IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Finck et al. - 2005NSSC39

Date: 20050223
Docket: CR. No. 228086
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Lawrence Ross Finck and Carline VandenElsen

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: February 2, 7 and 10, 2005 in Halifax, Nova Scotia

Written Decision: February 23, 2005

Counsel: Counsel for the Crown - Eric Woodburn and Leonard MacKay

Counsel for Mr. Finck - Ray Kuszelewski

Counsel for Ms. VandenElsen - Burnley Jones

By the Court:

[1] This decision follows a voir dire to determine the admissibility of a videotaped statement given to police by the accused, Lawrence Ross Finck, following his arrest on May 21, 2004.

[2] Mr. Finck stands charged with the abduction of a child in contravention of a custody order, unlawful confinement, obstructing police, and a series of related firearm offences. These charges arose from an armed standoff which occurred at a Shirley Street residence in Halifax, Nova Scotia between May 18-21, 2004.

[3] Evidence was called by both the Crown and the defence on the voir dire. I have considered the submissions of counsel together with the cases to which I have been referred, notably, *R. v. Oickle* (2000) 2 S.C.R. 3 and *R. v. Grouse*, (2004) NSCA 108.

[4] It is well established by these and other cases that in order for a statement given by an accused to the police to be admissible at trial, it must be voluntary at common law and must have been taken in accordance with the *Canadian Charter of Rights and Freedoms*.

[5] The burden of proving that a statement is voluntary is upon the Crown and it is a burden of proof beyond a reasonable doubt. The burden of proving a Charter violation is upon the accused person and it is a civil burden on the balance of probabilities. In the present case, no Charter violation is alleged and the court is

left to consider the admissibility of the statement in issue based on the common law test of voluntariness. While the overriding concern is with voluntariness, that concept overlaps with reliability.

[6] In the *Oickle* case, the Supreme Court of Canada was required to rule on the common law limits on police interrogation. The court observed that in defining the modern day confessions rule, it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes.

[7] It was emphasized by the Supreme Court that the analysis under the Confessions rule must be a contextual one. It is therefore incumbent upon the trial judge to strive to understand the circumstances surrounding the confession or admission and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule. The relevant factors include threats or promises, oppression, the operating mind requirement and police trickery. The court must also be concerned, of course, to find a causal connection between the impugned police conduct and the statement eventually provided by the accused.

[8] Bearing the foregoing principles in mind, I will now briefly review the evidence given by Csts. Mombourquette and Sampson and by Sgt. Mosher who successively conducted interviews of Mr. Finck.

[9] Cst. Mombourquette arrived at the scene of the standoff just after the takedown of the accused by the RCMP Emergency Response Team. He was asked to act as arresting officer and did so. He recorded in his notes that Mr. Finck was placed in his police car at 7:33 p.m. on May 21, 2004. At 7:35 p.m. Mr. Finck was placed under arrest whereupon he was read his Charter rights and the standard police caution. He was further advised of the availability of legal aid duty counsel and the telephone number. Mr. Finck responded at the time that he would represent himself.

[10] Upon arrival at the police station, Mr. Finck was taken to an interview room at 7:50 p.m. There, his right to counsel was repeated to him by Cst. Mombourquette. Mr. Finck said that he understood his Charter rights but expressed his disdain for lawyers in general. He indicated only that he wanted to call his brother and sister.

[11] Mr. Finck was also asked if he had any requests of any of the police officers. His answer was unresponsive. Shortly thereafter, his handcuffs were removed.

[12] Cst. Mombourquette left the interview room for awhile and on returning, found Mr. Finck lying on the floor. Cst. Mombourquette asked if he was alright and whether he was feeling sick to which Mr. Finck replied “no, I’m hungry”. Cst. Mombourquette said “okay, anything you need, just knock on the door there”. Mr. Finck did not then, or at any other time, make a request for food or drink. Rather, he continued to ask for his phone call to his siblings.

[13] Mr. Finck was under Cst. Mombourquette's supervision for approximately two hours, although the officer was absent for almost 50 minutes of that period. Cst. Mombourquette did not himself engage in any interrogation of Mr. Finck in respect of the charges for which he was arrested before turning Mr. Finck over to the interview team of Csts. Sampson and Lane.

[14] These officers began their interview of Mr. Finck at 10:47 p.m., about 45 minutes after Cst. Mombourquette last exited the room. Cst. Sampson began by re-arresting Mr. Finck under several specified charges under the Criminal Code (which he said he did to make sure no mistakes were otherwise made). Cst. Sampson then read him his Charter rights and standard police caution, satisfying both the implementational and informational duties in respect of the right to counsel, as recently reviewed by the Nova Scotia Court of Appeal in *Grouse* (at paras. 10 and 23).

[15] Cst. Sampson then permitted Mr. Finck to call the lawyer of his choice, namely, Mr. Bill Dewar in London, Ontario. Mr. Finck was given about 50 minutes of time to privately talk with Mr. Dewar beginning at 11:56 p.m. local time. Mr. Finck referred to Mr. Dewar as a civil lawyer and said that he was not looking for a criminal lawyer.

[16] Constables Sampson and Lane returned to the interview room at 12:46 a.m. and proceeded to interview Mr. Finck for about the next hour (although that included a break to discuss their progress). Cst. Sampson stated that their goal was to get a statement from Mr. Finck as to what had taken place, their primary interest

being in learning who fired the shot at the police.

[17] Constables Sampson and Lane tried different strategies. At times they were conversational; at other times they were persistent and provocative with their questioning in an effort to get Mr. Finck talking, thinking that if he became upset, he might say something.

[18] At times, Mr. Finck laid on the floor, saying he didn't want to talk to them. The police officers continued to question him, however, and eventually Mr. Finck continued to respond to them from the floor. In the estimation of Cst. Sampson, lying down on the floor was Mr. Finck's way of trying to ignore them when he felt pressured. Constable Sampson testified he did not believe Mr. Finck to be tired; and that he otherwise showed no signs of fatigue through his eyes, speech or holding his head up.

[19] Constable Sampson denied that the police strategy was to drag out the interview as long as they could in an effort to tire him out with repetitive questioning. He also denied that any threats or inducements were given, or anything withheld from Mr. Finck, to get his statement.

[20] Constable Sampson further confirmed that Mr. Finck did not ever complain of hunger or indicate any need for medical attention. Towards the end of the interview, Mr. Finck did ask for a local lawyer, Anne Derrick, whereupon the police attempted to contact her but without success.

[21] It was at this point, 1:53 a.m. on Saturday morning, that Sgt. Greg Mosher was brought in for a one on one interview with Mr. Finck at the request of Sgt. Hartlen. Sgt. Mosher knew the Finck family, including Larry Finck personally, from their younger years.

[22] Sgt. Mosher was given a short briefing by his superiors and also pursued the line of questioning as to who fired the shot at police.

[23] As Sgt. Mosher put it, and as is borne out by the videotape, the interview overall was a cordial one that lasted a little over an hour, beginning at 1:53 a.m. and ending at 3:08 a.m. Sgt. Mosher said that Mr. Finck did not appear tired when he got up off the floor to talk when he entered the room; that he wasn't groggy and seemed alert and to understand the questions. He said it was not uncommon to find an arrested person lying on the floor during an interview.

[24] At one point, Anne Derrick's name came up again but Mr. Finck included her in his general disdain for lawyers and told Sgt. Mosher he didn't want her representing him.

[25] Over the course of the hour, Sgt. Mosher took mostly a conversational approach, making frequent references to various members of the Finck family, and often tried to cajole Mr. Finck into continuing to talk, even though Mr. Finck said he was tired. It reached the point well into the interview, however, that Mr. Finck said he wanted to go to bed and didn't want to talk any further. Sgt. Mosher nonetheless made a further attempt at questioning Mr. Finck over who fired the

gun and they ended up talking a few more minutes. It was at that stage that Mr. Finck made the statement to Sgt. Mosher that he had loaded the gun back in January and that when his mother fired the shot at police three nights earlier, he had told her to aim high and keep it to the left, and she'd clear the porch. The interview ended shortly thereafter at 3:08 a.m. Mr. Finck was then taken downstairs to be processed.

[26] Sgt. Mosher confirmed that he made no threats, offered no inducements or withheld anything from Mr. Finck, to try to get a statement from him.

[27] By the time it ended, Mr. Finck had been confined to the interview room for over seven hours straight, although the total actual interview time by the police officers in conducting their investigation was more in the range of two hours, split between Sgt. Mosher and the team of Csts. Sampson and Lane.

[28] Mr. Finck took the stand on his own behalf at this voir dire in contesting the voluntariness of his statement. Although he complained about excessive use of police force in being taken into custody, he did not complain about his treatment by Cst. Mombourquette between the time of his arrest and his arrival at the interview room in the police station. Once there, he acknowledged that he had a strategy for getting through the interrogation. He said he was tired, that he knew what the police wanted but wasn't going to give it to them. He described himself as being in a survival mode with the objective of getting through the interrogation without being provoked into causing any violence or causing any damage. He said he kept talking to police as anything to shut them up.

[29] Mr. Finck testified that the reason that he laid down on the floor in the interview room from time to time was because he was tired. He also said at another point in his testimony that he laid on the floor to try to ignore the police interviewers.

[30] Mr. Finck characterized the entire interview process as one in which he was tortured, intimidated (both verbally and psychologically), provoked with lawless police behaviour and one in which his thought process had become impaired. He complained about not having his lawyer present for the police interviews and complained about deprivation of sleep, food and drink. He asserted that he had only three to five hours of sleep in total during the standoff. He further asserted that his last full meal prior to the police interviews was his Thursday dinner (approximately 24 hrs. before police interviews began) and that on Friday(the day the standoff ended), he limited himself to some cereal, juice and two bottles of beer. He acknowledged, however, in cross-examination that at no time during the police interviews did he ever ask for food or drink. He also acknowledged that he was used to going without sleep, citing a couple of specific past examples spanning a number of days.

[31] Mr. Finck also asserted at one point in his testimony that every statement he made during the police interviews was incoherent under the circumstances. This comment was made in the context of being cross-examined over several outlandish statements made by Mr. Finck to the police interviewers in his ongoing tirade against alleged child abuse being systemically perpetrated by child protection authorities, lawyers, and the executive and judicial branches of government in this

country.

[32] Mr. Finck's recurrent theme in his testimony overall was the abuse inflicted upon him by the police interviewers through their intimidating, provocative and lawless behaviour which he survived by continuing to talk to them, often in a rambling fashion, in an effort to shut them up.

[33] In acknowledging that the issue before the court on this voir dire is the voluntariness of Mr. Finck's statements, Mr. Kuszelewski made a number of submissions attempting to cast a reasonable doubt on the true voluntariness of the statements that were made. He first argued that it was a most peculiar situation for Mr. Finck's request to talk to Ms. Derrick to have been left unresolved until well into the interview by Csts. Sampson and Lane. The argument was made that in the minds of the police, there was still some arrangement to be pursued in respect of speaking with Ms. Derrick about legal representation which remained unsettled until near the end. The conclusion argued was that this prospect might be considered a form of inducement or otherwise served to taint the entire interrogation.

[34] Mr. Kuszelewski further argued that spending 7 hours and 49 minutes in an interview room (without sleep, food or drink) and preceded by a 67 hour standoff, created its own physical and psychological demands upon Mr. Finck that weakened him for interrogation. It was urged upon the court that over the duration of the interviews, there was a deterioration of the quality of Mr. Finck's ability to make voluntary statements. Combined with all of this, in the submission of counsel, was

the provocative questioning of Mr. Finck by the police during the course of the interviews, particularly that by Csts. Sampson and Lane. In Mr. Kuszelewski's submission, the combined effect of all of these factors is sufficient to raise a reasonable doubt about the voluntariness of the statement.

[35] As expressed in *Oickle*, (at para. 71), it is indeed incumbent upon the judge in a voir dire such as this to strive to understand the circumstances surrounding the confession or admission and ask if it gives rise to a reasonable doubt as to the voluntariness thereof, taking into account all the aspects of the rule. It bears repeating that the relevant factors include threats or promises, oppression, the operating mind requirement and police trickery.

[36] I have no hesitation in finding that there were no threats made or inducements offered by any of the interviewing police officers in trying to get a statement from Mr. Finck. I do not accept that the unresolved prospect of legal representation by Ms. Derrick can be characterized as a subtle inducement to Mr. Finck to give a statement. First of all, it is to be noted that Mr. Finck was afforded his Charter right to counsel under s.10(b) which he exercised by speaking privately at length with the lawyer of his choice, Mr. Dewar. He said he knew of his right to remain silent. As the police interviews evolved, Mr. Finck gave mixed signals by saying, on the one hand, that he didn't want a criminal lawyer and wanted to represent the family himself, and later asking Csts. Sampson and Lane to speak to Ms. Derrick. The police then attempted to contact Ms. Derrick on Mr. Finck's behalf without success.

[37] These events do not amount to anything of significance, however, because Mr. Finck later himself admitted to Sgt. Mosher that he didn't want Ms. Derrick representing him. Indeed in cross-examination on this voir dire, Mr. Finck again confirmed that he was not interested in having Ms. Derrick representing him. One simply cannot be induced by an offer or prospect of something that they don't want. I am therefore satisfied that the threats or promises component of the analysis does not come into play here.

[38] Of greater focus in this case is whether or not Mr. Finck was subjected to oppressive conditions during the police interviews which raise a reasonable doubt as to the voluntariness of his statement. As observed in *Oickle* (at paras. 58-61), if the police create conditions distasteful and inhumane enough, it should come as no surprise that the suspect would make a stress-compliant confession or admission purely out of a desire to escape those conditions. The court must therefore consider such factors as deprivation of food, clothing, water, sleep or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time.

[39] The first contextual observation to be made here is in respect of Mr. Finck's own personality and temperament. Mr. Finck presents himself as a strong willed, self-confident individual who has a long experience in representing himself in legal matters. Indeed, he estimated that he has appeared in Canadian courts of law on some 400 occasions representing either himself or others. He acknowledged that he had a good working knowledge of the Criminal Code even before this matter arose. Mr. Finck has repeatedly exhibited that he does not have a compliant

personality and has no difficulty in standing up to the police. His demeanour throughout the police interviews can only be described as confrontational and cantankerous in carrying out his intended strategy to get through the interrogation.

[40] The most persistent and heated questioning that Mr. Finck was subjected to came from Csts. Sampson and Lane in their pursuit of an admission as to who fired the shot at police. This questioning did not cross the line, however, into the sphere of oppressive police conduct to be censured. Moreover, I find that Mr. Finck was not the least bit intimidated by the police questioning. Indeed, he was defiant to the police interviewers throughout.

[41] In any event, the questioning by Csts. Sampson and Lane did not produce any results. It was only during the subsequent questioning by Sgt. Mosher, in a more conversational fashion, that Mr. Finck gave the police the inculpatory information about the loading and aiming of the gun. Although this information was given between 2:00 a.m. and 3:00 a.m., it should also be kept in mind that it was given during just the second hour of actual interrogation time.

[42] Although Mr. Finck may well have felt tired during the police interviews, the evidence does not establish a reasonable doubt that he was overly tired to the point that his will was overborne, leading him to make the statement that he did purely out of a desire to escape the conditions he was in. Granted, Mr. Finck said on more than one occasion that he was tired and wanted to go to sleep; nevertheless he continued to make conscious choices to continue talking to the police, providing information to them as he saw fit, knowing full well his

constitutional right to remain silent. Neither did he have any difficulty, whenever left alone by police in the interview room, in getting to his feet and attempting to shout a conversation with Ms. VandenElsen down the hall.

[43] The evidence is also unequivocal that Mr. Finck was never refused either food, drink or medical attention. He simply made no requests for any of these comforts even though he was told at the outset by Cst. Mombourquette that he could. The fact that the police did not proactively provide food and drink, in the absence of a request, is of no consequence.

[44] Having examined all the conditions and circumstances surrounding the interrogation of Mr. Finck, I find that the police did not create an atmosphere of oppression that affected the voluntariness of the statement in issue. Even if it could be said that the police engaged in overly persistent and provocative questioning after Mr. Finck said he was tired, Mr. Finck was not intimidated by the interrogation and I find no causal connection between the police tactics used and the statement which Mr. Finck eventually provided. Accordingly, an examination of all the surrounding conditions does not raise a reasonable doubt about the voluntariness of the statement given.

[45] The next factor for consideration in deciding the voluntariness of a statement made to police is the operating mind requirement. As clarified in *Oickle* (at paras. 63-64), the operating mind doctrine is just one application of the general rule that involuntary confessions are inadmissible. The doctrine requires only that the accused knows what he is saying and that he is saying it to police officers who can

use it to his detriment.

[46] The evidence before the court on this voir dire does not establish a reasonable doubt with respect to either branch of the doctrine. First of all, Mr. Finck acknowledged in his videotaped statement both that he understood his right to remain silent and that whatever he did say to police could be used in evidence against him. Nonetheless, he continued during the course of the police interviews to make conscious choices of providing or withholding information from the police as he saw fit, in keeping with his strategy of getting through the interrogation as above mentioned. During the interrogation, he demonstrated good recall of the events that occurred during the standoff when he wanted to. He also had no difficulty in reciting various case authorities and Criminal Code references to the police when it suited him.

[47] While it might appear on the surface that some doubt might be cast on the operating mind requirement by reason of a number of outlandish comments made by Mr. Finck throughout the interrogation about the family law institutions in this country, and his past experiences with them and the justice system in general, it is important to note that none of these comments originated in this interrogation. Rather, it was drawn out in cross-examination that they are in fact rhetoric and invective that has been uttered in similar fashion by Mr. Finck countless times before and in numerous venues. As Mr. Finck himself acknowledged, he has said these things so many times before that it has become ingrained in him and its repetition has become second nature to him. It therefore cannot be said that the utterance of these comments during the police interrogation is indicative that Mr.

Finck didn't know what he was saying to police or that it could be used to his detriment.

[48] As a final observation, both in respect of the oppression and operating mind factors to be considered, it is to be noted that when Mr. Finck eventually made the admission about the loading of the gun and where it should be aimed, that information was proferred by him and not as a result of a proposition or suggestion put to him by police.

[49] Taking all of the foregoing into consideration, and with the benefit of having watched the videotaped statement in its entirety, I am not left with a reasonable doubt in respect of the operating mind requirement.

[50] The only remaining factor to be considered is whether there was any police trickery involved in getting the statement from Mr. Finck which would impugn the voluntariness of the statement. The only incident that might be said to involve police trickery was Sgt. Mosher's indication that the police might find Mr. Finck's DNA residue on the gun. This, of course, was a scientific impossibility on what the police had to work with. Nonetheless, I consider this ruse to be of no consequence. Not only was the ruse put to Mr. Finck as a hypothetical rather than an asserted fact, but there was clearly no causal connection between that tactic and the information actually given to the police.

[51] In conclusion, an analysis of all the foregoing factors, even when considered

cumulatively, does not leave me with a reasonable doubt about the voluntariness of Mr. Finck's statement . The Crown has met the burden that it is required to discharge and the statement will therefore be admissible in evidence at trial.

J.