R. v. Harris

Her Majesty the Queen, Applicant and Kevin Harris, Respondent

104 W.C.B. (2d) 480
2012 CLB 33189, 2012 ONSC 6465, 2012 CarswellOnt 14880

Ontario Superior Court of Justice
Ferguson J.
November 27, 2012
Court File No 10-12484

EVIDENCE -- Confessions and admissions -- Voluntariness -- Crown applied to have statement of accused to police, made after he voluntarily attended their station and was arrested, declared voluntary and waiver and consent to take DNA sample valid -- Statement involuntary and subsequent DNA sample therefore inadmissible -- Court did not accept testimony of interviewing officer that her notes were complete; there was not complete and reliable record before court, officer repeatedly told court that it was impossible to keep verbatim record and court found that her note keeping appeared to have been selective -- It made no sense that statements to and from suspect were summarized to get gist of discussion but that conversation with witness was significantly more detailed; inference court drew was that detective chose to create poor record when dealing with her interactions with accused -- In absence of full, complete and reliable record as to what was actually said, court was left in doubt as to how this statement came to be and why accused came to station to co-operate fully with police, without counsel and without exercising any of his rights -- Accused should have immediately been provided his right to counsel upon arrest in lobby of police station or immediately upon arriving in interview room -- Once statement was ruled to be involuntary, statement in its entirety was inadmissible for any purpose: statement could not be relied upon to prove that waiver and consent were valid and fully informed or justify warrantless seizure of accused's blood sample

Nenad Trbojevic , for Applicant Todd B. White , for Respondent

J.E. Ferguson J.

The Applicable Legal Principles

[1] The onus is on the Crown to prove that the statement of Kevin Harris ("Harris") is voluntary, beyond a reasonable doubt.

[2] Under the common law confessions rule, a statement made to a person in authority is not admissible if it is made under circumstances that raise a reasonable doubt about its voluntariness. The rule is intended to protect the rights of the accused without unduly limiting society's need to investigate and solve crimes. *R. v. Oickle* , [2000] 2 S.C.R. 3.

[3] The judge should consider all of the circumstances surrounding the statement and ask if it gives rise to a reasonable doubt about the statements voluntariness. Relevant factors include the

existence of threats, promises or inducements; the lack of an operating mind; oppressive conditions; or police trickery that denies the accused's right to silence or shocks the community. *R. v. Oickle* , *supra* ; *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493 (Ont.C.A.).

[4] An additional factor is whether the statement was preceded by a caution that the person questioned did not have to say anything, but anything he did say might be given in evidence against him. In *Horvath v. The Queen* (1979) 44 C.C.C. (2d) 385 S.C.C., Beetz J. explained that the reason for the caution is that voluntariness implies an awareness of what is at stake in making a statement to a person in authority. The interviewee has an absolute right to remain silent and not to incriminate him or herself unless he or she wants to.

Full and Complete Record

[5] The Ontario Court of Appeal in *R. v. Moore-McFarlane supra* and *R. v. Ahmed* (2002), 170 C.C.C. (3d) 27 explained that the prosecution must establish the voluntariness of the statement made. The court observed that the completeness, accuracy and reliability of the record of the discussions are important to the inquiry into and the scrutiny of the circumstances that surround the taking of the statement. To discharge the burden, the Crown must introduce a complete, accurate and reliable account of the circumstances leading up to and including the taking of the statement.

[6] The importance of a full and complete record has been emphasized in many cases. In *Regina v. Shilon* , [2004] O.J. No.6138 (Ont. S.C.J.) Fuerst J. stated the following in paragraphs 54 and 55:

> [54] In this case, there is little in the way of a record of Mr. Shilon's conversation with Constable Kemp. The officer's notes are scanty. He admits that he cannot remember portions of the conversation at all, and even where he can remember the content of the conversation, he cannot recite the actual words spoken. He cannot recall how he identified himself to Mr. Shilon, how it came about that Mr. Shilon was identified to him, how he got business information about Mr. Shilon, what was actually said in the lobby about the vehicles to be towed, and what was actually said about the vehicles, including the Porsche while he and Mr. Shilon toured the garage. It may be that Constable Kemp's notes were sufficient for his purposes at the time, but they do not constitute a record of the conversation. It is apparent that the officer is unable to recite more than the gist of some parts of the conversation from memory now, more than two years later. This is not surprising, especially since he did not have a sense of the importance of the conversation at the time. However, in the circumstances of this case, I cannot find that the conversation was voluntary beyond a reasonable doubt, in the absence of a complete, accurate and reliable account of the words spoken by both the officer and Mr. Shilon. The bald assertion that no offers, promises, or threats were made is of little assistance, absent knowing the words that were spoken.
>
> [55] The Crown has failed to prove the statement voluntary beyond a reasonable doubt.

[7] Trotter J. dealt with an application to introduce a statement that was void of a meaningful record in *R. v. Belle* , 2010 ONSC 1618 (CanLII). He stated the following at paras 42, 45 and 46:

> [42] In determining whether statements that are imputed to an accused person are free and voluntary, it is necessary to assess the interaction of the accused person and the persons in authority. Without an accurate or reliable record of what transpired, it is not possible for the Crown

to satisfy its burden beyond a reasonable doubt. As Professors Paciocco and Stuesser point out in *The Law of Evidence* , *supra* , at p. 325:

> The combination of the heavy burden that is placed on the Crown and the need for the judge to evaluate all of the circumstances means that the Crown will not succeed if there are *material* gaps in the *voir dire* evidence relating to what was said or what happened during the interrogation.

[45] In this case, I find the record completely unsatisfactory. Beyond the issue of audio of video recording, there was not even rudimentary note-taking. The interactions between Mr. Belle and the bailiffs at the initial meeting at Mr. Belle's home were not recorded in any reliable sense. Moreover, the evidence of the two bailiffs was conflicting. Both conflicted with Mr. Belle's evidence. Mr. Kuyvenhoven was contradicted by some of his evidence at the preliminary inquiry. I am unable to determine with any degree of certainty what was said to Mr. Belle by the bailiffs, and the exact statements made by Mr. Belle to the bailiffs. This problem is significantly more acute in relation to the 15 to 20 phone calls that transpired between Mr. Kuyvenhoven and Mr. Belle between the first meeting at his home and June 29, 2006, when things came to a head. This set of conversations was referred to in great generality by Mr. Kuyvenhoven. I was not pointed to anything that was actually an admission, let alone anything that purported to be a direct quote from Mr. Belle. On this record, I am not satisfied beyond a reasonable doubt that anything that Mr. Belle said during these conversations was free and voluntary.

[46] Lastly, I turn to the conversation on June 29, 2006. As Ms. Mackett pointed out, there is more clarity in what was said by Mr. Belle on this occasion because both Mr. Kuyvenhoven and P.C. McCord heard Mr. Belle's tearful and purportedly apologetic words that morning, during a call that he initiated. However, this is only half of the equation. As Ms. Sickinger submits, what transpired on June 29, 2006 was a product of all that went before. Without any reliable record of the *details* of the initial meeting in the living room, combined with the complete *absence* of any record of the subsequent 15 to 20 telephone conversations between Mr. Kuyvenhoven and Mr. Belle, I cannot be satisfied that the statement made to Mr. Kuyvenhoven (and listened to by P.C. McCord) on June 29, 2006 was not the product of the threats and inducements alleged by Mr. Belle. I do not make a positive finding that things transpired exactly as Mr. Belle suggests; instead, I find that, because of the state of the record, and in light of the nature of the voluntariness issues that must be resolved the Crown is unable to meet its heavy onus.

[8] Horkins J. stated the following about the adequacy of the record in *R. v. Rajab* , [2004] O.J. No. 5795 at paras 23 and 29:

> [23] The Crown is required to put before the Court evidence of all of the circumstances leading up to and surrounding an accused's statement. Where the Crown fails to provide an adequate record, the burden of proof will not be met (see *R. v. Sankey* (1927), 48 C.C.C. 97 (S.C.C.); *R. v. Thiffault* , [1933] S.C.R. 509, 60 C.C.C. 97 (S.C.C.)). The maintenance of an adequate record of all of the circumstances leading up to an accused's statement to the police is a matter within the complete control of the authorities and therefore a failure to maintain an adequate record may permit the Court to draw an adverse inference with respect the voluntariness issue. In some circumstances, a Court might infer that evidence of inappropriate conduct was being suppressed. In other circumstances, a Court might simply infer that the police in question honestly and reasonably felt there was no need for recording and preserving all of the circumstances, including their own words and conduct in the presence of the accused...
>
> [29] There is a heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.

> The lack of an adequate record of the preliminary dealings with the accused, in the circumstances before me, by itself raises a reasonable doubt as to the voluntariness of these statements. There is, of course, no rule that a statement must be rejected on the basis of mere conjecture that somewhere in the chronology of the investigation an inappropriate threat or promise has been made... The record of the events precipitating these statements is inadequate to carry the very heavy burden of proof that the Crown is obliged to discharge in order to establish their admissibility. They are, therefore, not admissible for any purpose in the proceedings before me.

The Issue of Record Keeping when Credibility is Front and Centre

[9] In *R. v. Relleve* , 2004 MBQB 155McCawley J. stated the following at para 22:

> [22] Whereas police officers cannot be held to a standard of perfection, the accuracy of police notes and record keeping can make or break a case. This is particularly so where, as in this case, the credibility of one of the officers becomes an issue.

The Officers Evidence on the Requirement of Keeping a Complete and Accurate Record

[10] Detective MacNeil testified that she was well aware of her obligations to keep a full and complete record. She further understood the consequences of not doing so. She testified as follows:

> Q. Did you have any education in policing or law or anything related by either - from a college or a high school?
>
> A. College degree in police foundations, yes.
>
> Q. You had a college degree in police foundations.
>
> Q. So you were well aware of the Police Services Act even before you joined the police.
>
> A. Yes.
>
> ...
>
> Q. And further, even higher standards about keeping memo books, taking notes, proper interview techniques, being trained how to interview people, et cetera.
>
> A. Yes.
>
> Q. And then I take it before going to the -- you call it the sexual assault unit; you took further courses prior to going to that unit, correct?
>
> A. Yes.
>
> Q. You took again more emphasis on note taking, recording all statements, things like that, correct?
>
> A. Yes.
>
> Q. And there's a rule in Durham that when you're speaking with a witness that it should be at a minimum videotaped or audiotaped if at all possible.

A. Yes.

Q. You want the best evidence rule.

A. Yes.

Q. If you're in a situation where it's impossible to audiotape they recommend that you, you know, dictate or tape record whatever is being said.

A. Yes.

Q. And if that's not possible - I take it your division has like little tape recorders like little Dictaphones and things like that.

A. Yes.

Q. Okay, but you didn't use it in this case.

A. No.

Q. And so if you don't use it on a particular case I take it you -- you're - again the rules that you've been trained and the rules that govern you require that you take -- let me get the right wording. This is certainly before 2000 and enforced well after 2000, fair.

A. What?

Q. You entire career there's always been the same rule, only heightened, right, with respect to the best evidence and note taking, et cetera.

A. Yes.

Q. And let me just get it here. When speaking with a witness or a suspect full and complete notes must be taken. The notes must be detailed, complete and an accurate record of everything that's said by the person in authority.

Which would be you, right?

A. Yes.

Q. And the witness or suspect.

A. Yes.

Q. And you're to take verbatim notes wherever possible.

A. Yes.

Q. Correct.

You must record everything said by the person in authority and every utterance said by the witness or suspect and verbatim, if possible again. Correct?

A. Yes.

Q. That's critical, fair.

A. Are you referring to our policies and procedures?

Q. Yes.

A. Is that what you're referring to right now.

Q. Yes, and again we'll talk about the reasons for that, but if we take it one step further. If someone's not just a mere suspect being interviewed as a potential suspect among others or a witness, but someone is going to be accused and is going to be charged and you develop in your own mind that there's reasonable and probably grounds, the test becomes and your responsibility and duty become a hundred times greater fair.

A. Fair.

Q. Because if the person is going to be charged and you have any communication with them there may be issue of voluntariness down the road, correct. Prove the statements admissible whether they're true or false or whatever. What we're doing right now.

A. Yes.

Q. And so I take it you know that in the case of a voluntariness *voir dire* you must account for every moment of time speaking to an accused and record everything said by the person in authority. Being you, right.

A. Yes.

Q. And so -- and everything said by the potential accused or accused, correct.

A. Yes.

Q. And verbatim if possible.

A. Yes.

Q. So that a court can independently determine whether there was an inducement or a threat or something that could be objectively viewed as such fair?

A. Fair.

[11] Detective MacNeil agreed with the following practice when taking statements:

> When speaking with a witness or a suspect full and complete notes must be taken. The notes must be detailed, complete and an accurate record of everything that's said by the person in authority.
>
> You must record everything said by the person in authority and every utterance said by the witness or suspect and verbatim, if possible again.

[12] With respect to the importance of keeping a fulsome set of notes, Det. MacNeil provided the following evidence:

Q. But my question is this, why, why didn't you go in sometime during the

interview. Well she came out a couple of times, right?

A. Yes.

Q. And have her confirm the contents of your notes or the contents of your recollection while it was still fresh in your mind. Crystal clear in your mind. Why didn't you do that?

A. There was no need to.

Q. No need to?

A. No.

Q. Well there's a need to do it now isn't there? Isn't that fair?

A. No, I don't believe so.

Q. You don't believe so.

A. No.

Q. You believe, no matter what, it's your belief. Nothing can change your mind, right?

A. That's correct.

[13] Despite Detective MacNeil's testimony that her notes are complete I do not accept that evidence. There is not a complete and reliable record before the court. Detective MacNeil repeatedly told the court that it was impossible to keep a verbatim record. She did, however, acknowledge that this was required insofar as possible. She also managed to take detailed and copious notes while monitoring the interview of the respondent. I find that her note keeping appears to have been selective.

[14] Although the standard of note keeping is not absolute perfection a high degree of detail is required. The issue of missing notes also arose in this case.

[15] Detective MacNeil's notes leave out the following:

-- the details of her voice mail message to Harris;

-- the duration of that message;

-- the details of Harris' voice mail message to her;

-- the duration of that message;

-- the details of the five minute telephone conversation with Harris

-- an entire phone call with Jamie and a voice mail message to Jamie

-- no notes of the conversation between herself and Detective Sabo outside the interview room between 1214 and 1229

[16] Detective MacNeil's notes are not verbatim and contain the "generality" of what was said -

the "gist" of what was said with Harris. On the other hand, she concedes that her notes pertaining to her discussion with a witness (Rebecca Forbes) were detailed. It makes no sense that statements to and from a suspect are summarized to get the gist of the discussion but that a conversation with a witness is significantly more detailed. The inference I draw is that Detective MacNeil chose to create a poor record when dealing with her interactions with Harris. The missing notations of messages is also very troubling as they include two voice mail messages involving Harris, and a call with his partner and a voice mail message. Credibility is front and centre here. The comments made in *R. v. Relleve* , *supra* are applicable.

[17] In the absence of a full, complete and reliable record as to what was actually said, I am left with a reasonable doubt as to how this statement came to be and why Harris came to the station to co-operate fully with the police, without counsel and without exercising any of his rights.

The Issue of Tunnel Vision

[18] This issue has been raised by Harris' counsel as reflecting on the credibility and reliability of Detective MacNeil's evidence.

[19] Detective MacNeil testified several times using words like 'I know what I know and that is that'. In cross-examination, Detective MacNeil was asked whether she entertained the possibility that Mr. Harris' explanation -- also Nick's initial explanation -- was true:

> Q. And, in fact, I'm going to suggest that if he brought in a videotape of what happened in the basement that night, it still wouldn't change your mind, right?
>
> A. No.

[20] Further, when testifying about her note keeping Detective MacNeil's view of her note keeping was that nothing could change her mind about her belief (see paragraph 12 above).

[21] In relation to phone calls made, Detective MacNeil provided the following testimony:

> Q. If I were to suggest that you called Kevin and said certain things to him. If you don't have a note of even -- of that phone call you can't agree or disagree that it was said, fair?
>
> A. I have all the notes of the phone calls that were made...
>
> Q. And so you're prepared to say that you left one -- again, it's not that you don't recall. Now it's not that you don't recall or you can't say. Your evidence as I understand it now, under oath, at a criminal trial is that you left Kevin, Harris' boyfriend, his partner, Jamie, one message and one message only. No ifs, ands or buts about it. Is that your evidence?
>
> A. It is in my case notes that...at 9:50 a.m. on October 5 th that I contacted Jamie's cell phone and I left a message inquiring of Kevin's whereabouts and left message regarding directions to 17 Division. That is in my case notes.
>
> ...
>
> Q. Now is it your evidence under oath now today that that is the only voice mail message that you left for Jamie or do you remember?

A. That is all I recall is that message because it is in my case notes.

[22] Detective MacNeil failed to make a note of a further, second call to Jamie. When confronted with this discrepancy and played the tape in court, she did not concede that she was mistaken. Rather, she maintained that she did not recall making the phone call. I agree with counsel that this commitment to her own point of view, even in the face of contradictory evidence, affects her credibility as a witness and it reflects negatively on her reliability.

Rights to Counsel and How Dealt with in This Case

[23] There is an obligation on the part of the police to advise an individual of his or her rights to counsel immediately.

[24] In cross-examination, Detective MacNeil provided the following evidence:

Q. But you'll agree with me, that the moment a person is under arrest that's when his rights to counsel kicks in, fair? Immediately, Forthwith?

A. No.

Q. You don't believe that?

A. No.

Q. Okay.

A. As soon as practicable.

[25] Detective Sabo as well testified that rights to counsel are to be provided as soon as practicable.

[26] The Supreme Court of Canada in *R. v. Suberu* explained the obligations owed to a detainee upon arrest or detention in the following terms:

> [41] A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(*b*) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(*b*) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.
>
> [42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(*b*) creates an ill-defined and unworkable test of the application of the s. 10(*b*) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(*b*). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter* , the police have a duty to inform a detainee of his or her right to retain

> and instruct counsel, and a duty to facilitate that right immediately upon detention.

[27] When Harris arrived at the police station he was met by the two detectives; was arrested; and was walked into an interview room. The first few pages of the transcript and the video confirm that the first few minutes were essentially an informal chat. Harris was not immediately told of his right to counsel. The detectives are misinformed about the law on the timing of providing the Right to Counsel. They could have immediately provided his Right to Counsel upon arrest in the lobby or immediately upon arriving in the interview room. Although the detectives deny that anything was said to Harris following his arrest in the lobby Detective Sabo on page 1 of the transcript uses the word "recap". The inadequacy and inaccuracy of the record have already brought the detectives' credibility into question. The use of the word "recap" may mean that further things were said to Harris following his arrest and prior to his being read his rights. It is impossible to tell from this record.

The Reid Interrogation Technique

[28] I have found the record to be woefully inadequate, affecting the credibility of the detectives. As a result, although considerable time was spent on the use of this technique at the voir dire, I am not going to conduct any analysis of the Reid Interrogation Technique. It certainly does appear that the first couple of informal minutes in the interview were used deliberately as part of this technique.

Admissibility of the DNA Evidence

[29] With the ruling that the statement was involuntary and therefore inadmissible, the question became how did that finding affect the DNA admissibility to which a consent to obtain was obtained in the midst of that statement? I posed this question to counsel following my ruling on the voluntariness and received further email submissions from counsel. (All email exchanges have been made exhibits and are contained in the record).

[30] I agree with the submissions supported by the law received from counsel for Harris. Once the statement was ruled to be involuntary, the statement in its entirety is inadmissible for any purpose. The statement cannot be relied upon to prove that the waiver and consent were valid and fully informed. It cannot be used to justify the warrantless seizure of Harris' blood sample.

[31] In *R. v. G. (B.)* (1999), 135 C.C.C. (3d) 303 the Supreme Court of Canada was dealing with the use of an involuntary statement to cross-examine an accused and stated:

> 31 More recently, this Court again dealt with the issue, although incidentally, in *R. v. Calder* , [1996] 1 S.C.R. 660. In that case Sopinka J. considered the admissibility of evidence under s. 24(2) of the Charter, drawing an analogy with the confessions rule. He put the question with regard to an involuntary confession, at para. 26:
>
> > Is the distinction between use of a statement for all purposes rather than for the limited purpose of impeaching credibility a valid one in the application of s. 24(2)? The respondent draws an analogy with the practice relating [page 494] to confessions. An involuntary confession could not be used for any purpose.

Citing *Monette* , supra, he added, at para. 26:

> The authority of this case has not been questioned. Moreover, it is acknowledged by the appellant that involuntary statements may not be used by the Crown for any purpose.
>
> [Emphasis added.]
>
> 32 I do not believe that there can now be any doubt about the state of the law on this issue in Canada. Although it is possible, in certain circumstances, to distinguish between the use of evidence to challenge the credibility of an accused and its use on the merits, that is not the case with the confessions rule. The voluntariness of a statement, unlike the effect of evidence on the administration of justice, which may theoretically depend on the use made of it, is established only on the basis of the circumstances at the time the statement was made. A confession cannot suddenly become voluntary at the time of cross-examination.
>
> 33 To reintroduce an involuntary statement in this way would run counter to the most fundamental aspect of trial fairness. In many cases, as here, the guilt of the accused will depend solely on his or her credibility and on that of the other witnesses. To allow the statement to be used, even for the limited purpose of undermining the credibility of the accused, could lead to abuse and serious injustice. That is why the traditional rule, which is still in force in Canadian law, must be interpreted in such a way that no use may be made of an inadmissible statement at any stage whatsoever of the trial.

[32] It is clear from *R. v. G. (B.) supra* that an involuntary statement may not be used by the Crown for any purpose. No use may be made of an inadmissible statement at any stage whatsoever of the trial.

[33] In *R. v. I. (L.R.)* (1993), 86 C.C.C. (3d) 289 (SCC), the Court considered derivative confessions obtained following an involuntary statement. The court concluded that the second statement would be inadmissible if:

> (i) the tainting features from the first statement continue to be present;
>
> (ii) the fact that the first statement was made was a substantial factor contributing to the making of the second.

[34] The statement and the DNA consent are inextricable linked. Once the statement was found to be involuntary the Crown cannot use the statement to establish the validity of the consent. The consent was not valid and the sample was therefore not obtained by lawful means. The DNA is not admissible.