NR-CRIMADVISOR 2016-12
Criminal Law Newsletters
December, 2016

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1. — The Ontario Court of Appeal confirms that there must be a "nexus" between an "inducement" made by a police officer and the accused's decision to confess in order for the voluntariness of the statement to be undermined

One day a man walked into an Ontario Provincial Police station and told the counter assistant that he wanted to confess to burning down his mother's house.

The counter assistant made arrangements for him to speak to a police officer. At the outset of their discussion, the man told the officer that he was homeless and that he had nowhere to stay but jail. He said that he was not leaving until he had a place to stay. When the officer explained that only people who commit crimes go to jail, he said that he had committed a crime and "got away with it" so he would "just admit it".

The officer cautioned the man and told him that anything he said could be used against him in evidence and told him that he could leave any time he wished to. He repeatedly told him that arson was a serious offence and told him that it was punishable by up to 14 years' imprisonment.

The officer also advised him that he had the right to speak with counsel and he recommended that he exercise that right. In fact, he repeatedly suggested that he speak to a lawyer and, although initially reluctant to do so, the man relented and spoke to duty counsel. After doing so, he came back and gave a statement implicating himself in a fire that destroyed his mother's home.

The OPP charged him with arson.

The voluntariness of the confession was at issue in the trial and the trial judge excluded the confession as being involuntary.

According to the trial judge, "oppressive conditions" coupled with an "inducement" rendered the statement involuntary even though the officer's conduct was "impeccable" and "blameless". Although he had an "operating mind", the respondent, as the trial judge held, was "oppressed" by his own "mind" and "imagination". Desperate for shelter, he was impelled to confess to secure a place to stay. That the officer told him he could or would go to jail if he admitted to complicity in setting the fire was, for the trial judge, an inducement.

The Crown appealed the acquittal.

The Ontario Court of Appeal set aside the acquittal and ordered a new trial.

In his reasons, Justice Hourigan, who wrote for a unanimous panel, reviewed some of the general principles of the law of inducements. At paras. 26-27 he wrote:

> [26] Where the state induces a suspect to confess, regardless of whether the inducement comes in the form of a threat or promise, the confession will be inadmissible when the inducement, whether standing alone or in combination with other factors, is strong enough to raise a reasonable doubt about whether the will of the subject has been overborne . . . .
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> [27] The most important consideration in determining whether the accused's statement has been induced by such a threat or promise is whether there was a *quid pro quo* offer by the interrogators. A *quid pro quo* offer is an inducement for the suspect to confess that raises the possibility that the suspect is confessing, not because of any internal desire to confess, but merely in order to gain the benefit offered by the interrogator: *R. v. Heatley*, 2015 BCCA 350, 375 B.C.A.C. 194, at para. 6 . . . .

The trial judge erred in finding that the officer's advice that he could be imprisoned as a consequence of his confession was an "inducement" for several reasons. First, there has to be a "nexus" between the threat or promise and the confession for the court to find that it vitiates voluntariness. There was no "nexus" in this case. The respondent came to the police station to confess to the arson. Second, merely imparting accurate factual information to an accused is not an inducement. The officer had a duty to provide information to the respondent about his potential jeopardy; a failure to do so might have undermined the voluntariness of the statement on a different basis. Further, the officer was not actively trying to elicit a statement; he repeatedly advised the respondent to speak to counsel and told him he could leave whenever he wished to.

The trial judge also erred in finding that "oppression" vitiated the voluntariness of the respondent's statements to the police. Under the confessions rule, as Hourigan J.A. explained at para. 36, "the oppressive conditions must be caused or created by the state . . . " in order to affect the voluntariness of a statement to police. Given that the trial judge found that the officer's conduct was "blameless" and "unimpeachable" there is no basis at law for a finding that oppression was a factor that rendered the statement to be involuntary.

R. v. Fernandes, 2016 ONCA 772, 2016 CarswellOnt 16289

2. — Another judge of the Ontario Court of Justice decides that failure by police to take the breath tests "as soon as practicable" is a breach of s. 8 of the Charter

Section 258(1)(c) of the *Criminal Code* provides that where breath samples of an accused have been taken pursuant to a demand under s. 254(3), if " . . . each sample was taken as soon as practicable, after the time when the offence was said to have been committed . . . " evidence of the results of the analyses is "conclusive proof" of the accused's blood alcohol concentration at the time of the offence, provided that certain other statutory pre-conditions are met (such as whether the first breath test was taken within two hours of the time the offence was committed, etc.).

Where the Crown fails to prove the samples were taken "as soon as practicable", the Crown loses the advantage of "the presumption of identity" and, unless the Crown calls a toxicologist to "read back" the intoxilyzer readings, the accused is entitled to be acquitted because there is no evidence of his or her blood-alcohol concentration at the time of the offence.

As we saw in the April 2016 issue, a failure to take the breath tests "as soon as practicable" may not only lead to an acquittal but it may be viewed as a breach of s. 8 of the *Charter*. In *R. v. Nascimento-Pires*, 2016 ONCJ 143, 2016 CarswellOnt 3926 Justice Botham of the Ontario Court of Justice held that the police breached the defendant's s. 8 rights because the breath tests were not taken "as soon as practicable", and she excluded the breath results owing to the seriousness of the breach.

In a recent case, Justice David Rose of the Ontario Court of Justice held that the requirement to take breath tests "as soon as practicable" was, in effect, part and parcel of the requirement recognized in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 1984 CarswellAlta 121 and *R. v. Caslake*, [1998] 1 S.C.R. 51, 1998 CarswellMan 1, that in order to be lawful, warrantless seizures must be, *inter alia*, "conducted in a reasonable manner". Thus, a failure to take breath tests "as soon as practicable" was also a breach of s. 8 of the *Charter*.

He also found that the touchstone for determining whether there has been an infringement of the *Charter* for failing to take breath tests "as soon as practicable" should be the very same as for determining whether the tests were taken "as soon as practicable" such that the Crown might avail itself of "the presumption of identity", in other words, whether the police acted reasonably in the circumstances. (Justice Botham's judgment in *R. v. Nascimento-Pires*, *supra*, was to the same effect.)

Justice Rose found, however, that the breath tests were taken "as soon as practicable" and, thus, there was no infringement of s. 8.

The period of delay that gave rise to the argument was a period of some 44 minutes from the time when police arrived at the police station with the defendant until the time when the officer called the duty counsel for him. (The breath tests were conducted not long after the defendant finished speaking to duty counsel.) During this period the defendant was "booked". According to the officer who took the defendant to the police station, there was another officer, with a person under arrest, that preceded them in the "booking" area and it took, on average, some 15 to 20 minutes to "book" a prisoner there. Rose J. held that this evidence satisfactorily explained the delay and he was satisfied that the tests were taken "as soon as practicable".

As Justice Durno, sitting as a judge of the summary conviction appeal court, wrote in *R. v. Schouten*, 2002 CarswellOnt 4528 (S.C.J.), at para. 8, "In order to relate the breath sample results back to the time of driving, the Crown is required to establish *beyond a reasonable doubt* that the tests were taken as soon as practicable . . . ". Where the propriety of a warrantless search or seizure is in issue in a *Charter* application, the Crown must establish *on a balance of probabilities* that the search or seizure was lawful: *R. v. Collins*, [1987] 1 S.C.R. 265, 1987 CarswellBC 94 at para. 22. Further, *Charter* applications must be brought on notice to the Crown. As we

know, even if one establishes a breach was committed, the exclusion of breath tests is far from automatic.

It is very perplexing that defence counsel would argue the "as soon as practicable" issue as a *Charter* application, and put itself at a profound disadvantage in several ways, as opposed to as a trial issue.

R. v. Varatharasa, 2016 ONCJ 647, 2016 CarswellOnt 17238

3. — The British Columbia Court of Appeal orders a new trial when the Crown Attorney did not let a witness provide an explanation for an inconsistency in his evidence

The British Columbia Court of Appeal recently ordered a new trial where a defence witness was not permitted to explain an apparent inconsistency in cross-examination because the Crown cut him off.

The appellant was charged with nine offences including assault, pointing a firearm and offences relating to his possession of a loaded Smith & Wesson handgun at his apartment.

It was alleged that he assaulted and pointed a firearm at the complainant, a woman he lived with, over a two-day period, in October 2014 when their relationship was breaking down. She testified that the appellant used a gun and knife in the course of assaulting her. After the assaults were reported to the police, they arrested him at the apartment where he lived with the complainant and then obtained a search warrant. When they executed it some hours later, they found a loaded Smith & Wesson handgun under a duvet in the bedroom.

The only defence witness was Mr Motevalli, a former roommate of the appellant's. He testified that he and a friend Jay were at the apartment when the appellant was arrested, but that he (Mr Motevalli) was in the bathroom when the arrest took place. He said that when he came out of the bathroom after the arrest, he saw Jay, who seemed nervous, take a handgun from his hoodie and walk into the bedroom. He did not see what Jay did in the bedroom, but when he came out he appeared to be less nervous. His evidence, as Madam Justice MacKenzie, who wrote the reasons for the British Columbia Court of Appeal, put it, at para. 15, " . . . was intended to leave the obvious inference that Jay had placed the loaded Smith & Wesson handgun in question under the duvet on the bed where the police later found it, and therefore it did not belong to the appellant".

The trial judge accepted the evidence of the complainant and rejected Mr Motevalli's evidence in large part because there was, as he put it, a "major internal inconsistency" in his evidence. In cross-examination, the witness was asked about his finding out about the case from the appellant's lawyer. *Before* the lunch break, he said that he asked the appellant who his lawyer was; yet *after* the lunch break, he said, more than once, he got the lawyer's name, not from the appellant, but from a friend named "Mark".

After the lunch break, the Crown cross-examined on that point and after repeating that he got the lawyer's name from "Mark", the witness said, "Yes, but can I say something please? . . . Is it okay if I — add something?", to which the Crown Attorney said, "I have my answer" and did not permit him to add to or explain his answer. The trial judge found that this was the "major internal inconsistency" that tainted his evidence, even though the witness was not allowed to complete his answer.

The defence counsel did not object when the Crown cut off the witness nor did counsel seek to re-examine him on the point even though he was re-examined on other matters. The Crown counsel at the appeal argued that the failure to object or to re-examine was a "useful gauge" of the seriousness of the error in not allowing the defence witness to complete his answer.

The British Columbia Court of Appeal did not agree. Little could be made of the failure to object or cross-examine because the defence lawyer could not have known that the trial judge would later characterize the disagreement in the evidence as a "major internal inconsistency". Had the Crown not cut the witness off, he may have

satisfactorily explained his evidence such that there may not have been any contradiction at all. The inconsistency became, as MacKenzie J.A. put it at para. 38, the "lynch pin" of the judge's rejection of the defence witness's evidence. The case turned on the judge's assessment of the credibility of witnesses, and had the judge not found Mr Motevalli's evidence to be incredible, he may have had a doubt that the handgun in the bedroom was the appellant's.

Because the apparent inconsistency was, as the British Columbia Court of Appeal said, at para. 41, of "such pivotal importance" to the judge's finding of credibility — and the witness asked to, but was not allowed to, clarify the inconsistency — there was "a real appearance that the appellant did not receive a fair trial". Thus, a new trial was ordered on the all of the counts that were affected by the error.

R. v. Luk, 2016 BCCA 403, 2016 CarswellBC 2808

4. — An Ontario SCA judge finds that there is ample identification evidence to establish that the appellant was the driver

A man who worked as a bouncer in a bar decided to go to McDonald's late one night after his shift.

Unfortunately, when he was in the drive-through, his vehicle was struck from behind. After the bouncer was hit from behind, he got out of his car and approached the driver of the vehicle that hit his car. He spoke to the driver and, concerned about the accident and that the driver was intoxicated, the bouncer asked the staff at McDonald's to call the police. They arrived shortly after they were called.

The bouncer, who had obtained the driver's licence and insurance card from the driver, turned over these documents to the police once they arrived and told them what had happened.

The driver of the vehicle that struck the bouncer's vehicle was arrested at the scene of the accident by one of three officers who had attended at the scene. Oddly, there was a disagreement in the evidence about which officer arrested him.

Equally oddly, none of the officers gave evidence that they inspected the driver's licence at the scene of the arrest to confirm his identity. All the three officers and the bouncer, however, testified at the trial that the defendant was the man they dealt with at the scene. These were, admittedly, "in-dock" identifications. A fourth officer (presumably the breath technician) also identified the defendant as the man that he or she had contact with that night.

The defendant argued at trial and, following his conviction, on appeal, that the Crown had failed to prove the identity of the driver beyond a reasonable doubt.

Justice Fairburn affirmed the conviction.

Justice Fairburn found no error with the reasoning of the trial judge. He expressly adverted to the requirement that the Crown had to prove identification beyond a reasonable doubt and was well aware, as Fairburn J. put it, at para. 47, of "the frailties of in-dock identification". He also noted that he had to exercise caution in evaluating identification evidence of that kind and that honest people can be mistaken about identification. Given that *five* witnesses had contact with the appellant after the accident and all identified the appellant as the man they saw at the scene of the accident or in course of the investigation, the identification evidence was, Justice Fairburn agreed, "overwhelming". While Fairburn J. did not say so, one would think that each of the Crown witnesses said that he or she had contact with the appellant that went *far* beyond a "fleeting glance".

R. v. Kirk, 2016 ONSC 6225, 2016 CarswellOnt 16061

5. — The Ontario Court of Appeal holds that the trial judge should have provided a special instruction on the frailties of eyewitness identification evidence even when the appellant was at the scene of the crime and was in close proximity to the witness when the witness was stabbed

Two brothers were stabbed in a barroom brawl in Mississauga.

In a police interview that was admitted into evidence, the appellant admitted that he was at the bar, was involved in the fight and was in possession of a knife for a period of time during the fight. He denied that he stabbed any of the brothers and said he was only involved in the fight as a peacekeeper.

The jury convicted him of aggravated assault of one of the brothers and acquitted him of aggravated assault of the other brother.

The conviction turned on the evidence of the first brother that, as he exchanged punches with another patron, the appellant stabbed him from the side. He did not see it happen but said that after he was stabbed he turned and saw the appellant beside him with a knife. In addition to the appellant's admission that he was at the bar and involved in the fight, the blood of the second brother was found on his (the appellant's) clothing.

The appellant argued that he was convicted on the basis of uncorroborated eyewitness testimony of a single witness and that the jury ought to have been cautioned about the frailties associated with eyewitness identification. The Crown disagreed and asserted that no caution was necessary: after all the appellant admitted that he was present, in close proximity to the witness and was involved in the altercation. They relied on *R. v. Slater*, [1995] 1 Cr. App. R. 584 (Eng. C.A.) in which the English Court of Appeal held that where an accused admits to being present at the scene of an offence, and the only issue is whether he or she committed the offence, no specific instruction on the frailties of eyewitness identification evidence is required.

The Ontario Court of Appeal declined to follow the English Court of Appeal, as the Crown said they should, and that a special caution was necessary. They rejected the Crown's submission for two reasons.

> [11] First, it relies on the untenable distinction between eyewitness identification of an accused which requires a specific jury charge, and eyewitness observation of an accused committing the *actus reus* of an offence, which does not required a specific jury charge. Eyewitness identification, however, is most often (though not always) in the context of a person *doing* something: e.g. committing some element of an offence, leaving the scene of a crime, communicating with some other party. In this case, the question is not whether the witness observed the appellant at the bar on the night in question. Rather, it is whether the witness observed the appellant thrusting a knife towards him. Both are questions of identification.
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> [12] Second, the same reasons for providing a jury with a caution in "fleeting glance" cases may also apply to cases where the presence of the accused is not in dispute. In both cases, the reliability of a witness's observation is in issue. The fact that an accused admits to being present at a crime scene does not resolve that issue. The fact that the appellant admitted being in the bar, participating in the fight, and being in close proximity to Shahzeb, does not resolve the question of whether the appellant stabbed Shahzeb, or enhance the reliability of Shahzeb's evidence that he observed the appellant with a knife at his side, thrusting it towards him.

That defence counsel did not object to the draft charge at the pre-charge conference was not dispositive; it was ultimately the responsibility of the trial judge to assure that the appropriate charge was given.

In *R. v. Keane* (1977), 65 Cr. App. R. 247 (Eng C.A.) Lord Scarman L.J. had this to say:

> The principle is the special need for caution when the issue turns on evidence of visual identification: the

> practice has to be a careful summing-up, which not only contains a warning but exposes to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case.

Thus, the trial judge should have specifically drawn attention to circumstances under which the identification was made that might have attenuated the reliability of the identification. These included:

- the "chaos" of the bar fight;
- the poor lighting;
- the speed at which events took place;
- that the victim took part in multiple fights with multiple assailants;
- the inconsistency between his account that he was stabbed from the side and the objective evidence which suggests that he was in fact stabbed from the front;
- that the victim did not know the appellant;
- that he testified that that another individual with a similar appearance was involved in the bar fight.

The failure to properly instruct the jury on eyewitness identification both generally and with reference to the specific facts of the case required a new trial.

R. v. Virgo, 2016 ONCA 792, 2016 CarswellOnt 16561

6. — A five-year prohibition order is reduced to two years by an Ontario SCA judge for a middle-aged first offender who pleaded guilty to impaired driving and dangerous driving

In February of 2014, the police responded to a call from concerned citizens who saw a vehicle being driven erratically.

To quote Gilmore J., at para. 6, in her reasons for judgment in the sentence appeal, the attempts made by the police to stop the vehicle were "not successful", but the defendant "was eventually apprehended". The lowest of the two results of his breath tests was 240 mgs of alcohol per 100 mL of blood.

The driver pleaded guilty to impaired driving and dangerous driving and the trial judge imposed sentences as follows: three years' probation, concurrent on both counts; fines in the amount of $2,500.00, not including the surcharge, and a driving prohibition of 2 1/2 years on each charge, consecutive. Thus, the overall prohibition from driving was five years.

The defendant appealed the length of the driving prohibition and argued that it was so excessive as to be demonstrably unfit.

Justice Gilmore agreed. The appellant was a 54-year-old first time offender who had been continuously employed at a family business and his pre-sentence report was, as she put it at para. 18, "no less than glowing". He took alcohol and family counseling prior to entering his plea of guilty. Fresh evidence indicated that the appellant completed the community service he was ordered to do "with a dedication and commitment that is laudable". While the impaired driving and very high blood-alcohol concentration were the aggravating factors which justified a prohibition order that exceeded the one-year minimum, the trial judge over-emphasized denunciation. As a

result, the prohibition orders were reduced to an overall length of two years.

R. v. Buchner, 2016 ONSC 6344, 2016 CarswellOnt 15978