SUPREME COURT OF NOVA SCOTIA
Citation: *R v. O'Dea*, 2019 NSSC 406

Date: 20191209
Docket: CRS No. 478512
Registry: Sydney

Between:

Her Majesty the Queen

v.

Kimberly Ann O'Dea

Defendant

Restriction on Publication: s. 539(1) and s. 648(1)

Judge:	The Honourable Justice Patrick J. Murray
Heard:	November 27 and 28, 2019, in Sydney, Nova Scotia
Oral Decision:	December 9, 2019
Counsel:	Darcy MacPherson and Gerald MacDonald for the Crown Peter Mancini for the Defendant, Kimberly O'Dea

Order restricting publication of evidence taken at preliminary inquiry

539 (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

Restriction on publication

648 (1) After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

By the Court:

[1] A *voir dire* was held in this matter on November 27, 28, 2019 to determine the admissibility of a statement made by the Accused.

[2] I have spent considerable time reviewing the evidence and considering the submissions of counsel. I have reviewed the case law related to voluntariness and the *Charter of Rights and Freedoms* including the provisions themselves.

[3] Ms. O'Dea, in these circumstances, went to the police station on the morning in question of her own volition. She is charged with offences among the most serious in the *Criminal Code*.

[4] The events that day started with two dispatch calls to the Cape Breton Regional Police Services in the early morning hours. The first call indicated there was a woman at the station who believed she may have hit someone; the second call indicated that there was a person on the road on Oxford Avenue, Sydney Mines.

[5] On patrol that morning, in the same police vehicle, were Constables Sean MacLennan and Troy Walker. They heard these dispatches and responded by driving to the North Division office at 2 Fraser Avenue, Sydney Mines. Cst. Walker went into the police station and Cst. MacLennan continued on to the scene of the accident on Oxford St., just a few minutes drive.

[6] Ms. O'Dea, according to the evidence of the officers, both MacSween and Walker, was in a highly emotional state. The evidence in that respect is clear.

[7] Ms. O'Dea had no cellphone and knew help was needed. She went to the police station to get that help. They would know what to do. How to handle this sudden and tragic situation.

[8] When she got there, her condition became immediately apparent to Constable MacSween who was preparing for his shift upstairs on the second floor. He heard a female voice attempting to enter from outside the public entrance to the building shown in Exhibit #1.

[9] While at the station Ms. O'Dea was making rambling comments, disjointed, and pacing about. Cst. MacSween's evidence confirms this.

[10] Having spent only a few minutes with her, he left the station to go to the scene of the incident that occurred on Oxford Avenue, Sydney Mines. There was an exchange between he and Cst. Walker, who had heard the two calls involving an accident and had seen a vehicle in the laneway, Ms. O'Dea's blue BMW. He observed on his way in to the station that there has been no damage. He glanced at it, he said.

[11] Cst. MacSween was the acting desk Sergeant that day. When he left the station to attend the scene, he instructed Cst. Walker to take down or get the information on what happened. Cst. Walker has been a police officer for about four (4) years. The exchange was as follows. Cst. MacSween was asked:

> Q: Okay so he (Cst. Walker) arrives then what happens?
>
> A: He informed me at this point that he confirmed there was an incident up on Oxford Avenue and he told me that Shawn MacLennan, Cst. Shawn MacLennan, was going to the scene. So with Ms. O'Dea, she was pretty frantic, I told him to take some information from her to find out what happened and I'm going up to Oxford Avenue to see what the scene was.
>
> Q: So you told him to get information from her and you left?
>
> A: Exactly.

[12] Cst. Walker proceeded to do that. In the lobby of the station he met with Ms. O'Dea. There was a table and two chairs situated as shown on the diagram prepared by Cst. Walker in Exhibit VD # 2. She was up and down, and hardly sat in the chair it seems. He did what he was asked to do by the acting sergeant, he was taking notes. "I tried to get a story", he said.

[13] As stated, she was distraught. She asked to leave three or four times in the short period that Cst. Walker says he questioned her in the lobby. The evidence of Cst. MacSween, who had earlier met with Ms. O'Dea, was much the same. Ms. O'Dea asked to leave, she wanted to go see Dana. She was frantic. Cst. Walker confirmed this, stating she wanted to call Dana's mother. He found it difficult to take down what she was saying. He would have to keep bringing her back, keep asking her to stay, trying to keep her on point.

[14] Yet, he was able to write down in the span of four minutes, what had essentially happened according to Ms. O'Dea. It could have been longer he said, but the time he has noted in the notes is 6:54 a.m. He notes begin at 6:50 a.m.

[15] He asked her about her keys which she said were in the car. When she went to the bathroom, he retrieved her keys from her vehicle. He did not want to make it convenient for her to leave, he said.

[16] At that point, he placed her in the telephone room, which he believed was locked. He had taken her keys and made a note, which was out of sequence with the other times at 6:54 a.m.

[17] At the *voir dire*, Cst. Walker testified he believed Ms. O'Dea was never detained. At the preliminary inquiry he testified that he thought she was detained when he took her keys and placed her in the locked telephone room.

[18] The Crown concedes that Ms. O'Dea was detained at that point and that there was a breach of Ms. O'Dea's charter rights because Ms. O'Dea was not cautioned or given her right to counsel without delay as in s.10(b).

[19] This was not done until almost an hour later when she was arrested at 7:48 a.m. Cst. Walker having received a call from Cst. MacSween at 7:46 a.m. that Ms. O'Dea should be arrested for leaving the scene of an accident. She was given her right to counsel and police caution at 8:01 a.m.

[20] The Crown says further, however, that nothing really transpired, of an incriminating nature, after Ms. O'Dea had been arrested in the locked telephone room. I note that even there, Ms. O'Dea seemed agitated and spoke to Cst. Walker a couple of times through the door, asking for water and another exchange.

[21] The Crown confidently says that during the four minute interaction (they refuse to call it a conversation) between the Accused and Cst. Walker, the police were gathering information and doing what Ms. O'Dea wanted to do, report a motor vehicle accident. It was not a detention says the Crown and the utterances obtained, including those that were written down, is a voluntary statement, not contrary to the *Charter* and is therefore, admissible.

[22] The Defence submits otherwise stating this investigation began when Cst. Walker arrived at the police station and began questioning Ms. O' Dea, which continued for 4 minutes. After that she had then been placed in the locked room for almost an hour before being arrested and advised of her rights. The Defence further submits there are questions surrounding the voluntariness of the statement in these circumstances.

[23] The evidence is clear that no evidence was gathered from her during what Crown says is 45 minutes in phone room. She asked for a glass of water, this was after the information had been gathered. She was still cooperating.

[24] In respect of the first 4 minutes the Crown says the police were just trying to find out what happened. They had not decided that a crime had occurred.

[25] The Crown has the burden of proving the statements or utterances of Ms. O'Dea were given voluntarily, beyond a reasonable doubt. The determination is highly contextual, very much dependent on the individual facts of each case.

[26] Freedom of the Accused to choose whether to give a statement to a person in authority is key. All of the surrounding circumstances must be considered in assessing whether that choice has been taken way.

[27] A confession is inadmissible if made under circumstances that raise a reasonable doubt about voluntariness. The ultimate question is whether is the choice to make a statement was exercised of the person's own free will.

[28] The leading case of ***R v. Oikle***, 2000 S.C.C. 38, lists a number of relevant factors which are unlimited. These include that the statement be the product of an operating mind. This means the Accused must have the cognitive ability: (1) to understand what she or he is saying; and (2) comprehend that what she or he is saying may be used in proceedings against them.

[29] The Crown submits that operating mind is not "in play" on this *voir dire*. The threshold as described in ***Oikle*** it says, is low. The standard only requires that a limited ability to understand is needed to meet it.

[30] In terms of Cst. Walker arriving at the police station he was asked in cross-examination if he knew why Ms. O'Dea was there at the station. He said:

> Before she started uttering, I did not know what she was there for.

[31] I earlier referred to Cst. MacSween's conversation with Cst. Walker. In re-direct Cst. Walker said he did not know what Ms. O'Dea told Cst. MacSween before he arrived.

[32] There seems to be the suggestion from Cst. Walker that he was starting from scratch but the evidence is he was in possession of information about the accident,

the injury. Kim O'Dea was there and he saw her vehicle. He was later asked at what point he began to suspect there may be legal difficulties for her.

> Q: Did you at any point in that 45 minutes make a connection that Ms. O'Dea, the accident Ms. O'Dea was involved in was the same incident that your partner and Constable MacSween went to see on Oxford Street?
>
> A: Yes.
>
> Q: Okay at what point?
>
> A: At ah, when she started telling me she was there at that scene.

[33] The Defence has pointed to discrepancies between Cst. Walker's *voir dire* evidence and his evidence given at the preliminary hearing in terms of whether Kim O'Dea was detained at all and whether he told her he was going to take her car keys.

[34] Underlying the confessions rule is the rationale that statements involuntarily given are not reliable. The Defence here has expressed concerns as to the reliability of the statement the Crown proposes to introduce. Despite its prominence, the notes in Exhibit # 4 mention nothing about the frantic state of the Accused, and nothing about her asking to leave on numerous occasions.

[35] The Crown says she went to the station to report, but the evidence is she wanted Cst. MacSween to accompany her back to scene, not simply to report an accident. Cst MacSween was asked:

> Q: Again, I go back to my other point, it would be fair to say that Ms. O'Dea was, was adamant that she wanted to go back to Oxford Avenue?
>
> A: Well she wanted to go back, and she wanted me to go, somebody had to go, you know like… I can say everything wasn't clear it's just ah blurting out a lot of those comments. She was very distraught.
>
> Q: You recall Cst. MacSween it was ah, you have testimony at a preliminary inquiry?
>
> A: Yes.
>
> Q: Okay and if I were to suggest to you at the preliminary inquiry you said that she was adamant that she wanted to go back to Oxford Avenue?
>
> A: Yes, I, I would say she was.

[36] It is not entirely clear that Ms. O'Dea went there simply to report the accident. No evidence was given that she was asked to produce her license, registration or insurance. Nothing that would be expected in a mere reporting situation. It was more than that.

[37] I conclude from the evidence that Ms. O'Dea did not go to the police station simply to report the accident. She went there for help, she did not know what to do, but wanted the police to take her back to check on the condition of Ms. Jessome. It is obvious that was her main concern.

[38] That said, the police had good reason not to go as she requested. As Cst. MacSween said, they did not know what that scene would be like. There are also good reasons for the police to take down the information because it could be critical. Any little detail about the accident could be a matter of life or death.

[39] The police must be able to carry out their normal duties, which include crime detection, investigation and law enforcement. Even trickery at times will not defeat the voluntariness or free will of the declarant in giving a statement to persons in authority, usually the police.

[40] In cross-examination Cst. Walker said he pieced together her story as best he could. It was not a normal conversation, he said. She was always jumping around with words, ran over to call her mother, she was hyper, her words were going everywhere, "got to find out what is going on", words to that effect.

[41] In determining voluntariness, state of mind is important. The "operating mind" doctrine is not a discreet inquiry separate form the confessions rule. ***Watt's Manual of Criminal Evidence***, by David Watt, Carswell 2014, makes reference to operating mind and that persons may be in a state of shock after a motor vehicle accident. (***R v. Ward***, 1979, 2 S.C.R. 30)

[42] Further, the officer could not say for certain it was four minutes. At one point he said it took a long time. He was making notes as she was saying them. The Crown says the four minutes is uncontradicted.

[43] In terms of the officer's notes there was no mention for example of Dana Jessome's fingers being pinched by the window as Kim O'Dea was allegedly pulling away, which the officer mentioned a couple of times in his oral recollection of her oral statement.

[44] Cst. Walker in cross-examination was asked if he connected the dots and knew whether Ms. O'Dea was involved in the accident. He stated he thought it was most likely her when the acting sergeant left to investigate.

[45] He said on the one hand she was free to leave, but if she had attempted that he would have detained her. He did not consider her detained from 6:50 until the arrest he said. When she stopped cooperating, that is when he would have detained her. The case law, and in particular ***R v Singh***, 2007 S.C.C. 48, has stated this is a "yardstick" in determining whether there was a police caution should be given. The absence of a police caution is one factor among others in determining voluntariness as the confessions rule applies whether or nor a suspect is in detention.

[46] Until he spoke to his sergeant, Cst. Walker's intention was to keep her. He was in effect trying to buy time, and did not want her to leave. He said in terms of criminal charges that he did not form grounds, and did not have cause for concern up to that point, when she told him she was at the scene.

[47] I have some difficulty accepting that Cst. Walker did not know he was investigating a potential crime. He may not have known what, if any, charges there would be and was determined to keep her there. He would have detained her if it came to that.

[48] So in his mind, she was not free to go. The real question is, in her mind, did Ms. O'Dea consider herself free to go, free to walk away.

[49] My impression of the evidence is that she was not. She kept asking to leave and kept coming back. He may have only asked her to stay, but it was a form of persuasion from someone in uniform. She had hoped the police would do more than question her. She was in a vulnerable state and did not know if Ms. Jessome was badly injured or not.

[50] A reasonable person looking at that situation would say that Ms. O'Dea was not in any position to know what to do, what to say, whether to leave, and certainly not able to fully understand the extent of jeopardy she was in.

[51] Ms. O'Dea it seems, was beside herself for almost the entire time she was the police station, certainly in the early stages before she was placed in the telephone room. For the entire 4 minute period she was in an emotional state.

[52] In totality, the evidence suggests the police were attempting to keep her there for the purpose of gathering information, and investigating the accident.

[53] In these circumstances, there may be a fine line between investigating the accident and a crime. Given what the police had quickly learned about what had happened, I think something should have been said to her about the statements or utterances she was making, disjointed as they were.

[54] Cst. Walker brought her to that room before he received the call from Cst. MacSween which came some 45 minutes later. It appears that Cst. Walker decided to detain her, once he completed taking what is now presented as the written part of her statement combined with what she told the officer verbally while she was, as the Crown says, reporting the accident.

[55] As stated there is very little in the way of detail as to the reporting of the actual accident. One might expect there would be an accident report form containing the date, time, place, vehicle information, and insurance. Even a description or diagram of what happened, road and weather conditions.

[56] None of that appears in Cst. Walker's notes.

[57] Cst. Walker was following the instruction given to him by his superior officer that day. Take down the information. Whether the officer realized it or not he was gathering evidence that would lead to serious criminal charges. His decision to detain her in the phone room shows that he did realize, to some extent, the seriousness.

[58] There is no suggestion as to a lack of good faith, or any threats promises or inducements toward Ms. O'Dea. There were none. But was she treated fairly with respect to knowing what she said may be used in proceedings against her? I do not believe she was.

[59] The difficulty is that until the police investigate an accident, it is hard for even them to know if a criminal charges will result.

[60] It might be the case, that during this time, the police themselves did not know. But what they knew was enough. They knew or should have known, based on the information they did have, that Ms. O'Dea could be facing some serious legal difficulties and of a criminal nature.

[61] Cst. Walker's actions in doing everything he could to keep her there are telling. I suspect the four minute exchange was very likely longer than that, when you consider the self described difficulties the officer had in eliciting the information from her.

[62] On the whole, I have concerns, based on the test in ***Oikle***, with the voluntariness of this statement. Whether Ms. O'Dea had an operating mind is highly questionable in these circumstances. I do not believe she did and so find that the Crown has not proven beyond a reasonable doubt that the statements in oral and written form were given voluntarily.

[63] The absence of a police caution is one factor among others, but in this case it is an important one.

[64] In addition, I question whether what is put forward as the statement is an accurate account of what the Accused said. We know from the evidence it is not everything she said. It is what the officer could get down in between her ramblings. She had no opportunity to review it, add to it prior to it being introduced as evidence against her on the charges of manslaughter, criminal negligence causing death and dangerous driving causing death.

[65] Finally, I will make a comment on the Crown submission on the admissibility of the utterances as a *res gestae* statement made contemporaneously with no time to concoct them thus ruling out their fabrication.

[66] I do not find *res gestae* fits easily into this analysis for a number of reasons. It is often cited as an exception to the hearsay rule. As well, all utterances or statements to persons in authority must still be proven to be made voluntarily, and are thus, subject to the confessions rule as the Sopinka reference at 8.11. I understood the Crown's submission to be in agreement with that principle.

[67] Attempting to give the Crown the full benefit of its submission such statements may be taken as more reliable to the extent that is relevant, but I have found they were not voluntary, so I find that ends the inquiry.

[68] Turning to the *Charter* and sections and ss 7, 9, and 10(b) as outlined by the Defendant's counsel in his brief.

[69] With respect to the *Charter*, I have set out some concerns I have with respect to the honouring of Ms. O'Dea full rights as guaranteed. While the police were

doing their job, they were fully intent on detaining her. I think in these circumstances, a strong case can be made for detention prior to her being placed in the phone room.

[70] We know from the officer's evidence, that she would not have been able to walk away had she done so. In ***Shamshudden***, 2017 NSSC 310, the officer advised both suspects the were under investigative detention almost immediately. The Crown says the difference is that the officer in that case considered them detained. In this case, there is some question as to when the detention took place, from the officers own evidence compared to that given at the preliminary.

[71] Another difference is the characteristics of the Accused and her state of mind. She tried several times to leave and each time the officer asked her to return. This happened repeatedly. Given her state, while there was no demand, these requests could reasonably be taken as a direction from the officer to remain. She had just been involved in a traumatic event without knowing the result. Her state of mind was clearly agitated. The officer, in my view, was convincing her to stay and wanted her to stay, by his own admission.

[72] I have found that the prudent course of action would have been to inform her they were investigating the matter and that what she said could be used against her. Even though they were unsure what would come of it, she would have realized she had the right to remain silent.

[73] When giving her statement one officer described her as "rambling", the other said she just was not being clear and was very distraught.

[74] First, as I have stated, I find that there was likely an investigative detention. I agree with the Defence that this commenced when Cst. Walker began questioning Ms. O'Dea, armed with some key pieces of information.

[75] Secondly, even if there was not, I believe that Ms. O'Dea was psychologically detained. Given her obvious state, I find she was not being clear, and was distracted by her pre-occupation to return to the scene. She was blurting out sentences that did not flow together, without knowledge of the legal peril she was facing as she gave her account of what happened to the officer. (***R v. Grant***, 2009, 2 S.C.R. 353)

[76] Subjectively, it appears that Ms. O'Dea wanted to leave but felt she could not. Objectively, she asked to leave several times but each time ended up not

leaving after speaking to the officer. (***R v. Moran***, 1987, 36 C.C.C. (3rd) 225 (Ont. C.A.))

[77] We know the officer was intent on formally detaining her if she had left. I find the Defendant has established on a balance of probabilities there was a breach of her right under s.7 and her right to counsel pursuant to s.10(b).

[78] In this context one must ask how the police are going to be able to perform their duties, if no investigative techniques or inquiries are permitted before advising suspects of their rights, either the police caution or the *Charter of Rights* warning, read from a card.

[79] Each case must be decided on its own facts. Although Ms. O'Dea drove herself to the police station, she was still entitled to the benefit of her rights under the charter and common law.

[80] I do not find the detention to be unlawful or arbitrary pursuant to s. 9. It was the Defence's position as long as the police were investigating a crime. I have found this was, in part, what the police were doing.

[81] Because of my finding on voluntariness, exclusion of the statement is automatic. I will however, consider s. 24(2) in the alternative, having found there was a detention and a breach of the *Charter*.

[82] Section 24(2) of the *Charter of Rights and Freedoms* reads as follows:

> 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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[83] In determining whether it has been established in all the circumstances that the admission of the evidence would bring the administration of justice into disrepute, I shall consider the several factors outlined in ***Grant***.

[84] The actions of the police officers here do not demonstrate bad faith and were not willful in that regard. As Cst. MacSween said, they were attempting to deal with a traumatic situation. Apart from that however, I found that Ms. O'Dea did not receive the full benefit of the *Charter* rights, in very serious circumstances and so overall the breach was serious.

[85] With respect to the impact on Ms. O'Dea's rights, given her state at the time, I find it was significant because she was in such a vulnerable position. Had she been cautioned and informed of her rights, she may have chosen to remain silent or speak to counsel.

[86] Society's interest in having a case such as this tried on its merits is strong and would favour admission of the evidence. The manner of taking the statement and its reliability would also be a relevant consideration under this factor. It was not an audio or video taped statement taken in the usual manner.

[87] Having regard to all of the circumstances, it is my view that in the long term the repute of the administration of justice would be better served if the evidence was excluded.

Murray, J.