Date: 20020904
Docket: CR No.156899

IN THE SUPREME COURT OF NOVA SCOTIA

HER MAJESTY THE QUEEN
[Cite as: R. v. Hill, 2002 NSSC 205]

- versus -

DOUGLAS HILL

D E C I S I O N

HEARD: **at Halifax before The Honourable Justice Walter R. E. Goodfellow on August 28th and 30th, 2002**

DECISION: **August 30, 2002 (Orally)**

WRITTEN RELEASE OF ORAL: **September 4, 2002**

COUNSEL: **Craig M. Harding - Representing the Crown**
Joseph Patrick L. Atherton, Representing the Defence

GOODFELLOW, J. (Orally):

INDICTMENT

[1] Douglas Hill stands charged

1) That he at or near Halifax, in the County of Halifax, Province of Nova Scotia, between the 1st day of January, A.D., 1996 and the 31st day of October, A.D., 1996, did unlawfully commit a sexual assault upon the person of D. M., contrary to Section 271(1)(a) of the Criminal Code;

2) That he at or near Halifax, in the County of Halifax, Province of Nova Scotia, between the 1st day of January, A.D., 1996 and the 31st day of October, A.D., 1996, did unlawfully commit an assault upon D. M., contrary to Section 266 of the Criminal Code.

APPLICATION

[2] Douglas Hill makes this application for a stay of the charges against him pursuant to s. 24 of the *Canadian Charter of Rights and Freedoms*. Douglas Hill maintains that he suffered a violation of his *Charter of Rights* and, in particular, s. 7 of the *Charter* which states as follows:

LIFE, LIBERTY AND SECURITY OF PERSON.

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

BACKGROUND

[3] D. M. brought her allegations to the attention of the police in August 1998 and she attended at the Halifax Regional Police Station on August 10, 1998 to give a statement. The computer log shows that she was at the police station for two hours and her statement was audio taped. Sergeant Hurst, the police officer conducting the interview noted the starting time of the interview at 6:34 p.m. and the finishing time of the interview at 8:06 p.m., a total length for the interview of some 92 minutes.

[4] In providing disclosure, the tape of Ms. M.'s interview by Sergeant Hurst given by the Crown to Mr. Hill's counsel runs for approximately 49 minutes, leaving approximately 43 minutes of the interview unaccounted for. The taped statement provided indicates that D. M. (born June *, 1970) met Douglas Hill while he was on duty as a police officer at a downtown establishment (Lawrence of Oreganos) in the summer of 1994. They commenced dating in the fall of 1994 and had a personal relationship until July 1995. Ms. M. brought the relationship to an end due to telephone calls

from a lady who claimed to be Douglas Hill's girlfriend in an ongoing relationship and also a telephone call from Douglas Hill's wife and the indication that, contrary to what Douglas Hill had advised her, he was not a separated man but one remaining in a family unit with his wife. Ms. M.'s evidence is to the effect that she and Mr. Hill became emotionally involved but that she felt betrayed and therefore brought the relationship to an end.

[5] Ms. M. would see Douglas Hill from time to time when he would be carrying on his police duties, driving a police van, etc., and Ms. M.'s evidence in her statement and before me was that in May of 1996 she bumped into Douglas Hill at a local bar and later on when she went home by herself at approximately 2:30 a.m. Douglas Hill knocked on her door, she let him in and they had an emotional conversation in her bedroom of some duration. According to Ms. M., without any inducement or consent on her part, she says Douglas Hill forced himself upon her. Ms. M. indicates that at the time she was residing with two female roommates, each having their own rooms, and apparently one of the roommates was likely home during this alleged sexual assault.

[6] At a subsequent date, for which there is some conflict, Ms. M. indicates she felt compelled to accept a drive home from Douglas Hill because he was in

uniform and he directed her to the police vehicle, although she says she did not wish to accept a ride from him.

[7] She indicates that she told a number of people what had happened to her in May 1996, however, she did not go to the authorities until August 1998 when the interview of the 10th of August took place.

[8] Douglas Hill, in support of his application, engaged James A. Garland, a video and audio expert of considerable background and experience. Mr. Garland was qualified as an expert and reviewed in open court the entire tape pointing out, in his expert opinion, that there were ten occasions during the interview that the tape was stopped. One of the ten occasions was explainable as being a changing of the tape from one side to the other.

[9] The Crown called both Ms. M. and Sergeant Hurst, the police officer who conducted the interview.

[10] Ms. M.'s evidence is that she was at the police station for the purpose of the interview and that it was after dinner at around 6:00 p.m. It was in an interview room at the then Dartmouth Police Station and she says she was at the police station for a few hours and, in any event, quite a lengthy period. She has had an opportunity to review the transcript of her tape a couple of times, the last being in June 2002. She declined having the interview by

video and opted for the audiotape only. She indicated that the police officer had a difficult time getting the tape deck to operate. They started and she was quite a bit into the interview giving her actual statement as to what is alleged to have transpired and she estimated 20 minutes to a half hour, but not really sure of the time frame, when, according to her, Sergeant Hurst departed to obtain another tape deck because the first one was not operating properly. She indicated that things were a little bumpy when it came to the recording and something about a joke by the police officer. She recalls Sergeant Hurst stopping the recording the first time to get the new recorder and it could have been 20 to 30 minutes into the interview. The second stop she says it was later. She acknowledges when she read the transcript that she had left a lot of detail out as to the alleged sexual assault and gave more detail subsequently. When you review the transcript of her evidence at the preliminary inquiry, it is clear that on that occasion she gave additional evidence of the alleged sexual assault that is not contained in her statement to Sergeant Hurst, such as the fact that after the alleged rape, she gave Douglas Hill $20.00 for cab fare, took a shower, remembered more with the passage of time, etc.

[11] She confirmed under cross-examination that the police officer used a new machine but she was reasonably certain that the tape itself was alright and that the only problem was with the tape recorder. She says there was a lot of fumbling. When asked if she could recall there being ten stops in the recording, she said that seems like a rather high number. She acknowledges the time frame stated on the tape, namely, that it began at 6:34 p.m. and finished at 8:06 p.m. was consistent with her recollection.

[12] Sergeant Hurst, the police officer who conducted the interview was called and he reviewed the comments of Mr. Garland and acknowledged that there appeared to be in fact ten stops or breaks in the recording of the interview. He indicated he had no clear recollection of the stops but drew upon his experience and I found his suggestion that he would stop to test the equipment and make certain it was working to be reasonable. He has no specific recollection. He also felt that after she gave a portion of her statement, particularly a lengthy outline or narrative, he would quite probably turn the machine off to regroup and review by himself her evidence. He does not recall any discussion with her during the stops although he acknowledges at the outset he found her quite naturally nervous and he says he spent several minutes reassuring her, particularly the fact that

Douglas Hill was a member of the Halifax Regional Police Force would not provide any different approach.

[13] During his direct examination, Sergeant Hurst was not asked about the problems with the first recorder and the time frame stated by Ms. M. of 20 to 30 minutes that she says was given while the first recorder was being utilized. The issue came up in cross-examination and re-direct examination and the experienced police officer literally didn't know what anyone was talking about in suggesting that there had been a break in the interview, recording or an attempt to record for 20 to 30 minutes and the necessity of replacing the recorder. His recollection is that it simply did not occur.

[14] Sergeant Hurst was shown a copy of the HRM police video statement policy in effect September 20, 1996 and, while it is entitled "videotaping statements", some portions appear to have been directed generally at least to audio taping and certainly common sense would dictate observation of some of the specific guidelines without the necessity of a protocol. In particular:

9.2 EQUIPMENT AND TAPES

A POLICY

4. Master tapes shall not be altered under any circumstances and shall not contain more than one recorded statement.

6. All Master tapes stored as evidence will be accompanied with the appropriate property/exhibit form.

B INVESTIGATOR

2. Confirm than an adequate supply of new and used videotapes and audiotapes are available and ensure audio/visual equipment is in proper working condition; Deficiencies shall be reported to the Quartermaster for action through a mailbox notification.

4. Inform the witness when the recording is being conducted or resumed.

9.3 VIDEOTAPING STATEMENTS

A POLICY

B INVESTIGATOR

1. Upon entering the studio with the witness/accused, provide the accused/witness with the necessary information and comply with all guidelines stated in 9.2 of this chapter concerning the use of the audio/visual studio and equipment.

15. State when an interruption is necessary, the reason for the interruption and the time (i.e. change audio tape, videotape, etc.)

16. When resuming the interview, state the time and recount and confirm with the witness the events which transpired during the interruption including any conversation.

19. The videotaping of statements is not a substitute for taking comprehensive notes and the investigating officer shall take detailed notes during the videotaped interview.

20. Treat any notes made during the videotaping session as exhibits.

21. It is the responsibility of the investigating officers to include copies of these notes in the Crown Brief Package.

[15] I would comment that the requirement of taping comprehensive notes by the investigating officer is a very onerous responsibility and certainly my experience in examining witnesses and cross-examining witnesses in the courtroom, it is virtually impossible to take comprehensive notes and pay proper attention to the witness's demeanour and responses. Nevertheless, one would expect some notes particularly as to the time of stopping, length of stop, questions for witnesses, etc.

CASE LAW

[16] The burden of proving a breach of *Charter* right rests upon the applicant, in this case, Douglas Hill. The burden is one of proof on a balance of probabilities (*R. v. Stinchcombe* (No. 1), [1991] 3 S.C.R. 232).

[17] The Supreme Court of Canada has set out clearly the test for a stay pursuant to s. 24 of the *Charter*. *R. v. Harper* (1994), 3 S.C.R. 343 states:

> 1) The prejudice caused will be manifested, perpetuated or aggravated through the conduct of the trial, or its outcome; and
>
> 2) No other remedy is reasonably capable of removing that prejudice.

[18] Similarly, in *R. v. L. (D.W.)* (2001), 194 N.S.R. (2d) 379 (C.A.), the loss of diaries, which had been produced to the court, was held not to justify a stay, there being no indication as to how the s.7 right of the accused was breached.

[19] Counsel for Mr. Hill submitted a number of cases dealing with lost or missing evidence and, in each of those cases, the loss or destruction of material was clear. For example, in *R. v. Vaudry*, [1995] M.J. No. 248 (Prov. Ct.) the videotape of the initial interview was lost. This was in a case that turned on the credibility of the two parties. Also, in *R. v. Court*, [1997] O.J. No. 3450 (S.C.) at p. 11:

> Cases involving the loss or destruction of material beneficial to the defence differ from those involving late disclosure in that the former are not usually remediable by an order for production and an adjournment, whereas the latter usually are. No demonstration of actual prejudice is necessary to the finding of a s. 7 or s. 11(d) breach, as prejudice is to be assessed at the remedy stage of the analysis. In lost evidence cases, one must consider the impact of the loss on the defence, without requiring a specific enunciation of the prejudice caused. The prejudice may result from the inability to actually use the materials in cross-examination, or to use them as the foundation for cross-examination, to point to other opportunities to garner evidence, or to benefit the defence in making appropriate decisions relevant to the conduct of its case. Rather than requiring the defence to demonstrate the specific prejudice arising from the loss of the material which is no longer available, the defence can meet its onus by persuading the court to conclude , on the basis of the general nature of the records, what is known fo them, of the circumstances surrounding the creation fo the records, and of the facts in issue in the case, that prejudice has occurred to the defence ability to make full answer and defence. It is not necessary that the lost evidence be in itself directly admissible at trial. Where there is deliberate action by an agent of the state to withhold information of potential benefit to the defence, or the purposeful destruction of relevant evidence, or an unacceptable degree of negligent conduct resulting in the loss of evidence, a stay of proceedings becomes more likely. Even where the loss of evidence is not the result of deliberate action or design, but rather the product of the passage of time, a stay will be warranted where the prejudice to the defence cannot be remedied, and the clearest of cases test is met. (emphasis added)

[20] A case dealing with the admissibility of a statement given by the accused is *R. v. Timothy Walsh* CR. SK. 10135, May 14, 2002 where Cacchione, J. ruled the accused statement was inadmissible where he had been questioned for over a two day period, the interrogation recorded but the audio was of extremely poor quality, not all of it was recorded, and no notes were taken when the recorder was turned off. The question when it is an accused statement goes mainly to admissibility and the onus is on the crown to establish that the statement was given freely and voluntarily.

[21] Where evidence has been in the possession of the Crown and is not available for production and inspection, then there is an obligation to explain its absence: *R. v. Stinchcombe*, [1995] 1 S..R. 754 (at para. 2), 96 C.C.C. (3d) 318, 38 C.R. (4th) 42.

[22] Of considerable assistance and guidance is the Supreme Court of Canada decision in *R. v. La*, {1997] 2 S.C.R. 680, 116 C.C.C. (3d) 97, 8 C.R. (5th) 1, Sopinka, J. said at pp. 107-08:

> [20] This obligation to explain arises out of the duty of the Crown and the police to preserve the fruits of the investigation. The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in *Stinchcombe No. 2*, *supra*, recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached ...
>
> [21] In order to determine whether the explanation of the Crown is satisfactory, the Court should analyse the circumstances surrounding the loss of evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

[22] What is the conduct arising from failure to disclosure that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 78-81, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, per Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases an unacceptable degree of negligent conduct may suffice.

[23] In either case, whether the Crown's failure to disclose amounts to an abuse of process or is otherwise a breach of the duty to disclose and therefore a breach of s. 7 of the *Charter*, a stay may be the appropriate remedy if it is one of those rarest of cases in which a stay may be imposed, the criteria for which have most recently been outlined in *O'Connor, supra*. With all due respect to the opinion expressed by my colleague Justice L'Heureux-Dubé to the effect that the right to disclosure is not a principle of fundamental justice encompassed in s. 7, this matter was settled in *Stinchcombe, supra*, and confirmed by the decision of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80, 112 C.C.C. (3d) 289, 142 D.L.R. (4th) 595.

As to the remedy for the failure to preserve evidence, Sopinka J. commented at p. 108:

[24] The Crown's obligation to disclose evidence does not, of course, exhaust the content of the right to make full answer and defence under s. 7 of the *Charter*. Even where the Crown has discharged its duty by disclosing all relevant information in its possession and explaining the circumstances of the loss of any missing evidence, an accused may still rely on his or her s. 7 right to make full answer and defence. Thus, in extraordinary circumstances, the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial. In such circumstances, a stay may be the appropriate remedy, provided the criteria to which I refer above have been met.

FINDINGS

1. The alleged offences are said to have occurred in 1996.

2. The alleged offences were reported to the police by Ms. M. in August 1998. She attended police headquarters for her initial statement on the 10th of August, 1998.

3. The time recorded for her statement was recorded as having commenced at 6:34 P. M. with it concluding at 8:06 P. M., a total length for the interview of some 92 minutes.

4. The disclosure to Douglas Hill's counsel of the interview tape from the Crown runs for approximately 49 minutes leaving approximately 43 minutes of the interview unaccounted for.

5. There were at least ten stoppages of the interview identified by breaks in the tape recording when it was subject to examination by defence's expert and only one or two of the stoppages are explained satisfactorily, namely, the probable changing of the tape from one side to the other would reasonably account for one stoppage and perhaps a stoppage to check if the tape is working.

6. Serious conflict as to what transpired in the interview room between Ms. M. and Sergeant Hurst, the police officer who conducted the interview came out in their evidence. Ms. M. very clearly related problems with the recorder

necessitating Sergeant Hurst leaving the interview room to obtain an alternate recording machine. Ms. M. says that this took place when she was from 20 to 30 minutes into giving her statement. Sergeant Hurst, on the other hand, showed complete puzzlement when this was put to him in cross-examination and his response is that he has no recollection of that happening and does not believe that it did occur. Certainly, there is no notation or record of any such interruption in the interview disclosed in the tape provided to Douglas Hill's counsel or in any notes of the interview officer.

7. This conflict gives rise to numerous questions and possibilities. This would have been an unusual event for Ms. M. and it is hard to believe that she could recall such occurring without it in fact having occurred. On the other hand, Sergeant Hurst gave his evidence in a straightforward manner and did not convey any deliberate impropriety in the conduct of the interview.

8. Sergeant Hurst readily acknowledged the examination of the tape discloses 10 actual identifiable stoppages in the recording process.

9. Sergeant Hurst has no recollection of the actual stoppages. It is reasonable to assume that one of the earlier stoppages was, as Sergeant Hurst explained, likely to check and see if the equipment was functioning properly. The rest of the explanation given by Sergeant Hurst is pure speculation and I find no foundation

for a conclusion that there has been anywhere near a reasonable explanation for the stoppages in the recording of the interview. There are no recording notes or otherwise of the stoppages and no notes made by Sergeant Hurst that give any explanation or background as to what really transpired in the 92 minute period of the interview.

10. Sergeant Hurst indicated at the outset that he found Ms. M. understandably nervous and talked to her and gave her assurances and he suggests that might account for some of the time of the interview. However, the time recorded for the beginning of the interview is approximately a half hour after it appears Ms. M. arrived at the police station and it is more than probable that the attempt to address Ms. M.'s natural nervousness took place prior to the commencement of the recording of the statement at 6:34 p.m.

11. Even assuming that no part of the videotaping policy applied to audio taping, common sense would have dictated following a procedure that included such things as recording when an interruption took place, the reason for the interruption and time and, when resuming the interview, a restating of the time and confirmation of what transpired during interruptions. The failure to have any kind of record leaves the court in a position of finding that almost all of the 43 minutes

of the interview are unaccounted for on the audio tape and remain without not only reasonable explanation but any explanation whatsoever.

12. The court is unable to determine by way of example whether the first 20 minutes to a half hour of the interview were produced on the tape disclosed to Douglas Hill's counsel, that is, whether they started again, over taped or simply added to the existing tape which Ms. Simmons indicates was subject to a great deal of fumbling.

13. In the pre-trial conference held with counsel, it was clear to the court that the major issue for the jury to deal with is the question of credibility. There is apparently no corroborative or independent evidence , no medical evidence, etc., which means the crucial initial statement of the complainant has extreme importance and weight as relates to the accused's ability to cross-examine the complainant, in other words, to make full answer in defence.

CONCLUSION

[23] The law is clear that a stay should be granted only in the clearest of cases when the right of full answer and defence has been severely prejudiced and no other remedy can reasonably address the prejudice.

[24] The onus on Douglas Hill is one of proof on the balance of probabilities. The law does not require perfection on the part of the police, however, where you have the unusual situation of a crucial interview recorded, the results and disclosure of barely one-half of the interview period and such a lengthy portion of it unexplained, i.e. 43 minutes, it can hardly be said that the crown obligation to provide an explanation has been met. The rationale for taping the interview is to provide a complete and accurate record of what transpired and that was far from achieved in the circumstances that exist here.

[25] The cumulative weight to be given to my factual findings clearly establishes Douglas Hill has met the onus upon him and established that this is a rare, unusual and exceptional set of circumstances that preclude full answer and defence to the degree that justifies a stay, pursuant to s. 24 of the *Charter*.

[26] The application for a stay of the two charges is granted, motion for removal of bail conditions granted.

J.