**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. MacDonald*, 2009 NSSC 420

**Date:** 20090918
**Docket:** CRH 313239
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Brian Clarence MacDonald

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| **Judge:** | The Honourable Justice M. Heather Robertson |
| **Heard:** | September 17 and 18, 2009 |
| **Decision:** | September 18, 2009 **(Orally)** |
| **Written Release:** | March 19, 2010 |
| **Counsel:** | Glenn A. Hubbard, for the Crown<br>Roger Burrill, for the defence |

**Robertson, J.: (Orally)**:

[1] Brian Clarence MacDonald is a Halifax street person, well known to the police. He is accused of having assaulted another street person, Huey Newton Godron, on the porch of 1348 Martello Street in Halifax. This was the residence of a cleric at All Saints Cathedral, which is located next door. The minister lives there with her family, who had provided shelter to Brian MacDonald and Huey Godron over the few months preceding the day of the alleged incident, by allowing them to sleep on this covered porch at least out of the rain.

[2] The evidence of her husband, Mr. Moxley, was that they and their neighbours looked out for the street people who lived across in Victoria Park and helped these two in particular. His evidence was that although these two slept on the porch, other street people congregated there during the day.

[3] The charges against Brian MacDonald are that of aggravated assault of Huey Newton Godron, use or threatened use of a weapon, unlawful possession of a weapon and failure to comply with his recognizance of August 2, 2008, related to alcohol and weapon possession.

[4] The entire case of the Crown rests on three statements made by the accused during the course of the detention, first on a s. 87 *Liquor Control Act* violation for public drunkenness and then on the more serious charges as he became almost immediately the suspect in the assault on Mr. Godron as they were known to be heavy drinkers who shared the porch.

[5] Mr. Godron was subpoenaed to the Court and testified. However, his evidence was that he was simply too drunk to remember what happened that day. The police and the Crown were aware that he did not intend to be a cooperative witness. Thus, the Crown's case ended with the video tape of the accused. They sought admission of Mr. MacDonald's inculpatory statements to the police officers.

[6] It is alleged by the officers that Mr. Godron actually assaulted Mr. MacDonald first earlier in the day and that he, Mr. MacDonald went to the hospital

as a result. Upon release, they allege Mr. Brian MacDonald returned to the porch at 1348 Martello Street, found Mr. Godron lying on the pew and assaulted him with a piece of iron rebar sending Mr. Godron to the hospital with head injuries.

[7] The police were called to that address at approximately 4:30 pm and found Mr. Godron in need of medical attention. He was then sent to the local hospital by ambulance. Mr. MacDonald was not present. The police officers set up a crime scene investigation on the porch of the residents and brought in the identification unit, the evidence of that was all obtained from the evidence of Constable Joshua McNeil and Detective Constable Hanson, and then they returned to the station.

[8] Later that day they were called by a local resident who reported that the accused had returned to the porch some time after 6:00 p.m. They attended 1348 Martello Street again and found Mr. MacDonald in a very intoxicated state, so much so that he could not stand up and needed two officers to escort him to the police car. Constable McNeil took him to the Halifax police station in his car.

[9] During this transport, Mr. MacDonald made mutterings in the back of the car, many incoherent ramblings about Paul McCartney but then the words, "Is he dead?", "He beat me so I beat him back." Constable McNeil cautioned him at that time and the accused went silent.

[10] As he was then helping him into the station, Mr. MacDonald muttered, "I beat him with a broom." This was at approximately 6:30 or 6:40 in the evening. Mr. MacDonald was not informed that he was being detained for the aggravated assault on Mr. Godron and did not understand the extent of his legal jeopardy at this time.

[11] The second utterances were made to Detective Constable Michael Sullivan who came to the interview room in which Mr. MacDonald was being held at 8:10 p.m. He did receive a *Charter* caution from Detective Constable Sullivan relating to the assault charges. His inculpatory statements at that time were "Is he dead?", "Mike, I tried to kill him."

[12] Detective Constable Sullivan determined that he could not interview the accused that night as he was too heavily intoxicated and did not understand the *Charter* caution.

[13] The Crown has prudently accepted that these statements should not be admitted into evidence and cannot meet the threshold of admission due to the severe intoxication of the accused and failure to understand the *Charter*.

[14] So we are now concerned with the third statement video taped by Detective Constables Thomas and Ayers on June 12, 2009, at 9:57 in the morning, some 15 hours after the accused came into custody.

[15] There are a couple of legal issues here, blended with the facts. The Crown is required to a civil standard to prove that the statement was made voluntarily. As set out in *R. v. Oickle*, [1984] 11 C.C.C. (3d) 180 (NSCA), this involves the court making a contextual analysis and assessment of the evidence, in particular the operating mind of the accused, the presence of any oppressive circumstances, or threats or promises made to the accused.

[16] The court should provide a record of the whole context in which the statement is made.

[17] I do have a slight concern that the interview in question, which occurred between 9:57 a.m. and 10:22 a.m., was preceded by 12 minutes of contact with the accused and the two police officers, for which there was no record. I accept, however, that there is a low threshold here with respect to the degree of drunkenness, re: voluntariness and I see no evidence of oppression, threats or promises at this juncture.

[18] The more important issue is the capacity of the accused to understand the *Charter* caution given by Detective Constable Thomas at approximately 10:00 a.m., July 12th. They knew Brian MacDonald and he was well known to these officers. They knew of his difficulties with addiction.

[19] At the outset of the statement, Brian MacDonald was given his *Charter* rights. He was advised of his right to contact counsel without delay and his right to duty counsel. He was asked if he understood his rights. He was then asked by Detective Constable Thomas "Do you wanna call a lawyer?" Brian MacDonald's response seems to be as follows: "Nah. Probably be one down around there anyway, John Black or ... ."

[20] The defence submits that this response exhibited a fundamental misunderstanding by Brian MacDonald of his basic constitutional rights under s.10(b) of the *Charter*. The police would have been aware of the misunderstanding and as a result, in order to comply with their informational obligations under s.10(b), were required to clear up any misunderstanding the detainee may have exhibited about his rights.

[21] This could have been achieved by asking the question: "Mr. MacDonald, do you wish to have legal counsel now?" Detective Constables Thomas and Ayers would have been aware that John Black is employed as duty counsel at the courts and not then available to Mr. MacDonald.

[22] In *R. v. Bartle*, [1994] 3 S.C.R. 173, at paragraph 17, the Supreme Court explained that the informational duties of the police under s.10(b) are as follows. The state authorities are obligated:

> (1) 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;
>
> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[23] The state authorities must inform a detainee of the right to contact counsel without delay:

> Under these circumstances, it is critical that the information component of the right to counsel be comprehensive in scope and that it be presented by police authorities in a "timely and comprehensible" manner... Unless they are clearly and fully informed of their rights at the outset, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as their right to silence: *Hebert.* (*Bartle*, para 19) (Emphasis added)

[24] The issue of duty counsel is also explored in *R. v. Brydges*, [1990] 1 S.C.R. 190.

[25] In *R. v. Baig*, [1987] 2 S.C.R. 537: absent proof of circumstances indicating that the detainee did not understand his right to counsel when he or she was informed of it, then the onus is on the detainee to prove that he or she was denied an opportunity to ask for counsel at the time of detention.

[26] In *R. v. Bartle, supra*, paragraph 19, Lamer C.J., stated the law as follows:

> Moreover, in light of the rule that, absent special circumstances indicating that a detainee may not understand the s.10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s.10(b) caution, it is important that the standard caution given to detainees be as instructive and clear as possible.

[27] Most recently, in *R. v. Devries*, [2009] O.J. 2421 and I agree that Justice Doherty had an opportunity to comment but in a different context of that case of its facts, but nevertheless his remarks upon the informational duty of the police are interesting and they are located at paragraph 38 of that decision. He says:

> I, of course, do not suggest that the police are never obligated to go beyond the information required to comply with the informational component of s.10(b). Questions or comments made by a detainee or other circumstances at the time the s.10(b) caution is given may indicate a misunderstanding by the detainee of the nature of the s.10(b) rights. In those circumstances, the arresting officer will have to provide a further explanation of the rights: ...

[28] I have reviewed the video statement now three times and have replayed the portion of the tape where Mr. MacDonald referenced John Black several more times.

[29] I can say that Mr. MacDonald's reply to the words "Do you wanna a lawyer?" and the reply was muttered and hard to interpret but appears to be "Nah. There'll probably be one down around there anyway (pause) John Black."

[30] The Crown submits that these words mean that he chose not to avail himself of immediate counsel and made an informed decision to seek counsel of John Black when he went to court.

[31] Detective Constable Thomas said he interpreted the words to mean he knew John Black would be at the courthouse and he would speak to John Black there.

[32] The Court received by agreement a signed letter from John Black that explains his familiarity with the accused as his role as duty counsel at the courthouse.

[33] In viewing the video tape in its entirety, I had a concern that the accused although not then drunk, was somewhat confused in his utterance, particularly as it related to time lines of the events of June 11, 2009, when the interviewing police officers challenged Mr. MacDonald with their version of the events.

[34] The Crown submits that the accused's forgetfulness of when the assaults occurred is his attempt to avoid responsibility for the separate assault and retaliation of Mr. Godron.

[35] I was much less certain and found that in the entire context of his replies to the police questions he was anything but clear in responses and seemed at times muddled as to time frames of events.

[36] Certainly with respect to the *Charter* caution of immediate right to counsel I believe Mr. MacDonald's mind wandered off to the need to acquire counsel to represent him at trial.

[37] I do not believe he was focussed on the present and his immediate right to have counsel then and there before he made any statement to the police.

[38] His muttered reply created enough uncertainty that in my view the situation begged for Detective Constable Thomas to make a clarification such as, "Brian, you have the right to counsel now before you make any statement to us."

[39] Detective Constable Thomas explained that in dealing with other accused, if he feels there is any lack of understanding of rights, he repeats the caution one line at a time and asks after each sentence, "Do you understand?" He did not do so in this case.

[40] He also testified that his printed caution does not contain the word “now”, but that this would be implied in the words of the caution earlier read: "You have

the right to retain and instruct a lawyer without delay. You also have the right to free and immediate legal advice from duty counsel by making free telephone calls (and the numbers were provided). Do you understand? Do you wish to call a lawyer?"

[41] In these circumstances, it is my view that the accused was under the disability of a severe addiction; well known to the police. He was blind drunk 12 hours earlier, falling down and unable to stand.

[42] By 10:00 a.m. the next day though sober, I believe he remained muddled. His reply to the question, "Do you want a lawyer?" required clarification of the informational component of the right to counsel. It required more than the mere recitation of the caution. The *Charter* caution is not a mantra to be delivered in a formalistic way.

[43] I accept that on the balance of probabilities that the accused did not make an informed choice to decline immediate advice from counsel before making any statement to the police. I believe he wandered from the present moment and expressed equivocation and did not fully understand the caution.

[44] In the result, his s.10(b) rights have been violated. I therefore exclude the statement from evidence.

[45] With respect to the consideration of s.24(2) of the *Charter*, the Supreme Court of Canada has recently set new guidelines to assess this inquiry. See *R. v. Grant*, [2009] S.C.J. No. 32 and *R. v. Harrison*, [2009] S.C.J. No. 34.

[46] The Crown suggests that the *Charter* breach does not reach the threshold of exclusion, pointing out that the police officers did not, at any rate, act in bad faith.

[47] I considered whether admission of this statement notwithstanding the s.10(b) violation would bring the administration of justice into disrepute. I have reflected on the seriousness of the state's breach, the impact of the breach on the *Charter* protected rights and interests of the accused and society's interest in adjudicating the merits of the case.

[48] In my view, it is a balancing of these interests. I find that the administration of justice would indeed be held in disrepute in these circumstances.

[49] This is a different situation than those cases involving guns and narcotics.

[50] This is an absolute fundamental right to get advice from counsel before making a statement to the police.

[51] Access to counsel is the gateway of *Charter* rights particularly in these circumstances where this statement is the only evidence to be offered by the Crown in seeking a conviction.

[52] It would be egregious to allow admission of the videotaped statement into evidence.

Justice M. Heather Robertson