SUPREME COURT OF NOVA SCOTIA
Citation: *R v. Chambers*, 2023 NSSC 430

Date: 20231101
Docket: 513750
Registry: Bridgewater

Between:

His Majesty the King

v.

Carl Chambers

Restriction on Publication: Pursuant to s. 539.(1) of the *Criminal Code*
This ban expired on February 20, 2024

Judge:	The Honourable Justice Diane Rowe
Heard:	June 26, 27, 28, 29 and 30, 2023, in Bridgewater, Nova Scotia
Oral Decision:	November 1, 2023
Counsel:	Bryson McDonald, for the Crown David Hirtle, for the Accused

Publication Ban pursuant to s. 539.(1) of the *Canadian Criminal Code*:
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application therefor is made by any of the accused,make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,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.

By the Court:

[1] A blended *voir dire* was held in this matter with evidence and submissions heard over the course of several days, from June 26, 2023 until June 30, 2023. I then received written submissions from Mr. Chambers' counsel and the Crown, with the last written filing received on August 21, 2023. The *voir dire* concerned the admissibility and use of two statements that were made by the accused Mr. Carl Chambers to members of the Bridgewater Police.

[2] Upon considering the evidence before me, with the oral submissions, and then written submissions provided later by counsel, I proceeded to give a "bottom line" oral decision on November 1, 2023. I promised written reasons to follow. These are those reasons. Please note that I reserve the right to adjust my correspondence for formatting purposes, complete citations and grammar in the event that they are published, but the reasons will not change.

[3] In summary, the Crown was seeking the Court's ruling on the admissibility of Mr. Chambers' statements to Bridgewater Police on the basis of voluntariness. If the statements are ruled admissible, they are intended for use by the Crown for cross examination of Mr. Chambers, rather than to be tendered as evidence in support of the case against him.

[4] Mr. Chambers challenged the admissibility of the statements, submitting that the Crown did not meet its burden to prove voluntariness, and had also made a corresponding application to have these statements ruled inadmissible as they had been obtained in contravention of sections 9, 7, 8, 10(a) and (b) and s. 12 of the *Canadian Charter of Rights and Freedoms (Charter)*. Mr. Chambers seeks remedies from the Court pursuant to s. 24(2) of the *Charter* for these breaches, and requests first as a specific remedy that the charges against him be stayed or that, in the alternative, the statements are not admissible at trial for any purpose. Mr. Chambers also submits, in the further alternative, that in the event that there is a finding of guilt by the Court upon a trial that on any submission regarding sentence there be recognition of the impact of various alleged *Charter* breaches as a factor in reducing sentence. In short, if there is a finding of guilt, there would be a reduction in sentence, pursuant to finding a breach of *Charter* rights, as a remedy pursuant to s. 24(2), with reference to *R v. Nasoguluak* 2010 SCC 6 (CanLII).

[5] Upon hearing and reading the submissions from Mr. Chambers and the Crown, and considering the evidence before me, heard over the course of five days, I am providing written reasons concerning the blended *voir dire* before the next appearance in Court.

[6] These reasons address the evidence and the law with more particularity than the “bottom line” decision of November 1, 2023, but these written reasons will not vary substantively the “bottom line” reasons or the result.

[7] The evidence presented at the hearing consisted of both video evidence and *viva voce* evidence, with cross examination of the witnesses.

[8] The evidence established that Bridgewater Police received a call regarding a disturbance at 118 Starr Street, with Cst. Hasani as the first officer arriving on the scene on June 17, 2021.

[9] When Cst. Hasani arrived, he viewed Mr. Carl Chambers to be accompanied by a female in the driveway of this residence. The accused immediately, and without being asked to do so by police, lay face down upon the ground. Next to Mr. Chambers, on the ground, was a hammer and pruning shears.

[10] Cst. Hasani had arrived at approximately 8:55 p.m. Shortly thereafter, Cst. Hasani, with the assistance of Cst. Gibson, placed the accused in handcuffs behind his back.

[11] Cst. Hasani did not give evidence on why he handcuffed Mr. Chambers immediately on arrival, although he did identify as a safety issue the pruning shears on the ground.

[12] Cst Hasani's notes, as written later in his Supplementary Report filed after he had arrested Mr. Chambers, indicate he heard Mr. Chambers spontaneously utter "I am an intruder and good thing Craig didn't open his door, if he did I would kill him." This is one of the statements that the Crown seeks to admit for the purposes of cross-examining Mr. Chambers.

[13] While handcuffed, Mr. Chambers continued to lay face down on the ground until he was taken to his feet by Cst. Hasani at approximately 9:21 p.m.. He was then placed in the rear of Cst. Hasani's police vehicle.

[14] The accused had been told he was being arrested at the scene for assault causing bodily harm, at approximately 9:06 p.m., and was given his *Charter* rights and a police caution in regards to that offence. Up until his arrest, Mr. Chambers had been, as the video evidence demonstrated, from 8:55 p.m. until 9:06 p.m., laying face down on the ground, with human feces and blood on his face, arms, and clothing. This was not disputed.

[15] It was determined that none of the bodily fluids were those of the accused. After being placed in the rear of Cst. Hasani's police vehicle at 9:21 p.m., a paramedic did attempt to clean the accused's face and determined that the blood was not Mr. Chambers'.

[16] Shortly after 9:32 p.m., the accused was then transported by Cst Hasani to the RCMP Cookville cells where he was booked in, his shoes taken, and he was placed in a cell.

[17] At the Cookville cells, Mr. Chambers asked Cst. Hasani if he could have a shower and to clean himself of the blood and feces.

[18] No shower was provided, and no cleaning supplies were provided to Mr. Chambers, including a cloth, soap, or hand sanitizer. There was some brown paper towel given to him.

[19] Mr. Chambers went in the cell, as was shown by video evidence, removed his t-shirt, made his soiled t-shirt wet in the sink, and used the wet t-shirt to wipe his body. He then used the brown paper towel to dry himself and removed his soiled shorts and socks, leaving only his underwear on.

[20] Mr. Chambers was then taken by police from the cell wearing only his underwear through the common hallway of the cell area to the phone room to talk to his counsel by Cst. Hasani. He was then returned to the cell via the same hallway by Cst. Hasani and secured back in the cell. Cst. Hasani then left the cell area, and seized the accused's soiled clothing, which was located in the cell, at 10:29 p.m.. From the time when the accused had taken off these soiled clothes,

including when the clothes were taken by the police officer, the accused was not given any other clothes.

[21] At 1:54 a.m., Cst. Hasani returned to the Cookville cells to bring Mr. Chambers' clean clothing which had been provided to him by Mr. Chambers partner.

[22] Cst. Hasani placed the clean clothing with the accused's personal effects at the front desk, and then went to the cell to speak to the accused.

[23] After Cst. Hasani left the accused's cell approximately two minutes thereafter, the guard provided the accused with a blanket to cover himself, but the accused was not given his clean clothing until the arrival of Cst. Dudhatra at 9:23 a.m. the next morning, after his initial arrest. The accused was not provided with anything to cover his feet and was barefoot from the time that he removed his socks, shortly after being placed in the cell, until the following day.

[24] At 9:28 a.m., the accused was taken from Cookville cells to the Bridgewater Police Service Officer where he was placed in a "hard" interview room. He remained in the hard interview room from 9:50 a.m. to 5:15 p.m., save and except a period of about 25 minutes when he was out of the interview room. This was when he spoke to duty counsel the second time, after having been given his

Charter rights and a secondary caution by Cst. Dudhatra at the beginning of taking of his statement. At that time, Cst. Dudhatra advised Mr. Chambers that he was being arrested for an attempted murder. The Court notes that Cst. Dudhatra did continue to ask questions of Mr. Chambers throughout the time, and Mr. Chambers' statement was taken.

Voluntariness

[25] As was noted before, the Crown is seeking to rely on the videotaped statement given by Mr. Chambers to Cst. Dudhatra for the purposes of cross examination of the accused, and not for the purposes of tendering it as part of the Crown case against the accused.

[26] The Crown has the burden of proof in regards to determining voluntariness, and must prove beyond a reasonable doubt that:

1. The accused had an operating mind;
2. The statement was not induced by threats of promises;
3. The statement was not made in circumstances of oppression; and
4. The statement was not obtained as a result of police trickery.

[27] *Charter* issues that were raised by Mr. Chambers in his responding application included that:

1. the s. 10(a) rights of the accused were breached by failure of the police to advise the accused promptly of the reasons for his detention.
2. the s. 10(a) rights of the accused were breached by the failure of the police to advise him of the reasons for his arrest and accurately advise him of any change or the extent of his jeopardy.
3. the s. 10(b) rights of the accused were breached by the failure of the police to give the accused his 10(a) rights, and thereby, effect the decision of the accused as to whether to exercise his right to consult counsel and further affect his meaningful right to counsel.
4. the s. 9 rights of the accused were breached by the arrest of the accused for attempted murder without grounds.
5. the s. 7 and 8 rights of the accused were breached by the seizure of the accused's clothes without providing him with clothing to wear until the next morning or cover for his body until about four hours after the taking of the clothing.
6. the s. 7 and 8 rights of the accused were breached by the capturing of the accused unclothed, on camera and video.
7. the s. 7 and 8 rights of the accused were breached by the failure of the police to give the accused his clothing or cover his body upon the clothes being determined to be soiled.
8. the s. 7 and 8 rights of the accused were breached by the walking of the accused around the lockup area in his underwear and leaving him in the cell in his underwear.
9. the s. 7 and 12 rights of the accused were breached by the failure of the police to facilitate Mr. Chambers properly washing himself to remove blood, feces, and for failure to provide him with cleaning supplies.

Analysis

[28] The five days of the hearing was primarily focused on the review of hours of video of Mr. Chambers while he was in police custody, from the moment of first

arrival of the police on the scene, through his detention overnight in Cookville cells, and then throughout the videotaped interview with Cst. Dudhatra.

[29] Cst. Gibson's evidence concerned the arrival on scene and obtained via his own police car camera which documented the approach of the police and actions of the police and Mr. Chambers when they first arrived on the scene.

[30] Cst. Hasani, who gave his evidence in relation to the first statement, stated he heard Mr. Chambers make a spontaneous utterance to him while Cst. Hasani was asking identifying information of the accused, during this time, however this utterance was not captured on videotape.

[31] I will note that the Court had difficulties with Cst. Hasani's evidence and found that at points, he was neither a reliable or a credible witness. The Court's focus in the voir dire is on the issue of voluntariness and in regards to the breach of *Charter*. There is no argument between counsel that Cst. Hasani gave a first caution after Mr. Chambers had been handcuffed and then was lying on the ground for approximately half an hour.

[32] Mr. Chambers was immediately and forcibly detained by Cst. Hasani, with the assistance of Cst. Gibson, although he had submitted before police had even

left their vehicles by lying on the ground upon their arrival. It is not clear to the Court why he was handcuffed immediately.

[33] The Court found that Mr. Chambers was compliant, respectful and polite throughout the entire process. He is a mature man, and well spoken, and there is no question in regards to his fluency in understanding the police, and it appeared that he understood he was in jeopardy. The Court did not observe Mr. Chambers make any demands, show physical aggression, curse, swear, or act out at any point during the course of the video evidence before the Court. It became apparent to the Court, and confirmed as Mr. Chamber's evidence was heard, that he had some former military training, as he exhibited a very strong discipline in his bearing and response to direction by police officers.

[34] In that sense, I will note that three of the four elements the Crown was required to demonstrate were met, as follows.

[35] I do not find that there was any issue in regards to Mr. Chambers' operating mind. I do not find that there was an inducement by threats or promises of the police exerted on him in regard to making statements, and I do not find that there was any evidence of police trickery. However, in regard to the circumstances of

oppression, the Court was certainly engaged in a very measured consideration of the circumstances.

[36] While I do find that the circumstances that Mr. Chambers experienced while he was in police custody were disturbing and distasteful, I do not find that they meet fully the tests for oppression such that his statements were not voluntarily made, as had been set out in the leading cases on this element of the voluntariness test. The threshold for that is very high and while the Court was very disturbed by the manner in which Mr. Chambers was treated by Bridgewater Police upon his immediate detention and then throughout the next 24 and more hours, it does not give rise to the level set out in the jurisprudence. (*R v H*, 2006 NSCA 104; *R v MacIntosh*, 2021 NSPC 46; *R v Calnen*, 2015 NSSC 291; *R v Sandeson*, 2016 NSPC 17).

[37] In regards to the first utterance by Mr. Chambers that was allegedly heard by Cst. Hasani, there appeared to be lack of clarity in the evidence on whether Mr. Chambers made a spontaneous utterance before he was handcuffed, or after, or during. I also considered the manner in which a "total and exclusive control" (*R v Corner* 2023 ONCA 509) was immediately imposed by the police on arrival at the scene upon Mr. Chambers.

[38] Understandably, it raises the question of whether the first spontaneous statement was made voluntarily as there was immediate oppressive conduct on the arrest, but the element of oppression must place it beyond a threshold that is set out in the jurisprudence. In terms of voluntariness, I find that the first statement, if proven to have been made, would have been made voluntarily.

[39] However, in applying the *Charter* analysis set out by Mr. Chambers' counsel, in his very well written submissions, I find that Mr. Chambers' *Charter* rights were also infringed immediately when he was restrained, on the ground, in the totality of the circumstances.

[40] If such an immediate action to restrain Mr. Chambers was warranted by the police, then an immediate caution should have been given by Cst. Hasani or Cst. Gibson, both of whom were handcuffing Mr. Chambers, if not contemporaneously with the application of handcuffs, then immediately thereafter.

[41] The Court finds that the first utterance made to Cst. Hasani is not admissible, as there was a breach of Mr. Chambers' s. 10(a) Charter right. Upon applying a *Charter* analysis, in keeping with the issues put forward by Mr. Chambers' counsel in his written brief, Mr. Chambers' detention was immediate and forceful. Mr. Chambers was handcuffed at the scene and should have been immediately given a

caution given the serious nature of the detention in the totality of the circumstances. Handcuffs were placed on him by two officers, while he remained compliant while also lying face down in the dirt and covered in another person's feces and blood. The failure to do so, in these circumstances, meant that Mr. Chambers was not given any information about the reasons for his detention. On an application of the three-part test in *R v. Grant* 2009 SCC 32, para 71, the Court considers that, in the totality of the circumstances, handcuffing a compliant individual face down on the ground, while he is covered in blood and feces, sends a message that the justice system condones this level of conduct and that individual rights matter for little. Finally, though, on considering the third branch of *Grant, supra* there is an interest in adjudication of the case on its merits, and the matter can proceed to trial, without the statement attributed to the accused by Cst. Hasani.

[42] In regards to the second statement given to Cst. Dudhatra, there are questions concerning voluntariness from the beginning. Mr. Chambers was not provided with clean clothes until the morning. It is somewhat inexplicable why these clean clothes were not handed to Chambers upon Cst. Hasani's arrival at the cells during the night as he was, however, given a blanket just minutes thereafter. There was no question that there was staff available to have assisted Mr. Chambers in giving him some clothing, as there was staff at the cells themselves for overnight

supervision and Cst. Hasani had also arrived. There is no evidence concerning whether or not there was sufficient staff to effect remediating action at the Cookville cells to alleviate Mr. Chambers situation. Mr. Chambers submits that this was oppressive conduct which vitiated the voluntariness of his statement to Cst. Dudhatra, as he had been unclothed, dirty, and had his personal dignity undermined while in the cells.

[43] However much the Court may be concerned about Mr. Chambers' treatment at the Cookville cells, the Court must question whether this treatment rose to the level where the elements that vitiate voluntariness are met, in law.

[44] Mr. Chambers submits that he was detained, unwashed, and unclothed overnight. He submits that his personal dignity was compromised by his treatment as he was wearing only underwear over this evening. Clean clothes, as mentioned before, were provided to staff in the night but were not provided to him, although a blanket was. The next morning though, he did change into clean clothing and socks.

[45] Mr. Chambers submits that the sequence of degrading treatment over the course of several hours impacted him, and this denial of his human dignity, from the time of his initial arrest and into his interview with Cst. Dudhatra had a

cumulative impact on his ability to give a voluntary statement and that it did give rise to oppressive conduct that culminated in his interview with Cst. Dudhatra.

[46] However, the Court does note that Mr. Chambers was compliant, calm and did not appear to be subject to negative coercion to the degree that he was compelled to make the statements to Cst. Dudhatra for favour or in response to the oppressive circumstances that he found himself within.

[47] The Court is concerned about the quality of the treatment of Mr. Chambers, with some of the decisions taken by police in his detention bewildering. There is no rational explanation for why Mr. Chambers was denied the opportunity to clean himself, or have his clean clothing given to him. He was not aggressive to policing staff at any point. While Mr. Chambers had been examined by EMT at the scene to determine if he was injured, and the blood that was found upon him was determined to not be his own, he also had feces on him, which can give rise to illness or infection. Collectively, there is a disregard for Mr. Chambers' human dignity that is at the heart of the Court's consideration of his applications.

[48] Further, the incident of Mr. Chambers walking in just his underwear through the hallways to the phone, and then videotaped at a later point while changing into

his clothing, has been submitted by Mr. Chambers to be a breach of his rights pursuant to s. 7 and 8 of the *Charter*, as was the denial of his clothes.

[49] These various *Charter* breaches were canvassed extensively by Mr. Chambers counsel. Among them was that Mr Chambers' change in jeopardy was not fully detailed by Cst. Dudhatra upon Mr. Chamber's second arrest, this time for attempted murder, but with no mention of an ongoing investigation by police regarding other included offences that may lead to charges.

[50] Mr. Chambers argued, in that respect, that the full scope of charges being investigated by the police should have been told to Mr Chambers concerning a change in jeopardy. Cst. Dudhatra's failure to give a fully detailed scope of the charges, it was submitted, may have adversely impacted Mr. Chambers' right to counsel as his communication with duty counsel was informed by that information.

[51] The Crown submits that the higher jeopardy offence was the basis for the secondary arrest and caution, and that when Mr. Chambers spoke with duty counsel, any legal advice that he may have obtained would be responsive to the highest level of jeopardy inclusive of lesser offences.

[52] As Mr. Chambers was detained at the scene, covered with a mixture of dirt, feces and blood that was not his own, in the circumstances of having been found

holding a hammer and pruning shears with a broken door at the residence, it is not a stretch that an allegation of attempted murder might also include offences for break and enter, and assault, among the other offences that were set out eventually set out within the indictment.

[53] Cst. Dudhatra did continue his investigation of Mr. Chambers. It was noted that at several points, Mr. Chambers did attempt to state that he did not intend to answer any questions. However, it is not controversial in law that the police may continue to question the suspect after a caution. The questioning that was undertaken was not oppressive, although it was steady. Mr. Chambers was afforded an opportunity to eat, to drink, to go to the washroom.

[54] I don't find that Mr. Chambers' *Charter* rights were breached upon the "second arrest" and that the police caution was given appropriately, with the right to counsel afforded to Mr. Chambers in a very timely manner.

[55] Even if I were required to apply the *R v. Grant* analysis, which is not the case, the third branch of the test would weigh on the statement to Cst. Dudhatra as admissible as the Court sees that the trial of the matter is in the public interest. Section 24(2) was not engaged in that respect.

[56] I will also note some of the commentary of Justice Jamal in *R v. Beaver*, 2022 SCC 54 (CanLII) at para, as cited in *R v. Corner* 2023 ONCA 509):

> [163] In *Beaver*, Jamal J., for the majority, at para. 95, explained the threshold requirement in s. 24(2) in these terms:
>
> > Section 24(2) of the *Charter* is engaged only when the accused first establishes that evidence was "obtained in a manner" that breached the *Charter*. Determining whether evidence was "obtained in a manner" that infringed the *Charter* involves a case-specific factual inquiry into the existence and sufficiency of the connection between the Charter breach and the evidence obtained. There is "no hard and fast rule". [Citations omitted.]
>
> [164] Jamal J., at para. 97, went on to consider the "fresh start" concept developed in the authorities:
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> > A large body of appellate jurisprudence and academic commentary has recognized that evidence will not be "obtained in a manner" that breached the *Charter* when the police made a "fresh start" from an earlier *Charter* breach by severing any temporal, contextual, or causal connection between the *Charter* breach and the evidence obtained or by rendering any such connection remote or tenuous. In some cases, the police may make a "fresh start" by later complying with the *Charter*, although subsequent compliance does not result in a "fresh start" in every case. The inquiry must be sensitive to the facts of each case. [Citations omitted.]

[57] I make reference to this quotation from *Corner*, *supra* from *R v. Beaver*, *supra*, not in a sense that the Court is considering "a fresh start" situation, but that some of the principles and considerations undertaken by the Court in that decision may be analogous to this one. Upon the fresh caution having been given, Mr. Chambers had already obtained clean clothing, had rest, and was fully cautioned before obtaining advice on the higher jeopardy offence from duty counsel and then making a statement to Cst. Dudhatra. While it is not directly analogous to the "fresh start" of the facts in *Beaver, supra*, I do find some of the principles in those

two paragraphs helpful for the Court in considering this aspect as it regards voluntariness and the requirements of the *Charter* in this matter.

[58] I will note that in regards to the various requested remedies for breaches of the *Charter*, I am not finding that there was a breach of any section of the *Charter* that would give rise to a stay being granted.

[59] The submissions on reduction in sentence were not made out in the submissions filed or in the evidence. There were no authorities cited with the exception of *R v Nasoguluak*, in which the Supreme Court of Canada considered the reduction of sentence as a remedy for a serious Charter breach in the case of physical violence by police against the accused causing a broken rib cage and punctured lung, as done in the course of detention. (See also, *R v. Laver*, 2019 ABPC 183 (CanLII) distinguishing *Nasogaluak, supra*, in which the accused was injured in a similarly severe manner but there was no reduction in sentence).

[60] If, upon trial, Mr. Chambers is found guilty of an offence as charged, then the Court may seek some submissions by counsel in regard to Mr. Chambers' compliance with the police in the context of difficult conditions as a potential mitigating factor for consideration but not as a remedy for a *Charter* breach in keeping with *Nasogaluak, supra*.

Conclusion

[61] The utterance that had been reportedly made by Mr. Chambers to Cst. Hasani upon being handcuffed is found to be not admissible for the purposes of trial.

[62] The video statement to Cst. Dudhatra is admissible for the purposes of cross examination of Mr. Chambers, but not as evidence of the charges that are against the accused.

[63] This concludes my written decision on the *voir dire*.

Diane Rowe, J.