IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Hurley*, 2005 NSSC 76

Date: 20050407
Docket: CR 235954
Registry: Amherst

Between:

Her Majesty The Queen
v.

Larry Kevin Hurley

DECISION ON VOIR DIRE

Judge:	The Honourable Justice Walter R.E. Goodfellow
Heard:	in Amherst, Nova Scotia, April 7, 2005
Written Decision:	April 12, 2005
Counsel:	Michelle D. James for the Crown Jim M. O'Neil for the Defence

By the Court: (Orally)

[1] The Crown wishes to introduce in evidence in the trial a video taped statement by the accused given on December 9, 2003.

[2] The evidence presented on the *voir dire* consisted of the two police officers who participated, the video taped statement, a written copy of the charter and police warnings given to the accused and the accused himself.

[3] The Crown takes the position the statement was given freely and voluntarily and the defence takes the position that the Crown has failed to establish it was given freely and voluntarily and also that it was taken in such a manner as to produce an emotional state in which the accused lost his capacity to give his statement freely and voluntarily.

[4] It is clear that the police officers approached the accused at his place of employment and they readily acceded to the accused's request to come down to the police station at his convenience, i.e. at his lunch break. During the introductory stage the accused answered clearly his date of birth, address, etc. When one of the officers made reference to a name which is associated apparently with the accused having in the past been a victim of sexual abuse, the accused became emotional and started crying and this also occurred at another point when the name was mentioned again. The accused in his evidence indicates the use of the name made him, "give into them" so that he

would get out of there. The accused went on to say his earlier acknowledgement with respect to his right to counsel was not the truth. The accused acknowledged he grasped the warning that what was said could be used against him.

[5] I agree with the constables, the fact an accused becomes emotional and cries during interrogation is not that unusual. I do not think referring to an accused's past is taboo nor is a measure of aggressiveness in conducting an interrogation of a suspect out of line.

[6] I do not accept the defence's contention that the mention of a name in these circumstances is inappropriate and I conclude it does not in my view by itself establish oppression.

[7] What is troubling about the interrogation is that at the two crucial stages the value of video taping is to a considerable degree lost.

[8] Throughout the explanation to the accused of Charter entitlement to counsel and the police warning, the position/location of one of the police officers is such that one cannot observe the accused. The accused's face is blocked for this entire period and much of the time one cannot observe the accused at all.

[9] During the crucial part, a substantial portion of the interrogation, it is impossible to observe the facial response of the accused because of the

police officer sitting across from the accused. One constable said his fellow constable was leaning forward and at the end of the interrogation it appears the accused might also be somewhat at the side of the table. In any event, it is impossible to determine the distance between the police officer and the accused and it is quite possibly only a matter of inches. Certainly, as one constable noted, they were in touching distance.

[10] The inability to observe the accused, particularly his facial expressions and responses, severally limits and, in this case, substantially nullifies the benefits that normally flow from the practice, an excellent and fair practice, of video taping an interrogation. I note also in this case the accused can neither read or write.

[11] The court must take great care in putting limits on investigative techniques that are crucial to the police carrying out their duties. Care must be taken not to put limitations on reasonable, even aggressive interrogation by the police. The end product must satisfy the court that when interrogation results in admissions and confessions, such were made freely and voluntarily and given the inability to observe the accused in the manner of this taping results in failure to establish beyond a reasonable doubt that the statement was given freely and voluntarily and I rule that it is inadmissible.

J.