SCC File No.:37756

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

G.T.D.

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF G.T.D., APPELLANT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW OF POSITION AND FACTS

A. Overview

[1] The *Charter* guarantees all detainees the right to counsel, and requires that the police hold off from questioning them until they have had the opportunity to exercise that right[1]. Once a detainee asserts the right to counsel, the police are obliged to hold off from attempting to elicit incriminatory evidence from the detainee until the detainee has had a reasonable opportunity to exercise that right. [2]

[2] Detainees are under the control of the arresting officers and their ability to contact counsel relies on the officers providing the detainee with a reasonable opportunity to do so[3]. This frequently involves delays in order for the detainee to be transported to a telephone where they will have an opportunity to contact counsel in private[4]. The holding off period is therefore necessary in order to make the right to contact counsel meaningful, as the right is defeated if questioning is permitted to take place in the interval between invoking the right and exercising it. Being given access to counsel after the fact of questioning does not resolve any breaches of the requirement to hold off as the damage has already been done.

[3] The case at bar focuses on the appropriate remedy for an institutional practice that violates the duty to hold off by asking a question that elicits further evidence before the detainee has had the ability to contact counsel. There is a presumptive general exclusion of statements obtained in breach of the *Charter*[5], and the three *Grant* factors favour inadmissibility of the statement in this case.

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 10(b) [*Charter*].
[2] *R. v. Prosper* [1994] 3 S.C.R. 236 at para 269.
[3] *R. v. Taylor*, [2014] 2 SCR 495, 2014 SCC 50 at para 25.
[4] *R v Nelson*, 2010 ABCA 349 (CanLII) at paras 17-20, 490 AR 271; *R v KWJ*, 2012 NWTCA 3 (CanLII) at paras 28-30, 524 AR 75.
[5] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 92.

B. Statement of Facts

[4] The Appellant was accused of sexual assault by a former domestic partner. Officers found the Appellant at the Hope Mission, a homeless shelter in Edmonton[6]. Officers attended at the shelter at approximately 10:00 PM and discovered the Appellant to be sleeping[7]. He was "groggy"[8]. The arresting officer acknowledged that he wasn't sure if the Appellant's first language was English, but confirmed that his speech was "heavily accented"[9].

[5] The officer read the Appellant the standard police caution from his notebook and advised the Appellant of his right to counsel. He asked the Appellant if he wanted to speak to counsel, and the Appellant made a clear invocation of his right to speak to counsel by replying, "uh, yes"[10].

[6] The officer then continued as follows, "You may be charged with sexual assault and breach. You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you wish to say anything?"[11]

[7] The Appellant replied by saying, "Yeah. Like a boss says I'm raping, I didn't do because I was thinking, like, since we are in a relationship, it's okay. I didn't think it would be a raping because we our two boys together, [complainant's given name]." [*sic*], and this comment was detailed in the officer's notes[12]. The officer testified that this was written down word for word[13], and that the Appellant spoke with an accent.[14]

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[6] Trial Transcripts, p. 111, 30-38.**[Record of Appellant (RA)Tab 3I]**
[7] Trial Transcripts, p. 112, 5-15. **[RA Tab 3I]**
[8] Trial Transcripts, p. 112, 20-24.**[RA Tab 3I]**
[9] Trial Transcripts, p. 121, 38-p. 122, 3.**[RA Tab 3I]**
[10] Trial Transcripts, p. 119, 5-12.**[RA Tab 3I]**
[11] Trial Transcripts, p. 113, 16-21. **[RA Tab 3I]**
[12] Trial Transcripts, p. 113, 24-30. **[RA Tab 3I]**
[13] Trial Transcripts, p. 113, 38-40. **[RA Tab 3I]**
[14] Trial Transcripts, p. 113, 25. **[RA Tab 3I]**

[8] The arresting officer confirmed that he understood the Appellant's request to speak to counsel, but that his experience and training required that he read the caution regardless of the response to that question[15].

[9] At trial, the Appellant argued that the statement had been taken in violation of his 10(b) *Charter* rights, and that it should accordingly be excluded pursuant to s. 24(2). This argument was rejected, and the Appellant was convicted. The learned trial judge found that there was no violation of s. 10(b), and that if there had been, she would have admitted the evidence in any event.

[10] On appeal to the Alberta Court of Appeal, the panel was unanimous in finding a breach of the Appellant's rights under s. 10(b). However, the majority ruled the evidence be admitted pursuant to their 24(2) analysis. The dissenting Justice held that the evidence ought to have been excluded.

[11] The Appellant appeals the decision on the 24(2) analysis.

PART II – QUESTION AT ISSUE

[12] The within appeal raises a single question of law: Did the majority of the Court of Appeal of Alberta err in finding that the impugned evidence should not be excluded pursuant to section 24(2) of the *Charter*?

PART III – STATEMENT OF ARGUMENT

A. Standard of Review

[13] The standard of review on a 24(2) issue is normally reasonableness[16]. However, the usual deference is not owed to a trial judge's 24(2) analysis where the trial judge erred in the assessment of the constitutionality of the underlying actions[17] [18]. Therefore, the standard of

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[15] Trial Transcripts, p. 119, 20- p. 120, 17.**[RA Tab 3I]**
[16] *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, at para 32.
[17] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 129.
[18] *R. v. Paterson*, [2017] S.C.J. No. 15, 2017 SCC 15 at para 42.

review is correctness with regard to the legal analysis, and palpable and overriding error with regard to the underlying factual findings[19].

B. Did the majority of the Court of Appeal of Alberta err in finding that the impugned evidence should not be excluded pursuant to section 24(2) of the *Charter*?

[14] The learned trial judge in the case at bar found that there was no breach of the Appellant's *Charter* rights. The Alberta Court of Appeal was unanimous in overturning that decision, but provided no relief pursuant to 24(2).

[15] This Honourable Court has held that there is a "presumptive general, although not automatic, exclusion of statements obtained in breach of the *Charter*"[20], and set out three factors to be considered in determining whether evidence obtained in breach of the *Charter* should be excluded. The Appellant respectfully submits that all three of the *Grant* factors favour exclusion in this case, pursuant to section 24(2) of the *Charter*.

i. **The seriousness of the *Charter*-infringing conduct**

[16] There is no suggestion that the officer in this case acted with malice. Indeed, the finding was that he was acting in accordance with his training in asking the question, "Do you wish to say anything?" The officer was doing his best to comply with his obligations in accordance with his training. That being the case, as an individual he was not the source of the fault.

[17] However, breaches that are systemic or institutional in nature aggravate the seriousness of a *Charter* breach[21]. Breaches that result from systemic or institutional practices have a much greater scope, as they do not merely affect the accused in any particular case, but many other individuals. This was the very issue identified in *Grant* when the Court stated that, "for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge"[22].

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[19] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 129.
[20] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 92.
[21] *R. v. Harrison*, [2009] 2 SCR 494, 2009 SCC 34 at para 25.
[22] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 75.

[18] In the case at Bar, the evidence was that the officer was relying on a standard printed caution provided by the Edmonton Police Service[23], and that he had relied on this caution for ten years[24].

[19] This is not a case where the law is unsettled or unclear. The duty to "hold off" on questioning a detainee is well-established and well-known. It submitted that it is the obligation of police forces in Canada to continuously assess their practices in light of their *Charter* obligations in order to ensure that they are complying. As *Grant* noted, "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith"[25]. Ignorance is not a shield under the law for those accused of an offence, it equally cannot be a shield for those who we rely on to administer our laws and to uphold *Charter* values in dealing with detainees.

[20] In *R v Fearon*, the court noted, "Of course, the police cannot choose the least onerous path whenever there is a gray area in the law. In general, faced with real uncertainty, the police should err on the side of caution…"[26] In terms of police conduct, this admonition can be taken to instruct the police to exercise caution in how close they step to the line with regard to the *Charter* rights of Canadians.

[21] The systemic nature of this breach makes it serious, notwithstanding the good intentions of the arresting officer. Although the Appellant is the only person charged in the case at Bar, it is submitted that the court can infer that, because of the institutional nature of the practice of the Edmonton Police Service, and the length of time this practice was in effect, countless numbers of EPS detainees were potentially affected.

[22] It is submitted that both the trial judge and the majority at the Court of Appeal erred in law by failing to properly consider the wide scope of those affected by this systemic and institutional practice. When this factor is considered, the seriousness is elevated, and significant consideration must be given to the exclusion of the evidence under s. 24(2).

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[23] Trial Transcripts, p. 194, 29-31.**[RA Tab 3P]**
[24] Trial Transcripts, p. 120, 22-24. **[RA Tab 3I]**
[25] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 75.
[26] *R. v. Fearon*, [2014] 3 S.C.R. 621, 2014 SCC 77 at para 94.

ii. Impact on the *Charter*-Protected Interests of the Appellant

[23] The courts have long held that the impact on the *Charter* protected rights of accused persons are great where a statement is obtained in violation of their rights, particularly their right to counsel. *Grant* notes the following:

> The failure to advise of the right to counsel undermines the detainee's right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination. These rights protect the individual's interest in liberty and autonomy. Violation of these fundamental rights tends to militate in favour of excluding the statement.[27]

[24] At the trial level, the learned judge found that the impact on the Appellant's rights was minimal because "nothing suggests his will was overborne or he was tricked or that this was anything but his choice to speak"[28]. At the Court of Appeal of Alberta, the majority found "In this case the Appellant was 'clearly informed of his choice to speak to the police', and given the historical context the *Charter* breach can be described as being minimal or even technical"[29] However, these reflect fundamental errors. Without having access to the right to counsel prior to making statements to the police, the Appellant cannot be said to have made a meaningful and informed choice as to whether or not to speak. The fact that he was informed of his rights to speak to counsel is of little comfort when the police then proceed to violate his rights by failing to hold off as required.

[25] This is not a situation where "a statement is made spontaneously following a *Charter* breach, or in the exceptional circumstances where it can confidently be said that the statement in question would have been made notwithstanding the *Charter* breach"[30] The answer was not made spontaneously, but in response to a direct question that invited the Appellant to provide a response to the charges, and thus it was neither spontaneous nor likely to have occurred absent the breach.

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[27] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 95.
[28] Trial Transcripts, p 195, 15-17.**[RA Tab 3P]**
[29] *R. v. G.T.D.* (2017), 2017 ABCA 274 at para 24.**[RA Tab 1E]**
[30] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 96, quoted by the majority in *R. v. G.T.D*, 2017 ABCA 275 at para 24.**[RA Tab 1E]**

[26] Further, the breach was not minor or technical. To view the breach in this way reduces the right to counsel to a mere formality, a ritualistic step of no consequence. However, this right is critically important in light of the fundamental difference of power and knowledge between a police officer and most detainees, and serves the purpose of helping to "level the playing field" between accused and police[31]. Counsel not only explain that it is important to remain silent, but also *why* it is important to remain silent[32]. An accused person may not be aware that the Crown cannot use silence against them at trial[33], nor may an accused person realize that a statement intended as exculpatory could very well prove incriminating if it is contradicted by other evidence, or if the accused has failed to understand the elements of the offence, or in myriad other ways.

[27] The fact that the Appellant answered the question posed to him does not attenuate the impact upon him. As was noted in *Manninen*[34], answering a question that one has a right not to be asked does not constitute a waiver, and further that where the police ask questions of a detainee after they have asserted their right to counsel, they are likely to feel an obligation to answer those questions.

[28] Nor does the brevity of the interrogation have bearing here. The answer to a single question can be devastating, and can indeed entirely frustrate the purpose of the right to counsel, as seen in the present case. The right to counsel has little to offer an accused person if the police can conduct questioning in the intervening period, which gives rise to the very real risk that "admitting the evidence may suggest that *Charter* rights do not count, thereby negatively impacting on the repute of the system of justice."[35]

[29] In the present case, the impact on the *Charter* protected rights of the accused is very high and therefore militates in favour of exclusion of the evidence.

iii. Society's Interest in the Adjudication of the Charges on the Merits

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[31] *R. v. Whipple* (2016), 2016 ABCA 232 at para 27.
[32] *R. v. Berger* (2012), 2012 ABCA 189 at para 24.
[33] *R. v. Turcotte* (2005), 2005 SCC 50 at paras 36-58.
[34] *R. v. Manninen*, [1987] 1 S.C.R. 1233, [1987] SCJ No 41 at para 25.
[35] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 109.

[30] This factor hinges on three elements: The reliability and relevance of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the offence[36].

[31] With regards to the reliability of the evidence, it is submitted that both at the trial level and in the majority decision of the Court of Appeal, there was a conflation of voluntariness of a statement and its reliability. While it is acknowledged that the statement was not extracted through violence, intimidation, trickery, or coercion, reliability must be weighed in light of the Appellant's evident difficulty with English as shown by the structure of the statement, and the fact that the statement was not audio recorded and only transcribed in the officer's notes. It is therefore submitted that this factor does not weigh heavily in one direction or the other.

[32] In terms of the importance of the evidence to the Crown's case, the complainant testified, and was able to provide evidence. This is therefore not a situation where exclusion of the evidence would necessarily be fatal to the Crown's case because the case hinges on possession of the items to be potentially excluded. While the evidence is potentially probative and would be useful to the Crown, its exclusion would simply restore the Crown's case to the state it was prior to the breach, which was considered sufficient to arrest and charge the Appellant with the alleged offences.

[33] Sexual assault is, of course, a serious offence. However, *Grant* notes that this feature can "cut both ways"[37], in that it is expected that a police officer investigating a serious matter will take care not to violate the rights of the accused. Further, the courts must be cautious to avoid sending the signal that *Charter* rights are important, but that the police will be given a free hand where the accusation is serious.

[34] As was noted in *R v Morelli*, "justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices."[38]

[35] It is therefore submitted that in balancing the three *Grant* factors, the impugned evidence should be excluded pursuant to s. 24(2) of the *Charter*.

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[36] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 96, quoted by the majority in *R. v. G.T.D*, 2017 ABCA 275 at paras 80-84.**[RA Tab 1E]**
[37] *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32 at para 84.
[38] *R. v. Morelli*, 2010 SCC 8, at para 110.

PART IV – COSTS

[36] The Appellant does not seek costs.

PART V – ORDERS SOUGHT

[37] The Appellant requests that this appeal be allowed, that the evidence be excluded under s. 24(2), and that a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November 2017

Ian Runkle

Counsel for the Appellant

PART VI - TABLE OF AUTHORITIES

CASE **PARAGRAPH(S)**

LEGISLATION

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss. 10(b), 24(2).