SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Calnen*, 2015 NSSC 318

Date: 2015-11-02
Docket: CRH No. 426776
Registry: Halifax

Between:

Her Majesty the Queen

v.

Paul Trevor Calnen

Judge: The Honourable Justice James L. Chipman

Heard: November 2, 2015 in Halifax, Nova Scotia

Counsel: Eric R. Woodburn and Susan MacKay, for the Crown
Peter D. Planetta and Sarah M. White, for Mr. Calnen

Orally by the Court:

[1] A six-day *voir dire* was held (September 28-30, October 1, 5 and 7, 2015) to determine the voluntariness of Paul Calnen's statements to persons in authority. In my written decision of October 14, 2015, I concluded the Crown has proven beyond a reasonable doubt the statements were voluntary.

[2] Prior to the *voir dire*, Mr. Calnen asked the Court to also consider the issue of the probative value versus the prejudicial effect of his statements in the context of the jury trial. However, Defence counsel then placed this issue in abeyance pending my determination of the voluntariness issue.

[3] On October 28, 2015, a pre-trial conference was convened at which time the Crown indicated they were seeking to admit Mr. Calnen's statements in their entirety, save for mentions of a polygraph examination. In this respect, the results of a polygraph test are not admissible as evidence (see *R. v. Beland and Phillips*, [1987] 2 S.C.R. 398).

[4] Crown counsel's indication that they would be seeking to introduce all the statements (with only the polygraph references redacted) prompted Defence counsel to reiterate their request for the Court to consider the probative value versus prejudicial effect of the statements. In the result, I invited counsel to submit briefs and authorities in support of their respective positions.

[5] Today Mr. Woodburn qualified this by saying it was not the Crown's intention to introduce the 16-page post-arrest statement of Mr. Calnen taken by Sgt. Withrow.

[6] On the afternoon of October 30 (the Friday before the Monday the jury trial was scheduled to begin), I received a seven-page brief from Defence counsel along with several cases. Yesterday, I received various emails from both the Crown and Defence. Through this exchange it became clear that the parties were also at odds in terms of how the Court should deal with the evidence of post-offence conduct. Accordingly, I agreed to hear both issues at this *voir dire* the probative value versus prejudicial impact of the statements, and how post-offence conduct should be dealt with.

[7] Today, following selection of the jury, I heard oral argument from Defence and Crown counsel on the issue of the admissibility of Mr. Calnen's statements having regard to the issues noted above.

[8] I am now prepared to render my oral decision on this second *voir dire* concerning the admissibility of some, all or none of Mr. Calnen's statements.

[9] For the background of this case, I refer to my earlier decision and paras. 5-14:

> [5] On March 28, 2013, Ms. Jordan was reported missing to the Halifax Regional Police. An initial missing person investigation was conducted, led by D/Cst. Paul Trider.
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> [6] At the time, Ms. Jordan was a 35 year-old prostitute and the mother of one child. Mr. Calnen was a 50 year-old plumber with three grown children. For approximately two years before Ms. Jordan went missing, the two were in a relationship and lived together at Mr. Calnen's home.
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> [7] A few days after Ms. Jordan was reported missing, D/Cst. Trider visited Mr. Calnen at his home. Shortly after this initial contact, on April 5, 2013, D/Cst. Trider interviewed Mr. Calnen in an interview room at the Tantallon RCMP detachment (the "April 5 statement"). The statement began at 7:55 p.m. and concluded at 10:15 p.m.
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> [8] The police carried out further investigations including a polygraph test of Mr. Calnen on May 30, 2013. By this time the police considered the investigation to be a homicide investigation.
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> [9] On June 17, 2013, as he was leaving a work site near the Halifax police station on Gottingen Street, Mr. Calnen was arrested for the murder of Ms. Jordan.
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> [10] Following his arrest, Mr. Calnen was taken to the Halifax police station where he was interviewed by D/Cst. Jason Withrow from 2:50 p.m. until approximately 6:00 p.m. (the "June 17 statement"). There is a break of nearly one hour (4:27 p.m. to 5:21 p.m.) when Mr. Calnen is away from the interview room. During this time Mr. Calnen exercised his right to counsel and met with Peter Planetta.
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> [11] After the June 17 statement came to an end, Mr. Calnen was transferred to the Lower Sackville RCMP detachment. He was taken to an interview room for further questioning. Over the next 18 hours, Mr. Calnen was questioned by a number of individuals: Sgt. Greg Vardy, S/Sgt. Tom Townsend, Cst. Bruce Briers, D/Cst. Jason Hurley, and the victim's mother, Donna Jordan. The statement began at 7:40 p.m. on June 17 and concluded at 1:50 p.m. the next day (the "June 17 and 18 statement").
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> [12] In the midst of the June 17 and 18 statement, Mr. Calnen was given a break of about six hours. From 2:00 a.m. until 8:00 a.m. he was taken to a cell in

> the detachment. After the break, Mr. Calnen was returned to the same interview room and questioning resumed.
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> [13] At about 11:40 a.m., Donna Jordan was brought into the interview room. She pleaded with Mr. Calnen to reveal where her daughter was buried. At approximately 12:15 p.m. Mr. Calnen confessed to knowing the location of Reita Jordan's ashes. Roughly a half hour after this revelation, Donna Jordan left the interview room and the police continued to question Mr. Calnen until about 2:00 p.m. During this time, he provided details concerning the incineration of Ms. Jordan's remains and an explanation concerning how she died. He also signed a s. 527 application and consented to carry out a re-enactment of how Ms. Jordan's death occurred.
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> [14] The re-enactment took place at Mr. Calnen's residence during the early evening of June 18, and lasted about twenty minutes (the "Re-enactment statement"). Then Mr. Calnen was taken back to the cells at the RCMP detachment in Lower Sackville.

[10] As for the statements under consideration, the Crown and Defence now agree the purpose of this second *voir dire* is to determine the admissibility of two statements:

> 1) June 17 and 18 statement (the audio/video recording of this statement (Exhibits VD-1 and VD-4) was played in court at the first *voir dire* and the 167-page transcript (Exhibit VD-7) and 159-page transcript (Exhibit VD-8) were provided to and reviewed by the Court; and
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> 2) Re-enactment statement (the audio/video recording of this statement (Exhibit VD-2) was played in court at the first *voir dire*; there was no transcript).

[11] They also agree that all of the evidence before the Court in the first *voir dire* shall be considered before the Court in this *voir dire*.

General Principles

[12] The applicable legal principles are not controversial. As a general rule, the statement of an accused person may be edited to avoid undue prejudice and eliminate matters which it is best the jury not know: *R. v. Weaver* (1966), 51 Cr. App. R. 77. The editing process must ensure, however, that the remaining portions of the statement retain their proper meaning in relation to the whole of the statement: *R. v. Kanester* (1966), 48 C.R. 352, [1966] B.C.J. No. 77 (C.A.). Where a statement includes reference to an irrelevant fact or facts, if the facts may be separated from the rest of the statement without affecting its tenure, the irrelevant parts should be excluded: *R. v. Beatty*, [1944] S.C.R. 73.

[13] I have reviewed a host of cases to assist with the task of determining whether any, all or some portions of the statements should be excluded from the jury. In considering the general principles to be followed, I have found a very helpful canvassing of the law by Justice Moreau in *R. v. White*, 2006 ABQB 788 (CanLII) at paras. 4-11:

> [4] Evidence may be excluded if its admission would result in unfairness or the prejudicial effect of its admission outweighs its probative value: *R. v. Buhay*, [2003] 1 S.C .R. 631, per Arbour J., speaking for the Court, at para. 40:
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> > ... even in the absence of a Charter breach, judges have a discretion at common law to exclude evidence obtained in circumstances such that it would result in unfairness if the evidence was admitted at trial, or if the prejudicial effect of admitting the evidence outweighs its probative value (See, in the context of confessions: *R. v. Rothman*, [1981] 1 S.C.R. 410, at p. 696 per Lamer J., as he then was; *R. v. Oickle*, 2000 SCC 38 (CanLII), [2000] 2 S.C.R. 3, at para. 69, per Iacobucci J....
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> [5] In balancing probative value against prejudicial effect, consideration may be given to whether the prejudicial effect of the evidence would be out of proportion to its true evidential value. Maclean J.A.'s dissenting reasons in *R. v. Kanester*, [1966] 4 C.C.C. 231 (B.C.C.A.), adopted by the Supreme Court of Canada ([1967] 1 C.C.C. 97), referred, at para. 91, to the comments of Lord du Parcq in *Noor Mohammed v. Rex*, [1949] A.C. 182, at 192:
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> > It is right to add, however, that in all such cases the judge ought to consider whether evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.
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> [6] In *R. v. Beatty*, 1944 CanLII 22 (SCC), [1944] S.C.R. 73, Duff C.J.C. clarified his reasoning in *Rex v. Thiffault*, 1933 CanLII 52 (SCC), [1933] S.C. R. 509 as to the restrictions on the use of a prior admission by an accused that contains inadmissible evidence (at para. 9):
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> > We also considered that a document professing to embody the effect of admissions obtained in the way the admissions were obtained in that case, and containing *inter alia* a record of an admission of a fact that would be

> inadmissible as evidence against the accused and was calculated to prejudice him, ought not to be admitted as evidence against him.

[7] In *Thiffault*, the portion of the police interview of the accused relating to his earlier arrest for another criminal offence was determined (at para.12) not to be admissible, not only on the ground that it was wholly irrelevant, but also on the basis of the unfair prejudice to the accused.

[8] Duff C.J.C., in *Beatty*, pointed out (at para. 10) that if the statement of the irrelevant fact can be separated from the rest of the document without in any way affecting the tenor of that which remains, then the trial judge in most cases would probably be able to excise the objectionable portion while permitting the unobjectionable part of the document to go before the jury. The trial judge's duty in that regard was described by Maclean J.A. in *Kanester*, at para. 48:

> A very heavy duty lies upon a trial judge who admits a statement of this nature, where editing is of paramount importance, in order that evidence which may be irrelevant or unnecessarily prejudicial to the accused may be carved out from the original statement and yet insure that the remaining portions will retain their proper meaning in relation to the whole in the sense that when taken out of context the admissibility portions are relevant and do not lose their meaning and yet are freed from unnecessary prejudice that is out of balance with the purpose to be served by admitting the edited statement.

[9] In *R. v. Dubois* (1986), 27 C.C.C. (3d) 325 (Ont.C.A.), Morden J.A. noted at para. 56 that portions of the wiretap evidence in that case, although substantially irrelevant, were part of a context for understanding the evidence that did relate to the charge before the court. A new trial was ordered, however, the trial judge having failed to weigh the probative value of the challenged evidence against its prejudicial effect, having admitted clearly irrelevant or only tenuously relevant evidence, and having failed to adequately instruct the jury on the use they could make of the evidence.

[10] Ferguson J. referred in *R. v. Jacobsen* 2004 CarswellOnt 6675, (Ont. S.Ct.) at para. 4 to a useful summary of principles applied to the editing of statements in *R. v. Grewall*, 2000 BCSC 820 (CanLII), [2000] B.C.J. No. 2383 (B.C.S.C.) at para. 36:

> (a) Editing of a statement may at times be necessary because of the inclusion of irrelevant or unnecessarily prejudicial evidence but such editing must not affect the tenor of a relevant statement.
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> (b) Edited statements must be free from unnecessary prejudice, but the remaining portions must retain their proper meaning.

> (c) The jury should have as much as possible of a statement said to constitute an admission in order to place it into context for the purpose of determining its truth.
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> (d) Even though substantively irrelevant, contextual evidentiary relevance may allow admission.
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> (e) The extent of the admissibility of that contextual evidence and probative value must still, however, be weighed and balanced against its prejudicial effect.

> [11] A further consideration in the editing process is whether a limiting instruction will be effective to address any prejudicial effect of admitting the evidence: *Jacobsen*, at para. 7.

[14] I will apply these general principles to the statements under consideration in this case.

Discussion

[15] In their oral and written submissions Defence counsel referred the Court to *R. v. Greenwood*, 2014 NSCA 80, and in particular, paras. 120-149. Justice Fichaud (Farrar and Bryson, JJ.A. concurring) allowed the appeal and ordered a new trial because, among other reasons, he determined the trial judge erred by allowing the jury to hear the entirety of an audio tape. At para. 149, the Appeal Court held:

> [149] In my respectful view, the Chief Justice erred in law by (1) not holding a voir dire, or at least listening to the Lynds' excerpts, before ruling on their admission, (2) not conducting a balance of probative value against potential prejudice, (3) not directing a redaction of the Lynds' excerpts, and (4) giving the jury potentially conflicting instructions on the use of the Lynds' excerpts.

[16] At the outset of the discussion of this issue, Justice Fichaud stated at para. 120:

> [120] During the trial, the Crown played for the jury Greenwood's videotaped interrogation by the police. The interrogation included long soliloquies by police officers, not adopted by Greenwood, that related facts outside the officers' personal knowledge. But those were not the subject of an objection at trial or a ground of appeal. So I won't comment on them.

[17] In the case at Bar, Mr. Calnen's counsel refers to the above quotation as "noteworthy" and goes on to state:

> It is obvious from this opening comment that the court was alive to the issue of the admissibility of "police soliloquies", but as defence counsel had not put it in issue, it was not discussed.
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> Fichaud, J.A. explained that many of the things discussed by Lynds in the excerpts put to Greenwood were exponential hearsay and that Greenwood could not even have been cross-examined on without a weighing of the probative value versus the prejudicial effect of such questioning. At trial, the Chief Justice seemed to second guess the admission of the statement and chose to caution the jury thusly at paragraph 124:
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>> 124 Secondly, I'm going to caution this jury and make sure that it's the answers from Mr. Greenwood that is evidence in this matter, and not what the police officers say to him, that's not evidence.
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> This is along the lines of what was suggested by Crown Counsel at our pre-trial. While it may be that cautions can protect the jury from impermissible reasoning, it cannot exempt evidence from a balancing of its probative value versus its prejudicial effect. Fichaud J.A. asserts this at paragraph 149…
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> The conflicting instruction issue was created when the jury was properly instructed that they could not make use of the impugned evidence, yet also being told they could use it for context and to evaluate Greenwood's credibility. This would appear to bear a striking resemblance to the purpose for which Crown counsel has stated the entire Calnen statement should be admitted; to show context, and to evaluate his credibility by his infrequent responses, and presumably the lack thereof.
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> At first glance the issues appear to be separate due to the extreme nature of the embedded Jeff Lynds' evidence. At their base however, the issues share many of the same roots. Jeff Lynds talks about things of which he has no personal knowledge. The police officers talk about things of which they have no personal knowledge. They frequently discuss evidence they could never give in court. Just like the statements made by Jeff Lynds, their probative value is nil unless adopted. There is the potential for prejudice, and it would be an error to not conduct this balancing exercise. It would appear very much that Fichaud J.A. had considered this issue just as relevant to the lengthy police soliloquies. Unfortunately it wasn't raised on appeal and so we don't have the benefit of a directly governing authority.

<u>Police Soliloquies</u>

[18] In this case the June 17 and 18 statement is replete with police soliloquies. Justice Fichaud was obviously alive to the potential problems with these monologues when he said (at para. 120) that they were not adopted by the accused and related to facts outside the officers' personal knowledge. In Mr. Calnen's case, having reviewed all of the statements, I can emphatically say that much of the June 17 and 18 statement has the same problems. I will further expand on this following my discussion of how trial courts have dealt with statements containing lengthy police soliloquies.

[19] Defence counsel referred the Court to *R. v. Barges*, 2005 CanLII 47766, [2005] O.J. No. 5595 (S.C.J.). In *Barges*, the Crown attempted to introduce a lengthy interrogation of the accused. The decision dealt with the issues of voluntariness and balancing together.

[20] In *Barges*, the Court referred to the "Reid Technique" of police interrogation. Justice Glithero drew on an earlier Alberta case in setting the stage for what this technique involves at para 80:

> [80] The decision in *R. v. Minde*, 2003 ABQB 797 (CanLII), [2003] A.J. No. 1184 is instructive. It was relied upon by counsel for one of the former co-accused during the arguments on these various *voir dires*. It is helpful in that Moreau J. refers to and describes the "so-called Reid Technique" of police interrogation. It is described as involving various techniques, which include:
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> - Direct positive confrontation – a positive assertion that the police know the accused is guilty.
> - The putting of deceitful evidence to the accused – a factor which is not present here.
> - Discussion of the accused's redeeming qualities so as to pave the way for him to admit some involvement, but with explanation.
> - Displaying understanding and sympathy such as to minimize the moral fault of the accused's role.
> - Condemning the role of others in order to lessen the responsibility of the interviewee.
> - References to the theme that the community (and I add "family") is thinking bad things based on what they would know of the case – which would be lessened by the accused contributing his explanation as to what happened.
> - Procuring the interviewee's attention by moving closer physically.

- Suggesting alternative explanations, one of which is worse than the other, thereby inviting the interviewee to opt for the lesser level of responsibility.
- The use of lengthy monologues which are designed to deflect attempts by the interviewee to deny or object.

[21] In the case at Bar the Defence submits, and I agree, that the Reid Technique is the blueprint for at least part of the approach used by the officers' questioning of Mr. Calnen during the June 17 and 18 statement. At para. 85 of *Barges*, the interrogation is described:

> [85] In my assessment, approximately one-third of the transcript reflects what can be properly categorized as police monologue, with either no response from the accused, or no meaningful response, often because he was cut off when he attempted to say something. When there is an utterance from the accused, it is impossible to know often just what he is commenting on because the preceding monologue contained references to so many items and contained so many rhetorical questions. Given that the first few pages involved "chit-chat", as did the last few pages, and given that there are several intervening pages which are comprised of the transcript of intercepted communications played for the accused's benefit, the police monologues or theorizing amount to the most predominant aspect of the interview.

[22] In this case I do not find that Mr. Calnen was cut off when he attempted to say something. Nevertheless, the June 17 and 18 statement (up until the time Donna Jordan is brought into the interview room) almost entirely consists of police monologue with either no response or no substantive response from Mr. Calnen.

[23] The Reid Technique was discussed more recently by Judge Schreck in *R. v. C.T.*, 2015 ONCJ 299 (CanLII). His Honour cited *Barges* as follows at para. 18:

> [18] Although the term was not referred to in evidence, it is clear to me that in interviewing C.T., Cst. Duffield employed the "Reid technique" or something akin to it. The features of the Reid technique were described by Glithero J. in *R. v. Barges,* [2005] O.J. No. 5595 (S.C.J.) (at para. 53:
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>> They include unequivocal statements by the police indicating that they are convinced that the accused is criminally responsible, discussion by the police by an accused's redeeming qualities and the use of praise and personal flattery to attempt to persuade him to talk, the use of techniques designed to minimize the accused`s moral responsibility by suggesting some reason making the accused's actions more understandable, suggesting that anyone else faced with the same situation might have reasonably acted the same way, condemning others by suggesting their actions were in some way partially responsible for what happened, suggestions by

> the police that the community, or members of it, are thinking badly of the accused, hence suggesting that the record should be set straight, moving physically closer and touching the accused during the interview, while uttering gentle words suggesting understanding, questions suggesting two alternatives, both indicative of guilt, but one more palatable than the other, and both of which ignore the third possibility of denial, the use of lengthy monologues by the police designed to deflect the accused from wanting to leave or continuing to assert a certain position.

See also *R. v. Minde,* 2003 ABQB 797 (CanLII), [2003] A.J. No. 1184 (Q.B.) at para. 32.

[24] The judge then made the following observations at para. 19:

> [19] Of particular relevance in this case is the technique described in *Barges* that involves the suggestion by the police of two alternatives, one more palatable than the other but both indicative of guilt. This is a common feature of the Reid technique. In *R. v. Barges, supra* the accused was told that absent an explanation from him, the police would conclude that he was a "cold-blooded murderer" and a "monster". Similarly, in *R. v. McDonald,* [2013] B.C.J. No. 300 (S.C.), it was suggested to the accused that either he was a "cold hearted serial killer" or just a person with a "bit of a temper". In *R. v. Minde, supra,* the accused was given a choice between admitting that he had caused the deceased's death accidentally or else had intended her to die. The suggestion that a killing was either accidental or in self-defence or else intentional was also made in *R. v. Mallaley,* [2002] N.B.J. No. 453 (Q.B.). In *R. v. Chapple,* 2012 ABPC 229 (CanLII), [2012] A.J. No. 881 (Prov. Ct.), the police suggested to an accused charged with assaulting a child that the assault had been a reaction to the child's difficult behaviour and not because the accused was a "monster". A similar approach was used in *R. v. M.J.S.,* [2000] A.J. No. 391 (Prov. Ct.).

[25] When I review the audio/video recordings and transcript of the June 17 and 18 statement, I find suggestions made to Mr. Calnen that he is a monster and that he snapped.

Analysis and Disposition

<u>June 17 and 18 Statement</u>

[26] The June 17 and 18 statement is the most lengthy of the statements. It begins at approximately 7:40 p.m. on Monday, June 17, 2013, and concludes at roughly 2:10 a.m. on June 18, 2013, then resuming that day at 8:16 a.m. and ending at 1:50 p.m. In my earlier decision on voluntariness, I concluded with these final two paras.:

> [74] From the Oickle factors, the Defence has chosen to emphasize oppression. When I examine the totality of the recordings and transcripts as well as evaluate the viva voce evidence, I see no contextual basis for arriving at the conclusion that there was an oppressive atmosphere. To the contrary, Mr. Calnen was treated with respect and he exhibited an operating mind. The police strategy was clearly designed to play to Mr. Calnen's emotions. I do not say this critically. It seems to me that appealing to the man's conscience by playing an audio plea from his son, reading a letter from his daughter, and putting a picture of Reita Jordan and her sisters before him were prudent things to do. Similarly, I have no problem with the constant refrain of the officers to "do the right thing".
>
> [75] Bringing Donna Jordan into the interview room was obviously a late attempt to elicit a confession. It worked and Mr. Calnen subsequently told the police more details and walked them through a re-enactment. When I consider all of the facts, the law, and apply a contextual analysis, I come to the overwhelming conclusion that the Crown has proven beyond a reasonable doubt that the statements were voluntary.

[27] The question now arises as to whether some, all or none of the statements should be placed before the jury, weighing their probative value against their prejudicial effect.

[28] In *White* there was questioning described as a "lengthy monologue" and containing inadmissible hearsay (para. 27). Justice Moreau excised these portions of the statement (para. 27). Further, at para. 31 Justice Moreau noted as follows:

> [31] Finally, defence counsel argues that the entire passage from p. 85, l. 10 to the end of the interview should be excised as it consists of a lengthy monologue, exposing the detective's theory about the guilt of the accused which is not evidence and is prejudicial. It also includes exchanges challenging the accused's right to silence. The Crown had no comment about this passage. I agree with the defence's submissions and that portion of the interview will be edited out.

[29] In *Barges*, Justice Glithero spoke of his role as gatekeeper and offered a strong statement in support of his decision to ultimately exclude the statement in question from the jury:

> [92] I remind myself that one of my responsibilities as gatekeeper is to exclude evidence where the prejudicial effect clearly outweighs the probative value. The probative value of this interview is slight given that, for the most part, it contains unanswered police theorizing. Its prejudicial effect is substantial as it effectively allows the Crown to have another jury address. In my view, it cannot be said that failure of the accused to respond in the circumstances of an interview by a person in authority can amount to adoption by silence. Admission of this

> interview may result in the jury improperly using the accused's lack of meaningful response to the pages and pages of police allegations and theories. If the jury did not misuse the evidence in that way, then the fact that the police have various beliefs as to how this killing took place has no probative value. I have given consideration as to whether this interview can be edited. In my opinion, it cannot, as the offensive aspects of the technique are used often and repeatedly such as to render any remaining material quite meaningless. Furthermore, even with respect to those matters where there are admissions, the accused is entitled to have the entire circumstances of the interview placed before the jury so that it can properly assess what weight ought to be attached to any answers that he does give.

[30] Returning to the June 17 and 18 statement, I find that many of the above comments are apposite from the beginning of the statement until Donna Jordan enters the interview room at approximately 11:40 a.m. on June 18. Reference to the 167 and 159-page transcripts provides the best explanation. Sgt. Vardy starts talking at 7:40 p.m. on June 17 (p. 3) and apart from some opening pleasantries, Mr. Calnen has nothing to say until p. 16 when he says "okay" and "no". Sgt. Vardy's soliloquy then continues at p. 16 until p. 22 (Mr. Calnen says one word, "no") and then goes on uninterrupted until p. 33 when there is a short exchange about a boat. Sgt. Vardy then continues from the bottom of p. 33 to p. 42 when Mr. Calnen says "yeah". The soliloquy then carries on (apart from Mr. Calnen's "um-hmm" at p. 43) until there is a short exchange on p. 49.

[31] The above pattern continues throughout the entirety of the statement up until p. 167 (2:10 a.m. on June 18 with S/Sgt. Townsend who replaces Sgt. Vardy in the interview room at p. 114). It resumes at 8:15 a.m. on June 18 with Sgt. Vardy. For example there is a Sgt. Vardy monologue beginning at p. 7 (which apart from two "inaudibles" from Mr. Calnen) goes on until p.28. Cst. Briers enters the interview room at p. 32 and his soliloquy goes on uninterrupted (apart from some small banter between Cst. Briers and Sgt. Vardy) until p. 53 (one brief comment from Mr. Calnen) and then on from there until another brief comment from Mr. Calnen p. 62, with Cst. Briers continuing to p. 90.

[32] The pattern resumes with Cst. Jason Hurley as he begins his monologue at p. 94 and does not stop until Donna Jordan enters the room at p. 101.

[33] Having reviewed this statement in its entirety, I find that its prejudicial effect clearly outweighs its probative value up until the time Ms. Jordan enters the interview room. Accordingly, I find that the June 17 and 18 statement, up until 11:40 a.m., offers very little of probative value as for the most part it contains police monologues. Its prejudicial effect is substantial as the soliloquies contain

police allegations, theories, hearsay and irrelevant evidence. Admission of the entire interview – even with a limiting instruction – could lead to misuse of the police content. To recall the words of Justice Glithero in *Barges*, the prejudicial effect is significant because it effectively allows the Crown to have another jury address.

[34] Once Donna Jordan enters the interview room the situation changes. From here on emerge free-flowing questions and answers. Indeed, I find from the moment of Ms. Jordan's entry until the end of the interview, we have a contextual statement which has high probative value, whereby it is not outweighed by any prejudicial effect to Mr. Calnen. Accordingly, I permit this portion of the statement to be put to the jury.

[35] Given my decision to permit the Crown to place Mr. Calnen's statement (after Donna Jordan enters the interview room until the statement concludes) before the jury, there remains the question of how to provide the jury with the context of what transpired before Ms. Jordan's arrival. In this regard, I would anticipate the Crown to lead evidence through Sgt. Vardy and/or Cpl. Hurley regarding the amount of time Mr. Calnen was questioned on June 17 and 18 and how Mr. Calnen maintained his right to silence essentially throughout the piece.

[36] With respect to the Re-enactment statement, I have come to the same conclusion; i.e., I am prepared to admit it. In this regard the audio/video recording lasts about twenty minutes (there is no transcript) and features Mr. Calnen willingly showing Cpl. Hurley into his home. Mr. Calnen then demonstrates to Cpl. Hurley how he says Reita Jordan fell down stairs to her death. As he carries out the re-enactment, Mr. Calnen (who knows he is being video/audio taped by a police officer) gives voluntary evidence. There are limited questions and interventions from Cpl. Hurley, but nothing approximating a soliloquy or monologue.

Post Offence Conduct

[37] The Crown provided a brief and authorities including the recent decision of *R. v. Rodgerson*, 2015 SCC 38, as support for the notion that post-offence conduct can be used to establish the requisite intent for a homicide. In this respect, I refer to para. 27 of Justice Moldaver's unanimous decision:

> [27] The jury was entitled to consider the concealment and clean-up evidence in respect of Mr. Rodgerson's self-defence claim and whether he *unlawfully* killed Ms. Young. It was also entitled to consider this evidence in

> evaluating whether he had the requisite intent for murder. Regarding self-defence and unlawful killing, the relevance of the concealment and clean-up and the nature of the available inference was a matter of common sense: concealing the body and cleaning up the scene of Ms. Young's death could be viewed as evidence that Mr. Rodgerson knew he had killed Ms. Young unlawfully and was acting to cover it up. Once the jury moved on to the issue of intent for murder, however, this simple inferential reasoning was no longer of any use. Rather, the limited relevance of this post-offence conduct on the issue of intent rested on the following, narrower inference: the jury might reasonably conclude that Mr. Rodgerson concealed Ms. Young's body and cleaned up the scene of her death in order to conceal the nature and extent of her injuries and the degree of force required to inflict them.

[38] The Supreme Court of Canada goes on to provide guidance for crafting a specific jury instruction at paras. 29-31.

[39] Defence counsel strenuously disagrees with the Crown's application of *Rodgerson*. In Mr. Planetta's words:

> I am familiar with *Rodgerson* and strenuously disagree with my friend's representation of its application. In *Rodgerson* it was held that after the fact conduct could go to intent where the after the fact conduct was an attempt to conceal or destroy evidence of the nature and extent of injuries, which were known, not speculated. There was evidence of the injuries in *Rodgerson*, and evidence that the accused had attempted to conceal them. The known injuries were inconsistent with his defence. The decision rightfully rests upon known injuries and not mere speculation.
>
> Rodgerson is distinguishable from our case, as it was in *R. v. Hill*, 2015 ONCA 616, where a unanimous panel of the Ontario Court of Appeal distinguished it:
>
>> [57] I do not agree that the appellant's conduct in hiding and then burying the body could be seen as an effort to destroy evidence capable of showing the nature and extent of the injuries which in turn were capable of supporting an inference of intent. This was not a situation like *Rodgerson* in which the evidence of the injuries to the body, which the accused attempted to destroy as well as bury, and the blood at the scene, which the accused attempted to clean up, suggested a multi-blow attack consistent only with the intention required for murder under s. 229(a). In this case, the condition of the body indicated that Ms. General had been strangled and little else. The bruising on the neck did allow the pathologist to provide a broad estimate as to the length of time over which the appellant applied force to Ms. General's neck. That opinion was potentially significant on the issue of intent. It is, however, farfetched to suggest that the appellant was aware of and appreciated the significance of

> the bruising and took steps to hide the body to avoid discovery of the telltale bruising.

> There is no evidence of any injuries here, and certainly not evidence of injuries which are patently inconsistent with an unintended homicide. Leave to further appeal Hill has not been sought.
>
> Note that in *Hill*, the panel found that the after the fact conduct could assist in proof of intent, but again, if it is grounded in other evidence, i.e.: the deceased was pregnant and the accused did not want anyone to know as it would give him a motive. That is analogous to the reasoning in *Rodgerson*, and not at all helpful in our situation.

[40] The Crown addresses Defence counsel's comments in their brief as follows:

> In the Crown's respectful view, there seems to be some confusion regarding the differing uses that can be made of after-the-fact conduct evidence. There are differences in Mr. Calnen's case, where the accused gave an *exculpatory* statement about how Ms. Jordan died, with cases such as *R. v. Arcangioli*, [1994] S.C.J. No. 5. *Arcangioli* refers to a situation where an accused has admitted to *culpability* for one or more offences. It is in that situation not one like Mr. Calnen's, that an accused's conduct may lead to a trial judge instructing a jury that such evidence has no probative value with respect to any particular offence. Mr. Calnen's case is not one where, for example, he admitted to manslaughter but not murder, which is the type of situation to which *Arcangioli* refers.

[41] The Crown continues in their brief:

> In the Ontario Court of Appeal case of *R. v. Mujku*, [2011] O.J. No. 284. The Court in *Mujku* actually held that <u>after-the-fact conduct was admissible against Mr. Nop</u>, whose conviction along with his co-accused's for second-degree murder was upheld by the Court of Appeal.
>
> Unlike Mr. Calnen, who claimed Reita Jordan's death was accidental in his statement to police, Mr. Nop had been prepared to enter a plea for manslaughter, although that plea had not been accepted by the Crown. At trial, Mr. Nop did admit to being at the scene of the beating that lead to the death of the victim in that case, but he made no admission to participating in the beating.

[42] At this stage of the proceeding – absent having heard the evidence at trial – I reiterate my decision that I am prepared to admit the final part of the June 17 and 18 statement and the Re-enactment statement. Having said this, I wish to put counsel on notice that I will be seeking their input with respect to the crafting of my charge on how the post-offence conduct should be dealt with.

[43] I trust we will all bear in mind Justice Moldaver’s wise words in respect of our collective responsibility to work toward concise, coherent instructions for the jury.

Chipman, J.