PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. Fulford*, 2022 NSPC 49

Date: 20221213
Docket: 8535055
Registry: Windsor

Between:

His Majesty the King

v.

Tony Fulford

Restriction on Publication: s.486.4

Voluntariness *Voir Dire* and sections 10(b) and 9 *Charter* applications

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	October 25, 2022, November 21 and 25, 2022, December 12, 2022, in Windsor, Nova Scotia
Decision	December 12, 2022
Charge:	Section 161(4) of the *Criminal Code*
Counsel:	William Fergusson, for the Crown Chrystal MacAulay, for the Defendant

Cases Considered: *R. v. Tessier* 2022 SCC 35; *R. v. Suberu*, 2009 SCC 33; *R. v. Singh*, 2002 SCC 48; *R. v. Oickle*, 2000 SCC 38; *Boudreau v. The King*, 1949 CanLII 26 (SCC); *R. v. Oland* 2018 NBQB 255, *R. v. Naess*, [2022] OJ No. 5050,

By the Court:

[1] At trial on a charge of fail to comply with a condition of a prohibition order, contrary to section 161(4) of the *Criminal Code*, the Court entered into a *voir dire* to determine the admissibility of Mr. Fulford's statement to Cst. Murphy. The Crown says it was voluntarily provided and admissible on the trial.

[2] Cst. Murphy was the sole witness on the *voir dire*, and following Crown submissions, defence counsel prepared and filed written submissions also arguing Mr. Fulford was arbitrarily detained and his right to silence breached pursuant to sections 9 and 10(b) of the *Charter*. As a remedy he seeks exclusion of the statement.

[3] After considering the evidence and the law, I find the Crown has proven the statement voluntary pursuant to the common law confessions rule. The applicant has not established Charter breaches. The statement is admissible at trial. These are my reasons for reaching such conclusions.

The evidence on the voir dire:

[4] The *voir dire* occurred in the midst of Cst. Murphy's trial testimony, and without an agreement by counsel to adopt the evidence of the trial into the *voir*

dire, or *vice versa*, the Court will be careful to consider only the evidence led on the *voir dire*.

[5] Cst. Murphy testified that he knocked on Mr. Fulford's door after being directed there by employees of the neighbouring place of safety (POS) who had sought police assistance to address earlier behaviours of youth clients outside the POS. The employees told the officer a 'creepy man' who lives next door was observed speaking with the young people. Receiving no response to his knock on the front door of the older style house, and believing it might be a house-to-apartment conversion, the officer opened the front door. Once inside the vestibule he yelled 'Hello RCMP' or words to that effect.

[6] Mr. Fulford appeared at the top of the interior staircase, came downstairs, and the two spoke. Cst. Murphy told Mr. Fulford that he had been observed speaking to the kids next door and asked what he might have seen regarding "those kids out front and what was going on". Cst. Murphy says Mr. Fulford "described seeing kids out front and [said] that he spoke to them". Cst Murphy testified that Mr. Fulford added words to the effect, "I talked to them, I probably shouldn't have". The officer took no meaning from Mr. Fulford's response but thought it was "something different".

[7] Cst. Murphy testified on both direct and cross examination that Mr. Fulford was not under investigation nor was he suspected of any crime, adding "I was unaware of what he might have been a suspect for". The brief conversation ended with the officer telling Mr. Fulford to "be careful talking to those kids because each has their own troubles and baggage, and they are under the care of social services so it might be advisable to stay away from them". This, the officer says, "I would have said to anyone".

[8] Defence did not call evidence on the *voir dire*.

Position of the Crown:

[9] Put simply, the Crown says there is no evidence Mr. Fulford was a suspect, instead he was simply a citizen spoken to by police regarding what was going on with the young people outside the POS. There was nothing untoward about the short conversation that could render Mr. Fulford's statement anything other than voluntary. As such, the Crown says it has established voluntariness beyond reasonable doubt. Not being a suspect, arrested or detained at the relevant time, Mr. Fulford has not established the breach of a *Charter* protected right.

Position of the defence:

[10] Defence counsel says there are many factors to consider when assessing voluntariness and none on their own are determinative. She points to the officer (a) entering the house without benefit of invitation, (b) not providing Mr. Fulford the *Charter* right to silence before engaging in conversation, and (c) a failure to record the statement. The lack of invitation to enter the residence created an oppressive atmosphere, required rights to counsel, and led to an arbitrary detention which combined to render Mr. Fulford's statement to Cst. Murphy involuntary and a breach of his *Charter* protected rights.

The law on voluntariness:

[11] The Crown bears the persuasive or legal burden to establish voluntariness beyond a reasonable doubt. (*R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3 at para 68) The inquiry is contextual and fact-specific, requires weighing and balancing of the factors relevant to the case, and the Court must consider the existence of such things as police trickery, threats, promises, fear of prejudice or hope of advantage, oppressive circumstances, operating mind, and circumstances that degrade or devalue the detainee's right to silence, *inter alia*. (*R. v. Singh*, 2002 SCC 48 at para 35)

[12] The Supreme Court of Canada recently expounded on the confessions rule and voluntariness in *R. v. Tessier* 2022 SCC 35. As a starting point "the proper application of the confessions rule aspires to strike the right balance between the individual and societal interests at play in police questioning: on the one hand, protecting the accused from improper interrogation by the police and, on the other, providing the authorities with the latitude they need to ask difficult questions to investigate and solve crime" (para. 4). It must also be remembered that "voluntariness extends to a broader "complex of values" animated by both reliability and fairness" (para. 72).

[13] As far back as 1949, the SCC in *Boudreau* considered the absence of a caution as an important but not decisive factor in the voluntariness inquiry, confirming the confessions rule should remain flexible to account for the complex realities of police investigations. (*Tessier* at para 71, addressing (*Boudreau v. The King*, 1949 CanLII 26 (SCC)))

[14] The Court in *Tessier* specifically addressed that flexibility pointing to the Crown's obligation to establish that the absence of a caution did not undermine the defendant's free choice to speak to the police. (*Tessier* para. 8) Part of that context requires this Court to consider whether Mr. Fulford was a suspect at the time he provided the statement, and for clarity on that point I look to the review

of the law provided by Morrison J. at paragraphs 43-46 in *R. v. Oland* 2018 NBQB 255:

> [44] In *R. v. Morrison, supra*, Justice Trafford stated that a person is a "suspect" if the information collected during an investigation, objectively viewed, implicates him or her in the crime (para. 50). In *R. v. Wong, supra*, Justice Fuerst acknowledged that there were various formulations of the term "suspect". In that case she adopted the formulation set out by Justice Watt in *R. v. Worral*, 2002 CarswellOnt. 5171, that a person is a suspect when a "reasonably competent investigator" would be alerted to the realistic prospect that the person was implicated in the crime (para. 104; *Wong*, para. 64). At paragraph 65 Justice Fuerst goes on to state as follows:
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> > [65] More recently, in *R. v. Chehil*, 2013 SCC 49, at paragraphs 27 and 47, the court described "reasonable grounds to suspect" as engaging the reasonable possibility, rather than probability of crime (emphasis added). While still an objective standard based on objectively discernible facts, it is more than an educated guess or a hunch, but less demanding than reasonable and probable grounds to believe. It can arise from information that is less reliable than that required for reasonable and probable grounds to believe. See also *R. v. Ali*, 2016 ONSC 2100, at paragraphs 72 to 75. [Emphasis added.]
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> [45] In *R. v. Garnier, supra*, the court applied the "reasonably competent investigator test" articulated in *Worral* (paras. 36–47). A useful discussion of the issue is found at paragraphs 81–83 in *R. v. Smyth, supra*. In particular, Justice Trafford stated at paragraph 81:
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> While this rule is easily stated, and well established at common law, it is more difficult to define a "suspect." In my view, the definition of a "suspect" must be formulated for the purpose of giving effective, practical recognition to the right to silence. The right to silence is a cornerstone of our values as a free and democratic society. No one is required to speak with the police at any time, let alone while he is implicated in a crime. The most effective way of recognizing the right to silence is to define the term "suspect" objectively. Thus, where the information collected during an investigation, objectively viewed, tends to implicate a person in a crime, the person is a "suspect." The objective nature of the test is critical to its efficacy as a means of recognizing the right to silence. A police officer cannot avoid the obligation to caution a "suspect," objectively viewed, by a subjective analysis to the contrary. The fact that a person who is a "suspect," objectively viewed, may also be a witness, or a victim, does not affect the application of the rule to the investigation…
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> [46] More recently, in *R. v. Merritt*, 2016 ONSC 7009, Justice Dawson stated at paragraph 39:

> In accordance with this authority, I conclude that before someone can be considered a suspect for the purpose of determining whether a primary caution should be given **there must be a constellation of objectively discernible facts which**, returning to what was said by Charron J. in *Singh* at paras. 31-32, **gives rise to a reasonable suspicion that the person being interviewed has committed an offence.** I take this test to be different than a mere subjective suspicion or investigative hunch. It accords with the concept found in various versions of the Major Case Manual used by the police in Ontario, that there must be some evidence which tends to demonstrate culpability before the police consider someone to be a suspect. [Emphasis added.]

[15] Nothing in the evidence of Cst. Murphy supports a conclusion Mr. Fulford was suspected of any crime. Rather, the undisputed evidence supports a conclusion Cst. Murphy was simply following up with a citizen who may have witnessed whatever the young people were doing in front of the POS. At best those folks were not complying with the rules of community services residential agreements or at worst mischief.

[16] The POS staff did not provide any information to Cst. Murphy other than to direct him to the ‘creepy guy’ next door who spoke to the young people. There is nothing to objectively support a conclusion Cst. Murphy engaged Mr. Fulford in investigative contact arising from the commission, or suspected commission, of any offence. Finally, there were no “objectively discernable facts” known to Cst. Murphy at the time of the conversation which would lead a reasonably competent investigator to conclude Mr. Fulford was implicated in a criminal

offence. In point of fact, neither POS staff nor the officer knew Mr. Fulford's name or legal attachment to a prohibition order, and certainly not its conditions.

[17] The Court is reminded of the *apropos* statement of the Court in *Tessier* at paragraphs 75 and 76:

> [75] Even if one acknowledges that many encounters with the police can be daunting, fairness considerations are unlikely to arise in the same way where the person is not suspected of being involved in the crime under investigation. Fairness concerns are manifest once an individual is targeted by the state. There is nothing inherently unfair, for instance, about police questioning a person standing on the street corner without providing a caution while gathering information regarding the potential witnessing of a crime.
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> [76] Yet in the specific context where a mere witness or an uninvolved individual is questioned, introducing a caution requirement as a condition of voluntariness could exact a cost on the administration of justice, notwithstanding the fact that no unfairness has arisen in obtaining the statement. Questioning at a police station is, to be sure, qualitatively different if the circumstances suggest that the interviewee brought or summoned for questioning is, on an objective basis, a suspect deserving of a caution. But to call for cautions in all circumstances would unnecessarily inhibit police work. Where a person faces no apparent legal jeopardy and the intentions of police are merely to gather information, an imposed caution could even chill investigations. Effective law enforcement is also highly dependent on the cooperation of members of the public (*Grant*, at para. 39). Where a contextual analysis reveals that no unfairness has arisen and no *Charter* protections were engaged, a bright-line rule to caution everyone could disturb the balance struck by the confessions rule by excluding reliable and fairly-obtained statements. It is preferable to allow courts to take measure of the true circumstances of the police encounter flexibly. In the spirit of Charron J.'s suggestion in *Singh*, courts should pay particular attention to whether the absence of a caution has had a material impact on voluntariness in a manner which would warrant exclusion of the statement. [emphasis added]

[18] Having taken the measure of the situation and concluded Mr. Fulford was not a suspect, I will now consider whether the absence of a caution had a material impact on voluntariness of his statement.

Uninvited entry into the house:

[19] Defence argues the manner in which Cst. Murphy entered the residence vestibule, without invitation, created an oppressive atmosphere that required provision of *Charter* rights.

[20] While Cst. Murphy met Mr. Fulford in the apartment house vestibule, where he entered without verbal invitation, Cst. Murphy explained that he entered the building believing it was a house to apartment conversion, and as such the front door could be opened to reveal apartment doors therein. It turned out he was correct. Cst. Murphy entered and called out into the empty space identifying himself as RCMP. As I understood the evidence, Mr. Fulford then appeared at the top of the stairs, came down and joined the officer. He was not placed under arrest and must be taken to be aware that the person with whom he spoke was an RCMP officer, a person in authority, as there was no evidence to the contrary.

[21] There exists a common law implied invitation to approach and knock, which I find covers this situation. Recently in *R. v. Naess*, [2022] OJ No. 5050, the court rejected the argument a controlled delivery "came within the implied invitation to approach and knock", the court said at para 89: "Over 25 years ago, a majority of the Supreme Court of Canada recognized in *Evans* that the common law, absent a clear expression of intent by the occupier to the contrary, deems the occupier of a dwelling to extend an implied invitation to all members of the public, including the police, to approach the home and knock at the door to facilitate communication with the occupant: at paras. 40-42."

[22] There was no "clear expression of intent by the occupier" that the visiting officer could not open the unlocked door and enter the shared apartment vestibule. Surely knocking and entering a vestibule, which is in essence a common area between two apartments and calling out to the inhabitants must be viewed as akin to implied invitation to approach and knock. I find the vestibule between two apartment was no different than an apartment lobby. Once in that space, there is by extension an implied invitation to knock on an apartment door. That was unnecessary because calling out led Mr. Fulford to come out of his apartment or speak to the officer from the top of the stairs near an apartment door. The evidence was not exactly clear on the latter. As such, I find the

officer's attendance at the house complied with the common law implied invitation.

[23] It is argued the context and the atmosphere in the vestibule created oppression. However, much was left unsaid to support such a conclusion. There was no evidence of the size of the vestibule, how Mr. Fulford perceived the situation, what informed his decision to come downstairs, etc. The lack of evidence from Mr. Fulford on these points cannot be ignored. The officer's evidence supports a short friendly conversation in the apartment vestibule.

[24] Mr. Fulford chose to descend the stairs. There was no objective evidence supporting a conclusion an oppressive environment was created such that he experienced heighten vulnerability due to the officer's presence in the vestibule. On the discernable facts known at the time, I do not find it would shock the conscious of the community that the officer entered the vestibule in the manner he did and called out to Mr. Fulford who then engaged in conversation. There being no evidentiary support for oppressive circumstances, and such being highly unlikely on these facts, the Court does not find it existed in that place.

[25] Finally, defence concedes "many [other] common factors that indicate an atmosphere of oppression are not present in the case at bar: lengthy

interrogation, failure to facilitate legal advice despite requests from the accused, physical force, deprivation of sleep/food water/clothing/blanket/toilet facilities, etc." As a result, there is no need to consider those factors that commonly arise on a voluntariness *voir dire*. Likewise, I find no evidence of police trickery, threats, promises, fear of prejudice or hope of advantage, or circumstances that degraded or devalued Mr. Fulford's right to silence on the evidence.

[26] Lack of an operating mind was not argued but the law is quite clear "the operating mind doctrine requires the Crown to show that the accused possessed the limited cognitive ability to understand what they were saying" (*Tessier* at para. 8) and "[t]he default assumption in the cases is that, absent a cognitive impairment, an operating mind exists. But the burden always rests with the Crown to show, beyond a reasonable doubt, that the statement was voluntary in light of the broader contextual analysis proposed in *Oickle*. An operating mind is of course a necessary but not sufficient condition". (*Tessier* at para. 52)

Failure to record the statement:

[27] As previously stated, the confessions rule is "animated by both reliability and fairness concerns". (para. 70 *Tessier*) It is argued Mr. Fulford's statement was unreliable because it was not recorded. The Court was unsure if that meant

written in a notebook or audio or video recorded, nonetheless there is certainly support for a conclusion the statement, as testified to by Cst. Murphy was not *verbatim* but instead the officer's general recollection. Cst. Murphy said as much, and this does demonstrate a need for concern about reliability. However, the essence of the words spoken conveyed that Mr. Fulford spoke to the young people and thought perhaps he should not have done so. What stands out, rendering the essence trustworthy, was Cst. Murphy's thought that the response seemed odd at the time, but without context it was not clear to him what Mr. Fulford meant by his words. It is worth noting, saying he spoke to the youth generally does not mean that he specifically spoke to one who was under sixteen years of age- per the prohibition order. I find the statement sufficiently reliable despite not being recorded.

Psychological detention:

[28] Defence argues Mr. Fulford was psychologically detained. There was no evidence to support the conclusion a reasonable person in Mr. Fulford's position would feel he was not free to leave and was obligated to speak to police. A reasonable person would perceive the officer as simply asking about the youth next door, there was no suggestion the officer was aware of Mr. Fulford's order of prohibition. The conversation was brief and nonintrusive.

Only Mr. Fulford knew he was subject to a prohibition order, and yet he chose to speak. It cannot be ignored that Mr. Fulford chose not to testify. As such there was no evidence of intimidation whatsoever. All the factors weigh against finding he was detained.

Conclusion:

[29] Mr. Fulford was not a suspect. He maintained an ability to exercise a free choice to speak to Cst. Murphy throughout their interaction. He has not established evidence to the contrary, and nothing arose on the evidence to support another conclusion. He was capable of making a meaningful, free, and active choice to speak to Cst. Murphy, his mind was operating, and his choice was not improperly influenced by state action. Finally, there was no evidence led to support a conclusion the lack of a caution had a material impact on voluntariness in a manner warranting exclusion of the statement. Overall, there were no circumstances that raised a reasonable doubt as to whether the statement was voluntary.

[30] Based on the whole context of this case, I find the statement reliable and not arising as a result of an unfair deprivation of Mr. Fulford’s free choice to speak

to a person in authority. The Crown has proven beyond a reasonable doubt the statement was voluntary and, as a result, it is admissible in evidence on the trial.

The Charter applications:

(i) The right to silence:

[31] The applicant bears the burden to establish a breach of a *Charter* protected right on a balance of probabilities. Having determined Mr. Fulford was not a suspect or under investigation with respect to any offence, there was no legal requirement for Cst. Murphy to provide the *Charter* right to silence.

[32] While the defence counsel makes much of the fact that the conversation occurred within Mr. Fulford's dwelling house, it did not. Instead, I find the conversation must be seen to have occurred in the entrance vestibule of an apartment house where visitors are welcome to enter before knock on the door of a specific apartment. Cst. Murphy did not get that far as he simply called out and Mr. Fulford responded.

[33] It is settled law that the right to silence arises when a person is detained. (*R. v. Suberu*, 2009 SCC 33 at para 2) Mr. Fulford was not detained. Instead, he was a willing participant in a brief conversation in the apartment vestibule. He

was not arrested nor was he detained. Interestingly the court in *Tessier* declined to "expand the confessions rule where a person is not arrested or detained by adding an informational component to it that is absent from the settled jurisprudence". In doing so it referenced "*Hebert*, *Whittle*, *Oickle*, and *Singh",* where 'suspects' did require cautions. (*Tessier* at para. 55)

(ii) Section 9:

[34] Having fully canvassed the evidence, I find Mr. Fulford was also not *arbitrarily* detained. There was no evidence of "significant physical or psychological restraint" (*Grant* para 44). There was no legal obligation to speak to the officer and a reasonable person responding to a police officer calling out 'hello' in an apartment vestibule would not conclude he was without choice but to talk to the officer. While courtesy might compel a person to respond to a police salutation, on these facts nothing more was required of Mr. Fulford. His decision to engage was perhaps not a good one, but that did not arise as a result of arbitrary detention but perhaps an exercise in bad judgement.

[35] Neither *Charter* applications has been proven on a balance of probabilities.

[36] The statement is voluntary and admissible, and the *Charter* applications are dismissed.

[37] Judgment accordingly.

van der Hoek PCJ.