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1. — Ontario Superior Court judge dismisses a sentence appeal for a domestic assault even though the appellant was at risk of being deported

As we have seen in, for example, *R. v. Alzahrani*, 2015 ONSC 355 (March 2015 issue of "The Milligan Criminal Law Advisor"), adverse immigration consequences are an important factor to be taken into account in deciding the appropriate sentence for an accused.

Yet, as Justice Campbell, sitting as a judge of the summary conviction appeal court, recently reminded us, adverse immigration consequences cannot justify the imposition of a sentence that is unfit. Campbell J. declined to set aside a suspended sentence imposed by the trial judge and declined to impose a conditional sentence even when the conviction gave rise to an order of deportation for the appellant. The appellant, an engineer, pleaded guilty, in mid-trial, to what the trial judge called an "appalling" assault against his wife, in which he "significantly endangered" her. The offence was carried out in the presence of her family and the appellant resisted their efforts to stop him. Despite four days of pre-trial custody served by the appellant and that he completed some volunteer work and an anger management course, Campbell J. held that a conditional discharge would have been inconsistent with the fundamental purpose of sentencing and would not adequately reflect the principle of deterrence for crimes of domestic violence.

R. v. Sharma (2015), 2015 ONSC 5950, 2015 CarswellOnt 14596 (Ont. S.C.J.)

2. — Ontario judge imposes a sentence of two years less a day to a pharmacist who defrauded the province of Ontario of over $2 million

A Hamilton pharmacist recently pleaded guilty, after the completion of a preliminary inquiry, to defrauding the Ontario Drug Benefit Plan of over $5,000. He fraudulently overbilled the provincial government of approximately $2.5 million.

At the time of sentencing, he was 61 years old and was no longer working. His wife, also a pharmacist, was supporting him. He had no criminal record. He had sold his pharmacy and had repaid the province some $2 million from the sale of his business.

He had a long-standing addiction to opioids, probably due to an undiagnosed depressive illness. The motive for the fraud was to cover up bad investments that he had made.

While under investigation, but before charges were laid, the accused went for a psychiatric assessment and he was diagnosed with a major depressive disorder, which he likely had had for his entire life. The judge, however, noted, at paragraph 13, that there was "nothing in the evidence" to satisfy her that the depression and drug addiction played "a significant contributing cause to the offence".

Justice M. Speyer declined to impose a conditional sentence. Quoting from *R. v. Bogart*, [2002] O.J. No. 3039 (Ont. C.A.) with approval, Speyer J. acknowledged that the range for most large-scale frauds is three to five years and there were no exceptional circumstances that warranted the imposition of a conditional sentence.

Nevertheless, in view of, inter alia, the accused's expression of remorse, his repayment of most of the loss he occasioned and his mental illness at the time he committed the offence, the judge imposed a sentence of two years less a day with a "strong recommendation" that he serve his sentence where he may receive mental health and drug addiction counseling. She also imposed a restitution order for the half million dollars that was owing to the province.

R. v. Mikhael (2015), 2015 ONCJ 503, 2015 CarswellOnt 14583 (Ont. C.J.)

3. — "Legally inadequate reasons" of a trial judge do not give rise to a new trial

Generally, trial judges are required to give clear reasons explaining why they arrived at their conclusion to convict or acquit. Failure to give adequate and comprehensible reasons is generally regarded as a reviewable error: see, for example, *R. v. Sheppard*, [2002] 1 S.C.R. 869.

Sometimes, however, as Justice Campbell observed in a recent summary conviction appeal case, they do not have to say very much at all when the reason for their decision to convict is apparent from the record.

At his trial for "over 80 mgs" a defendant argued in written submissions that his rights under s. 10(b) of the *Charter* had been breached. In the written submissions he also argued that he should be acquitted because the breath tests were not taken "as soon as practicable" because of a 13- or 15-minute delay in waiting for an officer to come to the scene of arrest to await the arrival of a tow truck after the defendant had been arrested for failing an approved screening device test.

In his oral reasons, the trial judge dismissed the *Charter* argument but did not address the "as soon as practicable" argument except to say that the breath tests "were properly taken". Before he made his sentencing submissions, the Crown noted for the record that it was "implicit" that the trial judge addressed the "as soon as

practicable" argument raised in the written submissions. The defence counsel said nothing.

At his summary conviction appeal, the appellant argued that the trial judge did not give adequate reasons for rejecting the "as soon as practicable" argument. Campbell J. held, at paragraph 11, that the trial judge's reasons were, in this regard, "legally inadequate" but he dismissed the appeal anyway.

He noted, at paragraphs 12 and 13, that where the "basis of the verdict is readily apparent from the reasons provided and the trial record", as it was in this case, the lack of "any detailed reasons...from the trial judge...provides no significant impediment to the appellant's exercise of his right to appeal". Because the trial judge's finding that the tests had been taken "as soon as practicable" was "implicit" in his reasons, there was no reason, Justice Campbell asserted, to order a new trial.

He was "fortified", he said at paragraph 15, in this view because of the defence counsel's silence in the face of the Crown Attorney's comment that it was "implicit" that the trial judge rejected the "as soon as practicable" argument. According to Campbell J., had the defence counsel thought that the reasons were inadequate, he should have said something.

Justice Campbell went on to find that the (implicit) finding that the tests were in fact taken "as soon as practicable" — in other words, reasonably promptly — was the only reasonable conclusion on the record before the trial judge, especially in view of evidence that the appellant told the arresting officer he was "worried" that his vehicle might be left unattended after they left for the police station. It was therefore reasonable to wait some 13 or 15 minutes for another officer to come to the scene of the arrest to wait for the tow truck after the arresting officer and the appellant left for the police station.

R. v. Debilio (2015), 2015 ONSC 5769, 2015 CarswellOnt 13957 (Ont. S.C.J.)

4. — Finding of a breach of s. 10(b) of the Charter is reversed where the trial judge did not err in holding that the respondent did not invoke his right to counsel

A defendant was charged with the offence of "over 80 mgs" and brought an application under the *Charter* at the trial, alleging that his rights under s. 10(b) had been breached.

After failing an approved screening device test, he was arrested and advised of his right to counsel. The officer asked him if he understood the "*Brydges*" warning that the officer read to him and he acknowledged that he did. The arresting officer asked him, "Do you want to call a lawyer now?" and he replied, "No, not right now". He was taken to a police station and did not ask to speak to a lawyer before the breath tests (or at all). After both the breath tests were concluded, he was asked by the arresting officer if he wished to call a lawyer and he said, "No, I have nothing to hide".

In his evidence at the *voir dire*, the defendant said that when he was advised of his right to counsel, he declined because he could not see how he could speak to counsel "now" when it was late at night and when he was handcuffed in the back of a police cruiser. He said he always wanted the opportunity to speak to a lawyer but assumed that he would be given that chance when he was taken to the police station. He said that he declined to speak to a lawyer after the breath test had been taken because the "cat was out of the bag" and there was no point in speaking to a lawyer "then and there". He agreed in cross-examination that he did not ask to speak to a lawyer at any time when in police custody and that he did in fact understand his right to counsel, as he told the arresting officer.

The trial judge dismissed the *Charter* application and convicted the defendant. She found that the police had properly advised the defendant of his right to counsel and there was nothing in the evidence to suggest that the

defendant did not understand his right to counsel. The police were not "acting officiously or in an intimidating manner". The trial judge said that she did not believe the defendant's explanation for why he declined to speak to a lawyer when asked by the police officer after the breath tests. She concluded that he did not invoke his right to consult with counsel and, thus, his rights under s. 10(b) had not been violated.

The defendant appealed. The summary conviction appeal court judge found that there was a breach of the appellant's s. 10(b) rights. The appellant's saying that he did not want to speak to a lawyer "right now" implied, she found, a future exercise of the right to counsel and, because he did not unequivocally waive the right, there was a serious breach of the *Charter*. It was so serious, in her view, that she excluded the results of the breath tests and entered an acquittal.

The Crown appealed to the Ontario Court of Appeal. They gave leave to appeal, allowed the appeal and restored the conviction imposed by the trial judge.

According to Justice Hourigan, who wrote the reasons for a unanimous court, the summary conviction appeal court judge misapplied the law. The *Charter* application turned not on waiver but on whether an appeal court should have interfered with the trial judge's finding that the respondent never invoked his right to counsel.

Waiver, Justice Hourigan noted at paragraph 22, only arises once it has been established on a balance of probabilities that the applicant invoked his or her right to counsel: see *R. v. Baig*, [1987] 2 S.C.R. 537. Putting it differently, he said that the issue of waiver arises only if the detainee first asserts the right to counsel: *R. v. Prosper*, [1994] 3 S.C.R. 236 at 275-6. To quote Hourigan J.A., at paragraph 25:

> Absent invocation of the right to counsel and reasonable diligence in its exercise...police duties to provide a reasonable opportunity to consult counsel and to refrain from soliciting [sic] evidence will either not arise in the first place or will be suspended: *R. v Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, at para. 27.

Once it was established that the police fulfilled the "information component" of s. 10(b), the next question was not whether the respondent had waived his right to counsel but whether he had invoked it. Whether an accused asserted his right to counsel, Hourigan J. observed, is essentially a question of fact: *R. v. Backhouse* (2005), 194 C.C.C. (3d) 1 (Ont. C.A.) at paragraphs 77-8.

The summary conviction appeal court judge, Hourigan J.A. held, should not have interfered with the trial judge's finding that the respondent did not invoke his right to counsel.

Justice Hourigan held that the trial judge's finding that the respondent did not invoke his right to counsel contained no palpable or overriding error. It was, he noted, amply supported by the evidence It was, he found, open to the trial judge to find that "No, not right now" did not qualify as a invocation of the right to counsel. Her finding in this regard was supported by the evidence that the respondent acknowledged to the police officer that he understood his right to counsel and the respondent's evidence in the *Charter* application that he did in fact understand the right. It was also consistent with the respondent's never having asked to speak to counsel while in police custody. The trial judge's finding that "No, not right now" was not an invocation of the right to counsel was also fortified by a credibility finding that she did not believe his evidence about why he decided not to speak to counsel after the breath tests.

R. v. Owens (2015), 2015 ONCA 652, 2015 CarswellOnt 14602 (Ont. C.A.)

5. — Appeal for a conviction for murder based on statements made in the course of a "Mr Big" operation is dismissed by the British Columbia Court of Appeal

Last year, the Supreme Court of Canada in *R. Hart*, [2014] 2 S.C.R. 544 held that confessions made to police in "Mr Big" operations are presumptively inadmissible unless the Crown can establish, on a balance of probabilities, that the probative value outweighs its prejudicial effect.

The evaluation of the probative value of the statements will turn, the court suggested, on an assessment of their reliability. This process, the court held, is akin to the assessment of "threshold reliability" where statements are tendered as an exception to the rule against hearsay.

The Supreme Court in *Hart* instructed that courts should carefully consider all of the circumstances surrounding the making of the statements in the course of "Mr Big" operations and, in particular, they should consider whether there is confirmatory evidence for what the accused said to police. This, they suggested at paragraph 105, might well provide "a powerful guarantee of reliability". Courts should also consider the background and personality of the accused because that may shed light on how predisposed they might be to utter falsehoods to ingratiate themselves with the undercover officers and how vulnerable they might be to inducements. Courts should also look for "markers" of reliability such as the whether the statements included details that were not made available to the public by the police.

In a recent case, the British Columbia Court of Appeal upheld a conviction for first-degree murder that was based, in large part, on statements the appellant made to police in the course of a "Mr Big" operation.

It was alleged that the appellant killed a 14-year-old girl and then buried her body in shallow grave in a wooded area. After he became a suspect, the police embarked on a "Mr Big" operation to elicit statements from him about the murder and, in the course of "scenarios" (or interactions with the police), he made statements to them to the effect that he had killed her and buried the body.

He was convicted of her murder after a judge-alone trial.

The appellant not only made statements to police admitting his complicity in her murder; he also expressed a willingness to the police, in two "scenarios", to become involved in making pornographic videos and to use his teenaged girlfriend in these videos.

No objection was taken at trial by defence counsel to the admission of the most of the evidence from the "Mr Big" operation and no objection was taken to the admission of statements that the respondent made that he had killed the victim. But the *Hart* decision had not yet been decided by the Supreme Court of Canada at the time of the trial and the appellant (and the court) did not have the benefit of that decision. The defence did object at the trial to admission of the "scenarios" involving pornography but the trial judge admitted that evidence at the trial.

The appellant testified at his trial that he had lied to the undercover police about killing the victim. The trial judge did not believe his evidence and found that he was guilty of the first-degree murder of the victim.

The appellant's counsel argued at the appeal that the trial judge should not have admitted the evidence of the "scenarios" involving pornography and that he should not have admitted the statements the appellant made to police had he considered the principles set out in *Hart*, *supra*.

The British Columbia Court of Appeal dismissed the appeal, holding that the trial judge made no error in admitting the evidence of the "scenarios" involving pornography and that the "threshold reliability" of the appellant's statements to police would have been established having regard to the principles enunciated in *Hart*.

The Court of Appeal was satisfied that the trial judge properly exercised his discretion in weighing the probative value and prejudicial effect of the pornography "scenarios" and it was also satisfied that there was no basis to

think that he misused that evidence.

The British Columbia Court of Appeal noted that the risk of moral prejudice and reasoning prejudice is considerably less in a judge-alone trial than it may be in a trial with a jury. Justice Frankel, who wrote the reasons for the court, quoted from *R. v. Arason* (1992), 78 C.C.C. (3d) 1 (B.C. C.A.) at 39 in which the court quoted with approval from the judgment of the Privy Council in *Hong Kong (Attorney General) v. Shing*, [1989] UKPC 4, 111 N.R. 306, wherein Lord Griffith said:

> It is not without significance that this was a trial by judge alone. If the judge had been sitting with a jury he would have had to weigh carefully the probative value of such a previous conviction against the prejudice to the accused that would be likely to arise in the minds of the jury. The risk of such prejudice overbearing the probative value of evidence is of infinitely less significance when a case is tried by a judge alone.

Frankel J.A. held that "threshold reliability" of the appellant's various utterances to police would have been established in view of the *Hart* principles in any event. The appellant, unlike Mr Hart, was a "career criminal" and was not "destitute" like Mr Hart and thus it was far less likely that he would have invented or exaggerated or that his will was overborne by the actions of the police.

Most importantly, the appellant had knowledge of details of the murder that the police "held back" from the public (that the victim was buried naked with rocks thrown over the body). This was very strong confirmation of its reliability.

An "unforced" statement to one of the undercover officers that he killed a girl and buried her naked body *before* he ever met "Mr Big" lent verisimilitude to his account to "Mr Big". Furthermore, utterances that the appellant made to his girlfriend and to his son when being transported in a sheriff's van also tended to confirm the reliability of the confessions.

R. v. West (2015), 2015 BCCA 379, 2015 CarswellBC 2594 (B.C. C.A.)

6. — Alberta Court of Appeal holds that statutorily compelled statements to police cannot be used as grounds to obtain a search warrant and that statutorily compelled statements to an insurer are not admissible at a criminal trial

In a very important decision, the Alberta Court of Appeal clarified that no use may be made by the prosecution of information contained in compulsory accident reports made to the police under the provincial *Traffic Safety Act*(the "*TSA*") and in compulsory statements to insurers for insurance purposes following an accident.

Late one night in 2012, a man pulled his car over on a road in Edmonton to help another motorist with his tire. While they were talking, a passing vehicle struck and killed the man. The driver did not stop.

The next morning, the respondent contacted counsel about his involvement in the accident. His lawyer advised him of his right to remain silent but told him that he had an obligation to make a collision statement to police under the *TSA*. He advised the respondent that the *TSA* statement could not be used against him in a proceeding under the *Criminal Code* or the *TSA*. He also told the respondent that he was obliged to make a statement regarding the accident to his insurance company and referred him to an expert in insurance law.

The lawyer called police and told them that he had a client who needed to make an accident report under the *TSA*. He said his client was the driver of the vehicle involved in the accident. The respondent and the lawyer attended at the police station and provided the *TSA* report. One of the officers informed the lawyer that he wanted to seize the respondent's vehicle. The lawyer replied that they needed to obtain a warrant if they wished to seize

it.

The respondent was arrested and was asked where his vehicle was. He did not reply but the lawyer told them that it was at his house.

The police then obtained a search warrant for the respondent's car. In the information to obtain the warrant (the "ITO"), they referred to information that had been obtained from the *TSA* statement, including the statement that the respondent had been involved in a fatal collision, the respondent's name and the make and location of his vehicle. They did not mention that this information had been obtained as part of a compelled statement pursuant to the *TSA*. The search warrant was granted, the police seized the respondent's vehicle and found incriminating evidence on it.

The respondent subsequently contacted his insurance broker, TD, which opened a fatality file and assigned an independent adjuster to the file. The adjuster told the respondent that in order for the insurer to provide coverage to him, he had to make a statement to them. He could, however, have his lawyer present when he made the statement.

The respondent and his lawyer met with the adjuster and she underlined that it was a condition of his policy that he provide a statement to them and, if he failed to do so, he would be denied coverage. He provided her with a statement in writing. She said to him that she would not provide the statement to anyone but the insurance company. She would not give a copy to police, she said, without a court order.

The police eventually learned of the statement to the insurer and obtained production orders to get it.

The respondent was charged with careless driving and with failing to stop at an accident, contrary to the *Criminal Code*. He was acquitted at the trial.

The respondent challenged the admissibility of the evidence related to his vehicle and his statements to the insurance company, arguing that they were obtained in breach of his rights under ss. 7 and 8 of the *Charter*. Following a *voir dire*, the trial judge agreed and excluded the oppugned evidence. She held that the admission of the *TSA* statement, obtained by statutory compulsion, would violate the respondent's right against self-incrimination, following the Supreme Court of Canada's landmark decision in *R. v. White*, [1999] 2 S.C.R. 417. She also concluded that the statements made to the insurance company had an element of statutory compulsion and were accordingly inadmissible, again relying on the test for compulsion set out in *White*.

The trial judge also held that the information from those compelled statements should not have been used to afford reasonable and probable grounds for a search warrant. Excising this information from the ITO, the search warrant, she found, should not have been issued. Thus, she excluded the evidence obtained from the execution of the search warrant.

The Crown appealed the acquittals.

The Alberta Court of Appeal dismissed the appeal and upheld the acquittals.

They found that it was a breach of the *Charter* for the police to rely on information found in the *TSA* statement to obtain the search warrant. They relied on the *ratio* in *White*, *supra*, that statements made under compulsion violate s. 7 of the *Charter* are inadmissible in criminal proceedings against the declarant because their admission violates the hallowed principle against self-incrimination. The Supreme Court in that case expressly rejected the argument that information related in a compelled statement could be admissible in a limited way. Because section 71 of the Alberta *TSA* was similar to the provision in question in *White*, *supra*, in that it required that a driver

involved in a collision "shall...provide a report of the accident" to a police officer, the trial judge was quite justified in holding that the information contained in the report is admissible against the respondent.

The Alberta Court of Appeal went on to cite the Ontario Court of Appeal case of *R. v. Soules*, 2011 ONCA 429, leave to appeal denied [2011] SCCA No. 375, with approval. In that case, the Ontario Court of Appeal held that statutorily compelled utterances of a driver could not be used by the police officer to form grounds for an approved screening device demand. The same reasoning was applicable in this case, they held. Statutorily compelled statements could not be used for the purpose of establishing reasonable and probable grounds to obtain a search warrant or a production order.

The Alberta Court of Appeal also held that the trial judge's finding that the statement made to the insurer was a compelled statement was unassailable. The Alberta *Insurance Act* sets out statutory conditions that were part of every policy of insurance; one of those conditions required an insured to "promptly give to the insurer written notice...of any accident involving loss of damage to persons or property". The trial judge found that all of the statements made to the adjuster and insurance company were made pursuant to this obligation to report. She cited with approval the Ontario case of *R. v. DaCosta* (2001), 156 C.C.C. (3d) 520 (Ont. S.C.J.) in which Wein J. reached the same conclusion — that insurance was compulsory for a motorist and that the obligation for an insured to report to his or her insurer was created by statute.

The Alberta Court of Appeal also noted that it would be unfair for the prosecution to tender compelled statements made to an insurer in a criminal proceeding. To allow them to do so would permit the Crown to "avoid the protection of s. 7 and accomplish, through the insurance statements, what *White* prohibits the state from doing with *TSA* statements".

R. v. Porter (2015), 2015 ABCA 279, 2015 CarswellAlta 1660 (Alta. C.A.)

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