that personality and temperament are the most important factors in deciding the impact of an interrogation.

(c) The trial judge's reasons:

[62] The trial judge, whose reasons for admitting the statement may be found at (2003), 215 N.S.R. (2d) 158; N.S.J. No. 251 (Q.L.)(S.C), made the following findings after the *voir dire*:

1. As agreed by the parties, Mr. Grouse had an operating mind at all relevant times: para. 6

2. Nothing about Mr. Grouse's accommodation or treatment prior to the start of the interrogation either independently or cumulatively or in the context of the events which followed, gave rise to any reasonable doubt with respect to the voluntariness of the statement which he later made: para. 8

3. While acknowledging that the tactics used by the police during this investigation, which he characterized as "oppressive" and involving trickery could induce some people to confess, the judge found that Mr. Grouse was not intimidated or oppressed by the trickery and misstatements by the police or by the intense, persistent questioning. Mr. Grouse, found the judge, continued to make conscious choices

when providing information and responses, maintained the option to provide or withhold information and freely chose to give truthful or dishonest answers.

4. The misrepresentation or tricks in this case were not of a nature which would shock the community and the appellant's response and demeanour do not suggest a degree of oppression or intimidation interfering with his ability to provide a voluntary confession: para. 14

5. The police, while raising the possibility that the appellant acted without the intent to murder and indicating that different penalties applied to different offences, did not make any threat or inducement or suggest that a lesser penalty would be available if he were to confess and a more severe one if he did not: there was no "*quid pro quo*" offered. As the judge said: " ... I find nothing in the words spoken by the police claiming or implying that they had the ability to or would make any effort to influence the penalty the Accused would receive based upon whether or not he provided a statement": at para. 19.

6. While acknowledging that the cumulative effect of the investigating process and of prolonged questioning must be considered, none of the oppressive techniques employed during the early part of the interview intimidated Mr. Grouse and they were not factors at the time the statement was made. As the judge put it: "... I find no causal connection between those activities and the statement which the Accused eventually provided.": para. 21

7. The cumulative effects of the various tactics used by the police did not raise a reasonable doubt about the voluntariness of the statement: para. 23.

(d) The appellant's submissions:

[63] The appellant argues that the trial judge made three errors: first, by equating the presence of an operating mind with an absence of oppressive conditions and as a result failing to properly assess the circumstances of the interrogation; second,

by applying the "community shock test" to the police falsely telling the appellant that they had found gun shot residue on his hands; and, third, by failing to consider the cumulative effect of the conditions and means of the interrogation.

[64] I cannot accept these submissions. As to the first, the judge's reasons make it clear that he did not confuse the operating mind doctrine with an absence of intimidation and inducements or the presence of oppression. The judge noted that it was not disputed that the appellant had an operating mind and then went on in his reasons to consider the other relevant matters. Nor can I accept the appellant's third submission that the judge failed to consider the cumulative effect of the circumstances and police conduct in assessing voluntariness. He expressly refers to the need to consider the cumulative effect of these matters in at least three places in his reasons and there is nothing to suggest that the judge failed to do what he repeatedly said he was doing. Finally, in relation to the appellant's second submission, I do not accept that the judge erred in principle by failing to recognize that the false evidence is part of the oppression analysis while the broader topic of "police trickery" is part of the community shock test. It is apparent from the judge's reasons that he considered both oppression and whether the interrogation would shock the community in light of the totality of the police conduct.

[65] Aside from all of that, the appellant does not and on this record could not realistically attack the judge's clear finding that none of the police conduct which might otherwise give rise to concern in fact caused the appellant to confess.

[66] I can find no reviewable error in the judge's decision to admit this confession.

V. Disposition:

[67] I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.
Fichaud, J.A.