

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. Simpson, 2011 NSSC 250

**Date:** 20110303

**Docket:** Amh 321840

**Registry:** Amherst

**Between:**

Her Majesty The Queen

v.

Dean Allison Simpson

**Decision as to Admissibility of Statement**

**Judge:** The Honourable Justice Patrick Duncan

**Heard:** February 28, March 1, 2, and 3, 2011  
in Amherst, Nova Scotia

**Written Decision:** June 23, 2011

**Counsel:** Douglas Shatford, Q.C., for Her Majesty The Queen  
Dean Allison Simpson, Accused, self-represented

**By the Court:**

**Introduction**

[1] Mr. Simpson is charged in an Indictment with nine offenses contrary to the provisions of the **Controlled Drugs and Substances Act**, which offenses are alleged to have taken place on July 9, 2009.

[2] On that date, members of the Integrated Crime Unit based in Amherst, Nova Scotia obtained and executed a search warrant at 23 ½ W. Pleasant St. in the town of Amherst, a property determined to be owned by Mr. Simpson. The police contacted Mr. Simpson to attend at the property so that they could gain entry without damaging the building. They arrested Mr. Simpson, provided him with the Police Warning and the section 10 advisory under the **Charter of Rights and Freedoms**. Acting on information obtained during the course of the investigation, the police obtained a second search warrant for Mr. Simpson's residence at 827 Highway #6, in Cumberland County, which was executed on the same day.

[3] Mr. Simpson was released but was advised by Sgt. Timothy Hunter of the Amherst Police Department that they wanted him to attend at the RCMP Detachment at a later date. There were calls back and forth between Mr. Simpson

and Sgt. Hunter eventually resulting in Mr. Simpson attending at the Detachment on July 15, 2009 at approximately 4:30 p.m.

[4] He was escorted to an interview room and questioned by Sgt. Hunter and Constable Paul Vincent. The statement was videotaped, concluding at approximately 5:50 p.m.

[5] The Crown seeks to admit into evidence in this trial the videotaped statement of the accused. At the conclusion of a series of *voir dire*s conducted in the absence of the jury, I advised the parties that the statement would be excluded from evidence and provided a brief summary of my reasons for that decision. This was done so that the parties could prepare for the resumption of the trial on the return of the jury. I also advised that I would be providing more detailed reasons, which I am doing today.

## **Procedure**

[6] The Crown advised at the outset of the trial that a *voir dire* would be required in order to determine the voluntariness of the statement of the accused.

Commensurate with my responsibilities as set out in *R v. Travers* 2001 NSCA 71 at paragraphs 34-36, I discussed the question of whether the *voir dire* could also encompass an examination of whether Mr. Simpson's **Charter** rights were complied with. Mr. Shatford agreed to lead evidence from the police officers in a blended *voir dire* in which both voluntariness and **Charter** compliance were in issue.

[7] Two witnesses were called on the *voir dire* being Sgt. Tim Hunter and Constable Paul Vincent.

### **Voluntariness**

[8] The onus to prove that a statement is voluntary is on the Crown. See, *R. v. Oickle* 2000 SCC 38. Voluntariness must be established to a standard of proof beyond a reasonable doubt. Voluntariness can only be determined by considering all of the circumstances and the ultimate question is "whether the accused exercised free will by choosing to make a statement".

[9] The common law confessions rule applies only to statements that are made by a person speaking to a “person in authority”, when they know that individual to be a person in authority.

[10] In this case the two police officers who interviewed Mr. Simpson are known to him as police officers and were identified as such at the outset of the interview. They were “persons in authority” within the meaning of the rule.

[11] I am satisfied that all police officers who had contact with the accused and whose evidence would be necessary to satisfy the burden that is upon the Crown were called as witnesses in the *voir dire*.

[12] The question is whether there was any conduct on the part of the police that could impact on the voluntariness of the statement made by Mr. Simpson to them. In general terms, the following are identified as relevant concerns in assessing voluntariness:

1. *Lack of an operating mind*

[13] I am satisfied that the accused had an “operating mind” as that term is discussed in the case of *R. v. Whittle*, [1994] 2 SCR 914. Mr. Simpson was aware of what he was saying, that he was saying it to police officers, and that it could be used to his detriment. In fact, Sgt. Hunter was alert to this issue and began the interview with a series of questions and answers pertaining to his personal information, the time, date, place and subject matter of the interview. The questions were obviously intended to show that Mr. Simpson had an operating mind, and, in fact, did so.

2. *Oppressive circumstances*

[14] There is no evidence to support a finding that oppressive circumstances existed before or during the taking of the statement, that would impact on the voluntariness of the statement.

3. *Police trickery*

[15] There is no evidence to support a finding that the police engaged in impermissible conduct that would amount to trickery that would “shock the community”, being the test set out in *R. v. Rothman*, [1981] 1 SCR 640.

4. *Threats or promises (inducements)*

[16] It is the evidence that speaks to this factor which has generated reasonable doubt in my mind and that caused me to conclude that the statement should be excluded.

[17] It is well settled that when we speak of fear, prejudice or hope of advantage, that these need not be aimed directly at the detainee. While the concept of a *quid pro quo* offer by interrogators is an important consideration, it is not the exclusive factor in rendering a statement involuntary. Assessing the strength of the alleged inducement or threats is key and in the end analysis one has to ask themselves whether looking at all of the circumstances, “was the will of the accused overborne”? see, *R. v. Spencer*, [2007] 1 SCR 500.

[18] After a brief introduction, and a reference to **Charter** rights, Sgt. Hunter administered the so-called police warning or caution and advised the accused as to the charges being contemplated against him.

[19] When the discussion turned to a question and answer format on the substance of the case, Constable Vincent noted that when they had the accused in custody on July 9 Mr. Simpson “did not want to say a lot at that time”.

[20] Mr. Simpson was then asked about the type of operation and he provided a very generic answer about the qualities of THC as medicine. He was asked whose grow operation was in place at the residence and he simply answered that “it is my residence”. He was asked who owns the grow operation. Mr. Simpson hesitated in answering at which point Cst. Vincent noted that there were two adults in the house, Mr. Simpson and his common law spouse, Shirley. Mr. Simpson stated quickly that Shirley, had nothing to do with it. At this point Sgt. Hunter says that “Shirley is going to be charged with the same thing you are.” Sgt. Hunter went on to describe how Mr. Simpson’s common-law spouse and children were in the house and that whoever lived in the house had to know what was in the basement



and therefore knew of the grow operation. He then asked Mr. Simpson whether he had legal authority to grow to which Mr. Simpson responded that he did not. He put the question to Mr. Simpson as to whether the grow operation was his only, or his and Shirley's. At that point Mr. Simpson answered that it was his own.

[21] When viewing the exchange on video, I was left with the clear impression that Mr. Simpson was initially seeking to avoid giving any meaningful answers to the questions, but became concerned about the role of his spouse in the matter and that the police seized on this concern of his. Mr. Simpson was far more forthcoming after the suggestion was made that his wife could be charged.

[22] I am reinforced in this concern by a later exchange in the interview. Sgt. Hunter expressed his familiarity with the accused for some number of years and assured him that he was "not here to make it hard for [Mr. Simpson] or anyone else", but that he did not accept Mr. Simpson's explanation that he was giving away the product, rather than trafficking it for profit. There were three questions in a row to which Mr. Simpson indicated that he would "pass". After the last of these, Constable Vincent referred him to the set up in the downstairs of the residence where there is an office and a deep freeze. Again reference was made to

the state of Mr. Simpson's wife's knowledge of what was taking place in the house. Although Mr. Simpson again indicated that he would "pass" in relation to a question of whether she agreed with what he was doing in the house, subsequent questions resulted in more information being conveyed by him.

[23] Very shortly thereafter Constable Vincent advised Mr. Simpson that "right now your wife could be charged with the same offenses" and "give us a reason not to charge her". Mr. Simpson replied that she had nothing to do with it. He indicated that he would "pass" on the questions that followed. Again there was reference to his wife and that she "may be charged with the same offenses as you". The officer indicated that Mr. Simpson had not provided a "compelling reason" for them not to charge her. At this point Mr. Simpson told them that she did not want him to do it and that she did not use the product.

[24] Individually, and cumulatively, these references to Mr. Simpson's wife, when taken in the context of the questioning immediately before and after the references, leave me with a doubt as to whether his responses were the product of a free will being exercised to make a statement, or whether his answers were

provided as a means to convince the police not to carry out the threat to charge his wife.

[25] The Crown submitted that the police did not make an offer to refrain from charging Mr. Simpson's wife. With respect, I conclude that the officer's statement that to that point Mr. Simpson had not provided "a good reason not to charge her" sent the very clear message that if he could provide information that met the officer's expectations, then she would not be charged. This is exactly the type of threat or inducement, depending on how you view it, that the confessions rule is intended to safeguard against. The danger of this approach in questioning is that it undermines the reliability of the confession. When a person is in the position of either accepting sole responsibility or implicating a loved one, the lingering doubt will always be whether he provided a true statement, or one that was intended to protect the loved one.

[26] For these reasons I have concluded that I have a reasonable doubt as to the voluntariness of the statement and therefore it is excluded from evidence on this trial.

## **Charter Of Rights**

[27] Section 10 of the **Canadian Charter of Rights and Freedoms** states:

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right...

The onus is on the accused to establish on a balance of probabilities any alleged breach of section 10 (a) and/or 10 (b) and that as a result of the breach, that the evidence should be excluded under section 24 (2) of the **Charter**.

### *Detention*

[28] To trigger the right the accused must be under arrest or detained. The officers made it clear to Mr. Simpson that he was not under arrest at the time of the taking of his statement. The question remains as to whether he was detained.

[29] Detention may be physical or psychological, that is the police may assume control over the movement of the person by physical constraint or by demand or direction. In *R. v Grant* 2009 SCC 32 McLachlin C.J. and Charron J., writing on behalf of the majority held that:

44 In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
  - a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
  - b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

- c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

Was Mr. Simpson detained? I have concluded that he was.

[30] Mr. Simpson attended at the RCMP Detachment in response to the repeated requests of Sgt. Hunter. On arrival at the Detachment, he was accompanied by Sgt. Hunter from the public area and into a secured area available only to the police and those accompanying them. Mr. Simpson was directed to an interview room that was described in testimony as being 30 to 40 m from the public entrance.

[31] Sgt. Hunter informed Mr. Simpson that he intended to interview him. Once in the interview room, the officer exited to engage the audiovisual recording equipment. Mr. Simpson was advised of this. Upon Sgt. Hunter's return to the room, he was accompanied by Constable Paul Vincent, and the interview began. The interview lasted for over an hour.

[32] I conclude that a reasonable person would perceive that there was no choice for Mr. Simpson but to comply. His physical liberty was restricted by the conduct of the police officers if only by reason of the location where the statement took

place. The officers did not indicate to Mr. Simpson that he was free to leave at any time. Rather, it is apparent that he was the subject of a focused investigation and that they intended for him to stay in the room and cooperate in the statement taking.

[33] While not determinative of the issue, it is worth noting that both officers entered into the room with Mr. Simpson knowing that it was their intention, as they described it, to “release him” after the interview and after he entered into a Promise to Appear. By their use of the term “release him” they signal their own perspective of the meeting, that is, that he was detained and would only be released in accordance with the provisions of the **Criminal Code**.

[34] Having concluded that Mr. Simpson was, in fact, detained I turn now to the issue of whether the police fulfilled the obligations put on them by section 10 of the **Charter**.

***Section 10(a)***

[35] I am satisfied that the duty under section 10 (a) was met in that the accused was aware, by his own admission, of the charges that were under investigation. Sgt. Hunter, at a very early point in the interview, specified each of the charges and confirmed with Mr. Simpson that he was aware of the matters which gave rise to the subject interview.

***Section 10(b)***

[36] At the beginning of the interview process, Sgt. Hunter produced a piece of paper entitled “Statement Form” which was entered into evidence on the *voir dire*. In the video Sgt. Hunter can be observed asking Mr. Simpson the questions that are contained in the first part of the form, and recording Mr. Simpson’s answers. This consisted of Mr. Simpson’s personal information, the time, the date and the place of the interview, those conducting the interview, and the matters under investigation.



[37] At that point Sgt. Hunter deviated from the language on the form. The next section, entitled “Charter Caution”, includes a proper recitation of the advisory that must be given to accused persons with respect to the right to retain and instruct counsel without delay. It states:

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 to 1-866-638-489, during business hours or 1-800-300-7772, during nonbusiness hours.

This language complies with the informational component specified in the case of *R. v Brydges*, [1990] 1 SCR 190, that is, the existence and availability of the applicable system of duty counsel in the jurisdiction. After this advisory, the form asks the following questions:

Do you understand? Answer\_\_\_\_\_

Do you wish to call a lawyer now? Answer\_\_\_\_\_

You also have the right to apply to Nova Scotia Legal Aid for legal representation if you are charged with an offense.

Do you understand ? Answer\_\_\_\_\_

Person consulted:\_\_\_\_\_ Time consulted:\_\_\_\_\_

[38] These spaces are not completed on the form. Instead of following the format on the form, Sgt. Hunter simply reminded Mr. Simpson that he was provided with his **Charter** rights upon his arrest on July 9. Mr. Simpson acknowledged that this was so.

[39] Sgt. Hunter then advised Mr. Simpson that he was not under arrest and that he could telephone a lawyer at any time that he chose. The officer continued and read the Police Caution as it was set out on the form after which he recorded that the accused answered “yes” when asked whether he understood the Police Caution.

[40] I do not accept that the duty to provide the informational component of section 10(b) can be satisfied by confirming that the accused recalls the rights as provided to him almost a week previously. This defect is not cured by telling him that he can call a lawyer if he chooses to. The object of providing a suspect with his section 10 (b) right to counsel is to support the detainee’s right to choose whether to cooperate with the police investigation at the time of the current interview, and to give him access to legal advice on the situation that he is facing at the time.

[41] The officers acknowledge that Mr. Simpson had not been “willing to say too much” during the July 9<sup>th</sup> attempt to interview him. This subsequent interview was intended to address the product of the search and seizure at the 827 Hwy 6 address, which was an additional source of jeopardy to Mr. Simpson from that he faced when interviewed earlier.

[42] I recognize that there is a duty on the detainee to be reasonably diligent in exercising the right to counsel however in this case, while he was told that he could telephone a lawyer, Mr. Simpson was not asked specifically whether he wanted to do so at that time. Consequently, while an accused may waive the right to counsel, that waiver must be clear and unequivocal and “premised on a true appreciation of the consequences of giving up the right”. see, *R. v. Clarkson*, [1986] 1 SCR 383. That did not occur on the facts of this case. There was no waiver.

[43] It is interesting to note that at the conclusion of the interview Sgt. Hunter requested that Mr. Simpson sign the Statement Form and while doing so suggested to Mr. Simpson that he had in fact read the **Charter** Rights provision to him from that form. This had not occurred and Mr. Simpson refused to sign.

[44] I am satisfied therefore that it has been established on a balance of probabilities that the right afforded to the accused under section 10 (b) of the **Charter** was breached.

### **Remedy**

[45] Section 24 (2) of the **Charter** provides the remedy for a breach in a case such as this. That section reads:

24 (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[46] The framework for exclusion has been articulated by the Supreme Court of Canada in the case of *R. v. Grant, supra*. The inquiry is objective and asks whether a reasonable person, informed of all relevant circumstances and the values underlying the **Charter**, would conclude that the admission of the evidence would bring the administration of justice into disrepute. The focus is not only long term but also prospective.

[47] Section 24 (2) begins with the proposition that a breach causes damage to the administration of justice and so the remedy is intended to ensure that evidence obtained through the breach does not cause further damage to the justice system. The focus is societal systemic concerns and does not aim to punish the police or provide compensation to the accused. In considering section 24 (2), the court must have regard to the following:

- (1) the seriousness of the charter-infringing state conduct (i.e., admission may send the message that the justice system condones serious misconduct);
- (2) the impact of the breach on the charter protected interests of the accused (i.e., admission may send the message that individual rights count for little); and
- (3) society's interest in the adjudication of the case on its merits.

The court must balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

1. *Seriousness of the Charter Infringing Conduct*

[48] The more severe or deliberate the state conduct that led to the violation the greater the need for the courts to dissociate themselves from the conduct through

exclusion. State conduct varies on a spectrum from inadvertent or minor violations to evidence obtained through willful or reckless disregard of **Charter** rights.

[49] In this case, the police knew or ought to have known that it was a duty to provide Mr. Simpson with his section 10(b) rights. The same officer, Sgt. Hunter, had correctly provided this right to Mr. Simpson some 6 days earlier.

[50] I note again Cst. Vincent's reference to the fact that Mr. Simpson had apparently not been too forthcoming in the statement taking of July 9 after having been provided with a proper **Charter** advisory. It leaves open the inference that, in an effort to obtain a statement viewed as more inculpatory, the officers sought to minimize the likelihood that Mr. Simpson would exercise his right to counsel, by passing over the **Charter** advisory in a cursory manner.

[51] It may very well be that Sgt. Hunter felt that the cumulative effect of providing the proper **Charter** advice some days earlier, combined with his informal advice that Mr. Simpson would be permitted to make a phone call to a lawyer, was sufficient. On the other hand, Sgt. Hunter presents as an experienced

officer who seems unlikely to make that type of mistake. There was no urgency that would justify a shortcut.

[52] Having regard to all of the circumstances, I view the **Charter** breach as one of negligent disregard for the accused's section 10 (b) **Charter** right.

2. *Impact on the Charter Protected Rights of the Accused*

[53] The next question is to assess the degree to which the breach actually undermined the accused's interest protected by the section 10 (b) right.

[54] The right to counsel is, of course fundamental in our system of justice and the expectation is that the police will properly and fully inform the accused of that right and provide him with the opportunity to implement the right should the accused indicate that he intends to exercise the right to counsel. That did not take place here and in consequence thereof the accused entered into a statement taking that lasted in excess of an hour, without the benefit of counsel.

[55] Inculpatory evidence was generated from the accused in direct consequence of the **Charter** breach. There was a serious impact on his right.

3. *Society's interests in adjudication on the merits*

[56] The question to be answered is:

Whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct.

I must ask myself: Is the truth-seeking function of the criminal trial process better served by admission of the evidence, or by its exclusion?

[57] Reliability of the evidence is an important factor in this inquiry. Therefore, the more reliable the evidence, the more this militates in favor of admission, and the converse is also true.

[58] In my view the circumstances under which this statement was taken calls into question the reliability of the statement. In particular, there were exchanges



during the taking of the statement which I have set out in my reasons on voluntariness, which raise the question as to whether Mr. Simpson was assuming sole responsibility for the illegal activity in order to insulate his wife from prosecution or further investigation.

[59] The charges are serious and the impact of an order to exclude the statement on the Crown's case is yet to be seen. Exclusion will eliminate the accused's account of his role in the alleged illegal activity.

[60] There has been no pre-trial challenge to the validity of the search and seizures and evidence on the *voir dire* suggests that there is independent evidence that speaks to the elements of possession. Exclusion of the evidence will not undermine efforts to introduce evidence of the nature of the substances seized or what the quantities and the character of the operation is in measuring whether it was intended for personal use and possession or for the purposes of trafficking, or production. The Crown should be able to continue this prosecution to obtain a finding on the merits.

4. *The final step is to balance the three inquiries.*

[61] My findings in relation to each of the three *Grant* factors all support a conclusion that favors exclusion of the statement and I so order.

[62] Orally at Amherst Nova Scotia, 03 March 2011.

Duncan J.