

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Keats*, 2014 NSPC 108

Date: 2014-12-23

Docket: 2602676 to 2602679

Registry: Windsor

Between:

Her Majesty The Queen

v.

James Duncan Keats

Restriction on Publication: Section 486.4 of the Criminal Code

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

DECISION ON VOIR DIRE

Judge: The Honourable Judge Claudine MacDonald

Heard: December 22, 2014 in Windsor, Nova Scotia

Charges: Section 122 *Criminal Code* x 2
Section 271(1) *Criminal Code* x 2

Counsel: William Fergusson, Q.C., for the Crown
Chrystal MacAulay, for the Defendant

By the Court:

[1] The Crown seeks to have Mr. Keats statements admitted into evidence.

[2] Ms. MacAulay argues that Mr. Keats' right to silence was breached, and an atmosphere of oppression existed such that voluntariness has not been established. Further, she argues that the statement was obtained in circumstances where Mr. Keats' right under section 9 of the *Charter* to be free from arbitrary detention or imprisonment was violated and the statement should be excluded pursuant to s. 24(2).

[3] A "blended" *voir dire* was held, recognizing of course that the onus of proving voluntariness lies on the Crown, standard being proof beyond a reasonable doubt. For the alleged s.9 *Charter* breach, the onus is on the accused to prove the breach on a balance of probabilities. If that is established, then whether or not exclusion will be granted is determined in accordance with s. 24(2).

[4] I will decide on the voluntariness issue first, keeping in mind that the *Singh* decision makes it clear that a finding of voluntariness is determinative of the section 7 right to silence issue. After this, I will deal with the alleged section 9 breach.

[5] The Crown must prove voluntariness beyond a reasonable doubt. It is important to keep in mind that concern over false confessions is not the only rationale for the confession rule. As set out *R. v. Singh*, para. 30:

Of course, not every involuntary confession is false. While the confession rule's primary concern is with reliability, it is well established that voluntariness is a broader concept. As this Court stated in *Oickle* (at para. 70): "Wigmore perhaps summed up the point best when he said that voluntariness is 'shorthand for a complex of values': *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, S. 826, at p. 351." These values include respect for the individual's freedom of will, the need for law enforcement officers themselves to obey the law, and the overall fairness of the criminal justice system: see *Oickle*, at paras. 69-70, citing *Blackburn v. Alabama*, 361 U.S. 199 (1960), at p. 207.

[6] In *Oickle*, Iacobucci J., described the tension between protecting the rights of the accused and the necessity that crimes be investigated as follows:

33 In defining the confessions rule, it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes. Martin J.A. accurately delineated this tension in *R. v. Precourt* (1976), 18 O.R. (2d) 714 (C.A.), at p. 721: Although improper police questioning may in some circumstances infringe the governing [confessions] rule it is essential to bear in mind that the police are unable to investigate crime without putting questions to persons, whether or not such persons are suspected of having committed the crime being investigated. Properly conducted police questioning is a legitimate and effective aid to criminal investigation... On the other hand, statements made as the result of intimidating questions, or questioning which is oppressive and calculated to overcome the freedom of will of the suspect for the purpose of extracting a confession are inadmissible....

All who are involved in the administration of justice, but particularly courts applying the confessions rule, must never lose sight of either of these objectives.

[7] In *R. v. Hebert*, McLachlin J. (as she then was) set out that the right to choose whether or not to speak to the authorities is defined objectively.

The right to choose whether or not to speak to the authorities is defined objectively rather than subjectively. The basic requirement that the suspect possess an operating mind has a subjective element. But this established, the focus under the Charter shifts to the conduct of the authorities [page182] vis-à-vis the suspect. Was the suspect accorded the right to consult counsel? Was there other police conduct which effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not?

Similarly, in *R. v. Singh*, 2007 SCC 48, Charron J. in setting out that voluntariness would be determinative as to whether there had been a breach of the right to silence stated:

[36] On the question of voluntariness, as under any distinct s. 7 review based on an alleged breach of the right to silence, the focus is on the conduct of the police and its effect on the suspect's ability to exercise his or her free will. The test is an objective one. However, the individual characteristics of the accused are obviously relevant considerations in applying this objective test.

[37] Therefore, voluntariness, as it is understood today, requires that the court scrutinize whether the accused was denied his or her right to silence. The right to silence is defined in accordance with constitutional principles. A finding of voluntariness will therefore be determinative of the s. 7 issue.

BRIEF OVERVIEW OF FACTS:

[8] Mr. Keats was arrested at 5:59 p.m. on Thursday, May 30th, in Kentville. He was told that he was being arrested for two counts of sexual assault on B.W., was advised of his right to counsel, and cautioned. This was a planned arrest, in that officers had met at 3:55 p.m. to determine the roles of the officers. According to Cst. Collier, the plan was to arrest Mr. Keats, bring him to Enfield and hold him overnight. The interview was to be held the following day, Friday, May 31st.

[9] After the arrest, Mr. Keats was taken from Kentville to Windsor (Rawdon), leaving Kentville at 18:07 and arriving at Rawdon at 18:45. According to Cst. Collier, the Rawdon office was the closest office at the time in order for Mr. Keats to contact a lawyer. Mr. Keats spoke with a lawyer from 18:57 to 18:59; at 19:11, Mr. Keats was removed from the interview room and then transported to Enfield, arriving there at 19:56. A decision had been made not to begin interviewing Mr. Keats the evening of his arrest.

[10] The interview began at 9:30 a.m. and concluded at 4:08 p.m. on Friday, May 31st. A subsequent interview was carried out from 5:30 p.m. until 6:58 p.m. A decision had been made to postpone the start of the interview in order that the officers could be energized because they had worked long hours. Both interviews

was video and audiotaped. During the initial interview, Mr. Keats denied sexually assaulting B.W., but he did make some admissions: he was at the residence, he had physical contact with B.W. in the course of performing his duties as a paramedic, he rubbed her arm and he hugged her.

[11] As I mentioned, the interview concluded at 4:08 p.m., after which Mr. Keats was remanded through the Justice of the Peace Centre to appear on Monday in Windsor Provincial Court.

[12] At approximately 5:30 p.m., after the remand but while still in the Enfield Detachment, Mr. Keats asked to speak to Cst. Collier, which he does over the next hour and a half. During this interview, Mr. Keats, having said that he was there on his own free will makes a statement.

[13] In order to provide a fuller context for what took place during the interviews, I must refer to them at some length, but will attempt to limit this to the highlights of the contact between the officers and Mr. Keats.

[14] At the outset of the interview, Cst. Collier advises Mr. Keats that in addition to the two counts of sexual assault, he would be adding two counts of breach of trust. After advising him of his right to counsel, Mr. Keats, stated, "I said to you yesterday, my concern is that I don't wanna say something." (p.3 transcript)

Cst. Collier: so...if you want to talk to him again and get the same advice or whatever...that's your decision...

Mr. Keats did in fact exercise his right to counsel. Until approximately 11 a.m., Mr. Keats is doing much of the talking, discussing in considerable detail his work as a paramedic. After Cst. Collier outlines some information with respect to the complaint, Mr. Keats says, "when I spoke to the lawyer this morning he said don't say anything" (p.35 transcript, 11 a.m.) Cst. Collier deflects this by telling Mr. Keats, "I don't want to tell me any advice that your lawyer gave you...because that's confidential...so kinda keep that to yourself about what your lawyer..." (p.35)

Cst. Collier says, "I already know you were there...and I talked to your partner."

He asks Mr. Keats a question concerning the firefighters who were present. Mr. Keats talks about the call and then says, "I think I'll hold off on the rest." (p.37)

Shortly after, Mr. Keats can be seen wiping his eyes with a tissue, sniffing, and he appears to be crying. (p 40).

[15] At 12:42 p.m. Cst. Collier refers to Mr. Keats having been at the ball game with his nine year old son, (the situation at the time of arrest), asking him “do you teach your kid to own up if he did something wrong” (p84). “You teach L. to own up to his responsibilities right.” (p. 85, 1 p.m.)

Shortly after this discussion about his son, Mr. Keats, crying, says “I prefer not to talk to you and I’m sorry.” (p 85) Shortly after, he says “You’ve only been truthful to me and I believe you, but I don’t feel safe anymore and I want, I don’t want to say anything more until I talk to a lawyer.”

Cst. Collier replies, “well you’ve talked to a lawyer James.”

Mr. Keats later says, “I feel that I’m not safe unless I say something... and I don’t want to say.” (p 86)

[16] Cst. Collier shifts the focus back to Mr. Keats son. He tells Mr. Keats that he was going to leave for a couple of minutes, and that he wants Mr. Keats to think about things. Cst. Collier speaks for approximately 3 minutes, appealing to Mr. Keats’ emotions, telling him, among other things, that he wants him to think about his job, how much he has given to the community, to concentrate on what he teaches his son. “I have interviewed everybody...and we have forensic teams...we collect... DNA...I’ve been watching you James...you’re holding back on

something...if you did something wrong this would be the time so we can get it cleared up. I can't tell you that there won't be any repercussion...And I want you think about the morals that you're teaching L,. (pp.88,89)

[17] Cst. Collier leaves the interview room at 12:55 p.m., returning at 1:02 p.m. and asking, "Have you thought about what I said James? After having been asked what happened in the bedroom, Mr. Keats says, "I don't want to say anything because I don't want it to be misconstrued."

[18] Shortly after, Cst. Collier confronts Mr. Keats with the allegations, telling him, "She said you performed oral sex on her and you had sex with her..." Why is she saying that?"

"I don't know, I do not know, I don't know", Mr. Keats replies, whispering.

[19] Cst. Collier once again leaves the room, returning after 5 minutes or so. Upon his return, the tone of both the interview and Cst. Collier changes markedly. "Listen to me. I don't want you to say anything right now, but I'm gonna be very straightforward with you. There's no doubt in my mind that you sexually assaulted B. W. There's no doubt in my mind that you committed oral sex on her and you had sex with her. I don't want you to say anything now and I'll tell you the reasons

why. Okay? And I want you to listen to me. I want you to listen to me good and I want you to look at me when I'm talking to you.”

[20] As I mentioned, the tone of the interview and Cst. Collier changed. Ms. MacAulay submitted that Cst. Collier was yelling at Mr. Keats so loudly that the volume had to be adjusted while we were watching the tape. The volume of the tape did require adjusting at times, necessary in order to hear what was being said by Mr. Keats who often spoke softly, indeed was barely audible. To be clear, the volume was not adjusted to lessen the impact of yelling by Cst. Collier. If there is yelling, it is important that the court hear it. That being said, Cst. Collier did on occasion speak loudly and forcefully, but not to the point where it merits consideration as a factor in this voir dire.

[21] Cst. Collier, at one point telling Mr. Keats “Don't interrupt me”, puts forward two scenarios, that Mr. Keats has done this multiple times or it was a mistake... I have no doubt that we're gonna find your DNA ...This is the time to man up...this is what you preached to L...this is the time to tell me...look at me James. What happened in that bedroom?

Mr. Keats, whispering, replies, “I'm not talking to you anymore.” (p94)

[22] Cst. Collier: You're not talking because you're guilty or are you not talking because it happened? ... You haven't denied it. You didn't seem surprised when I arrested ya and now you're gonna say I'm just not gonna talk. If you did something in that room this is the time to tell. This is the time to do what you preach to L..”

(p94)

Mr. Keats (barely audible): I didn't do, do anything...I did not do anything in that room. I don't wish to talk anymore. (approximately 1:30pm).

[23] Cst. Collier, says “Okay James, sit tight,” and leaves the room at 1:31p.m., returning at 1:37p.m. Upon returning, Cst. Collier speaks more loudly and more forcefully, telling Mr. Keats “I'm giving you an opportunity to talk to me here today. If we find DNA in her vagina from you, how are you going to explain that... I'm not saying that we have it, but ...if we find...how are you going to explain that?”

Mr. Keats: I did nothing wrong in that room to her.

Cst. Collier: We're beyond that James. (p.95)

[24] When Cst. Collier refers to the other sexual assault count, alleged to have happened in September, 2012, Mr. Keats, says “Whoa, no.”

Cst. Collier: Just hold on.

Mr. Keats: Nope.

Cst. Collier: Let me, let me finish. (p.96)

Shortly after, this exchange occurs:

Cst. Collier says, “Did she say I want it, I haven’t had it in fifteen years...And it was consensual? If that happened...this is the time to tell me... Did she come onto you?”

Mr.Keats: I’ve already asked not to say anything more...I don’t want to say anymore to you and that’s all. (p.97)

Cst. Collier: Did she come onto you in that room James?

Mr. Keats: Please don’t talk to me about it.

Cst. Collier: Okay...Well here’s the thing James.

Mr. Keats: No, no. You know what.

Cst. Collier: She’s saying...

Mr. Keats: You have what you have.

Cst. Collier: You listen to me.

Mr. Keats: All I’m doing is I’m asking, please, please leave me alone now...I don’t want to talk anymore. I want to wait until I see a lawyer, I want to see a lawyer, I want to sit down with that lawyer and I want to talk to a lawyer. I don’t want to speak to you guys anymore. (p.97, 1:45 p.m.)

Cst. Collier: You know why you don’t want to speak to me, James? Because something happened in there.

Mr. Keats: ...I want to find out what is my...I want legal counsel is what I want. I want somebody to help me. (p.98)

Cst. Collier: You spoke to legal counsel, James. I advised you the charges

Mr. Keats: I know and they said for me not to say anything and now I'm trying not to say anything. (p.98 at 1:46 p.m.)

Cst. Collier: Okay and I appreciate that....

[25] Cst. Collier then speaks for 4-5 minutes, setting out options: is Mr. Keats a sexual predator or was this something that just happened, an isolated incident. (p. 99, 1:50 p.m.) This exchange follows:

Mr. Keats asks, "When will I be allowed to speak to another lawyer or speak to a lawyer again? (p.99, 1:50 p.m.)

Cst. Collier: You spoke to a lawyer already James.

Mr. Keats: Am I going to be allowed to speak to a lawyer again?

Cst. Collier: You can speak to a lawyer once, once you're released, yeah.

Mr. Keats: Okay.

Cst. Collier: Did it just happen in there James?

Mr. Keats: Do you know what, I'm getting really mad and I blurt out and say...I fucked her dog in there...I'm afraid that I'll be mad and say the wrong thing...I want to talk to a lawyer so I know how I can talk to you. ...I have the utmost of respect for you...I want somebody to help me now...So, if you have to put me back in the cell, yeah, do whatever, please do so. I don't want to talk anymore until I talk to a lawyer. (pp.99-100)

Cst. Collier: ...But here's what's gonna happen. When it comes down to court day and there's a witness up on there, an elderly lady that's giving a statement to say this is what happened to her and we can put you in the room and you were in there and if any DNA comes back and there's DNA where it shouldn't be...

Mr. Keats: Right

Cst. Collier: You were given an opportunity here today to explain your actions if it was a good choice or if it was a bad choice. ...if it goes to the point when you go in there and you don't say anything, but there's the evidence and this is an older lady saying. See what we're getting at?

Mr. Keats: And I have my lawyer to stand up for me and to say this, this and this....The only way that I can protect myself now is to speak with a lawyer. (p.101, 1:56 p.m.)

[26] Shortly after this, Mr. Keats corrects Cst. Collier, explaining that he was never a funeral director. Cst. Collier tells him "you just deflected me...", then asks, "Did you sexually assault that woman in that room?" (p.102)

Mr. Keats: ...This is the reason why I don't want to talk anymore...I didn't have any ulterior motive.

[27] Cst. Collier again directly asks Mr. Keats if he sexually assaulted B.W., Mr. Keats replying that he did not. He is asked if he performed oral sex on B.W., and again, Mr. Keats replies that he did not. (p.102, 2:00p.m.)

[28] At 2:09 p.m. Cst. Collier leaves and Cst. MacKinnon enters, telling Mr. Keats that she will be speaking to him. Soon after she reads out the secondary caution, the following exchange occurs:

Mr. Keats: ...I said something to him and it came out the wrong way. I'm terrified I will say something wrong...and then I'm

screwed for the rest of my life. I want to speak to legal counsel so I can ensure that whatever I say is said properly. (p.104)

Cst. MacKinnon: Okay

Mr. Keats: If that's what I want.

Cst. MacKinnon: Yep. Well, you spoke to a lawyer.

Mr. Keats: I, I understand that I spoke to a lawyer already. But I wasn't able to talk to them and get advice and...because I had no idea what was going on and I didn't know anything.

Cst. MacKinnon: Okay

Mr. Keats: So and now I know more, that's why I wish to speak to...

Cst. MacKinnon: I'll tell you this, okay

Keats: That's all.

Cst. MacKinnon: Just look at me when I'm talking to you okay. So you spoke to a lawyer last night. Right. You told them what the charges were against you. Correct? You spent the night in cells. As soon as Bill came in and started talking to you today, you got to speak to another lawyer. Correct.

Mr. Keats: Right

Cst. MacKinnon: So your lawyer gave you advice on the charges that are before you. (p.105)

Mr. Keats: Right

Cst. MacKinnon: ...So you have spoken to a lawyer and you have received advice and now we're proceeding with that, okay.

Mr. Keats: I understand, but that's the...

Cst. MacKinnon: And after you're released...

Mr. Keats: ...the advice that my, advice of my lawyer...is don't say anything until you have talked to a lawyer and that's what I've

already gone against that advice...by talking. And now I'm trying to...

Cst. MacKinnon: And you know what, that's good advice...

Mr. Keats: No I understand. I appreciate that.

Cst. MacKinnon: So, the lawyers will always tell you that. But then they hang up the phone and then their life goes on...

A few minutes later, Mr. Keats says, "I'm afraid, the same as I said to him, I tried to..."

Cst. MacKinnon: Here, let me put it this way, okay.

Mr. Keats: But if I say something more to you now and I say it incorrectly, my career is already over, my life is already over.

[29] The interview continues, with Cst. MacKinnon telling Mr. Keats "You need to tell the truth." (p.107, 2:13 p.m.)

Mr. Keats: I want to tell the truth...I have told the truth. I'm trying to tell you guys I no longer wish to speak to you...And I don't know how many times I'm gonna have to say it.

Cst. MacKinnon: The thing is though James, we're not done speaking with you okay.

Mr. Keats: Okay then I apologize, but I'm not gonna talk to you anymore. (p.107)

Cst. MacKinnon: And that's fine. So you can listen, okay.

[30] She later tells Mr. Keats that he is at a crossroad and is being given an opportunity-to be known as the paramedic who did this and then lied about it, or

the ‘guy that stress got to’ who made a bad choice. “Your son’s gonna look back on this probably for the rest of his life.....You need to tell the truth so we can work through this. Okay. Did you have sex with B.?” (p.109) When Mr. Keats says ‘no’, Cst.MacKinnon says, “Okay. I don’t believe that.” Later, Mr. Keats, in a barely audible voice says, “Because I want to talk to a lawyer.”

[31] Within a few minutes, he once again says he wants to speak to a lawyer “so I know that I can say things properly. That’s all.” (p.111). Cst. MacKinnon tells him, “Okay. Well we’re beyond that right.”

[32] From about 2:25 p.m. until 2:47 p.m., Cst. MacKinnon talks to Mr. Keats, telling him that she knows he had sex with B., referring to the sacred trust we have in paramedics, telling him that his son will remember the five police cars showing up at the ball field... “Dad got arrested at my ball game, he didn’t admit to anything, evidence shows that he’s guilty...he lied the whole time...He’s gonna zero in on the fact that you didn’t tell the truth...We can’t work through anything if we are not talking...It’s your job to set this straight. Don’t throw away the last twenty years of your life over one mistake...I’m gonna let you think for a little bit, okay.”

[33] Cst. MacKinnon leaves and Cst. Rose-Berthiuame enters the interview room at 2:55pm, and reminds Mr. Keats that his rights still apply. “You know you don’t have to talk to me.”

Mr. Keats asks, “Is there a way I can see those rights again?”

Cst. Rose-Berthiuame: Okay, I can tell you about them.

Mr. Keats: I asked to speak to a lawyer a number of times.

Cst. Rose-Berthiuame: Yep

Mr. Keats: I know that I already...

Cst. Rose-Berthiuame: And it is my understanding that it, sort of interject there, bud, but it’s my understanding that you, that you have spoken with a lawyer, right?

Mr. Keats: I spoke with him in the very beginning when I was...

Cst. Rose-Berthiuame: And he’s given you some advice and that, right?

Mr. Keats: To not talk until (very low voice)

[34] After telling Mr. Keats that he is glad that he understands his rights, he reminds him that he has already spoken to a lawyer. He also tells him that “whether or not you may answer those questions, James, or you speak to us, is entirely up to you... I’m gonna talk to you just like this and show you all kinds of respect because...I do respect your rights and I do respect you James. ...whether or not you answer any of these questions is up to you, okay.” Mr. Keats: How long?

[35] Cst. Rose-Berthiame once again reminds Mr. Keats that his decision whether or not to speak to the officer is “entirely up to you.”...But if I didn’t come in here and chat with you, alright, I wouldn’t be doing my job...(p.119)

[36] He then speaks to Mr. Keats, repeating some of the earlier themes, the importance of understanding why this happened, that the forensic evidence is substantial and will show that the offence happened, that he himself is certain that the offence occurred. He talks for approximately 10 minutes, suggesting that Mr. Keats committed the offence by acting on pure emotions, in which case it was a mistake. Alternatively, he suggests that Mr. Keats committed the offence as a calculated act. When this monologue ended at 3:11p.m., Mr. Keats, still seated, is leaning into the wall.

[37] At 3:14 p.m., Cst. Rose-Berthiame, after reminding Mr. Keats that he does not have to answer, asks him if he is sorry for what happened or does he just not care. (p.123) For the next 30 minutes, Cst. Rose-Berthiame talks to Mr. Keats, telling him “it’s up to you to explain yourself and to explain your actions. ...the investigators can only present the evidence...and that is James had sexual intercourse...It’s factual, right. It’s for the courts. And when they say they can’t tell your story as to why this happened...People do forgive James, and people can

understand... You're thinking about your wife, you're thinking about your son, you're thinking about your job. You're thinking about your friends and what everyone's gonna think... The evidence is going to speak for itself... that you did have sexual intercourse with this elderly lady. Whether or not you speak with me here or not, that's the foregone conclusion... I wouldn't be giving you two cents... if I didn't think you were a good person and that deserved a chance to tell your side of the story... Only you can tell your side of the story... And it's important that you have the opportunity to tell yours..."

[38] After telling Mr. Keats that he has no doubt that "if he could turn back the hands of time" he would not have had sexual intercourse with that elderly lady..." Would you. Or maybe you would. But only you can say that.... Maybe James is a sexual predator... or emotion got the best of you (p.126) You didn't mean to hurt that woman... Look at me. Look at me. ... cause Bud you didn't do a very good job of covering it up.

[39] The dichotomy set up is that Mr. Keats acted "on pure emotion" or this was a calculated, planned act... "Based on the physical evidence that's been gathered... I believe that you didn't plan it. ... I believe you're not some psychopath... We've heard from one person. We're giving you the opportunity to

hear from you as to why this happened.....we're beyond the point of say whether or not it happened...why did this happen? It takes courage to admit when we're wrong...Are you the predator? Are you the person whose emotions got the best of him...I don't think you're the predator, but I don't know...

[40] Cst. Rose-Berthiame leaves and while Mr. Keats is alone in the interview room he whispers "home soon" (p.129, 3:51 p.m.)

[41] Cst. Collier returns, telling Mr. Keats, "We're done. Gonna shut it down here. Just wanted to give you that last opportunity. Before ending the interview, he sets out details of the allegation, telling Mr. Keats "...your partner came upstairs, the door was closed, she was laying in the bed and you were kneeling beside her. That's gonna be an interesting one for you to have to justify. I'm gonna leave that with ya because you haven't gave me anything to go on about your side of the story...And I know her side of the story... I know...what we're gonna be putting forward to the Crown for prosecution. I'm leaving you with that. Is there anything you want to say to me about that?"

Mr. Keats: No.

Cst. Collier:Is there anything you want to say before I end this?

Mr. Keats: (low tone) I just want to speak with a lawyer...

Cst. Collier: Okay

Mr. Keats: ...And then I'll go from there.

[42] The interview ends at 4:08 p.m.

[43] Mr. Keats is remanded, after which he asks to speak to Cst. Collier at 5:30 p.m. Before asking questions of Mr. Keats, Cst. Collier gets confirmation from Mr. Keats that he does wish to speak to him. Cst. Collier tells Mr. Keats that nothing has changed, he is still facing the same charges and he has been remanded to Burnside. Mr. Keats replies 'yes'.

Mr. Keats: I want to talk...I keep wanting to talk to a lawyer, but I'm not gonna get to see a lawyer. And I don't want it to..., I can't handle the fact that people think, even if it's now don't get me wrong, even if it's you guys, I don't want anybody to think that I did something wrong. I can't wait to talk to a lawyer, I'm sure it's the wrong thing they'll tell me, do it done, but ...you guys did your job and you did it very well...

Cst. Collier: You know you're not being forced to tell me anything,

Keats: I'm not, I'm saying this.

Cst. Collier: And you understand that you're telling me this on your...

Mr. Keats: My own free will.

[44] Over the next hour and a half, Mr. Keats provides a statement to Officer Collier.

VOLUNTARINESS

[45] The position of the Crown is that voluntariness has been met with respect to both statements. Further, the post-remand statement of Mr. Keats is a separate statement, having been given at the insistence of the accused. The Crown relying on *R. v. Reeves* submits that once a judicial remand has occurred, the arbitrary nature of the detention has ended.

[46] Counsel for Mr. Keats argues that this was one statement-separated by a remand hearing, with the post-remand interview being a continuation of the interview that had ended just after 4 p.m. Mr. Keats' requests to speak to counsel were intertwined with his efforts to exercise his right to silence. When considered in this light, Mr. Keats told the police at least 24 times that he did not wish to speak to them. Repeatedly, Mr. Keats was presented with the limited choices, for example, that he was a sexual predator or this was a one-time incident. The position of Ms. MacAulay is that Mr. Keat's right to silence was breached and therefore the first statement is inadmissible. As for the post-remand statement, the

defence position is that this was a continuation of the same statement that had been taken earlier, and should not be admitted into evidence.

[47] Earlier I set out some general legal principles with respect to the issue of voluntariness, and referred to the *Singh* decision. In that case, the accused was charged with murder. During police interviews, the accused stated on 18 occasions that he did not want to make a statement. In response, the police either confirmed his right to be silent or persisted in laying out facts and evidence against him. During the interview, Mr. Singh made incriminating statements. The Supreme Court upheld the admissibility of those statements. In doing so, Charron J. stated:

What the common law recognizes is the individual's right to *remain* silent. This does not mean, however, that a person has the right *not to be spoken to* by state authorities. The importance of police questioning in the fulfilment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. Therefore, the common law also recognizes the importance of police interrogation in the investigation of crime. (para. 28)

[48] In holding that police are not precluded from trying, in a legitimate way, to persuade the accused to speak, Justice Charron also said:

[45]. The Court in *Hebert* stressed the importance of achieving a proper balance between the individual's right to choose whether to

speaking to the authorities and society's interest in uncovering the truth in crime investigations. As I stated earlier, the suspect may be the most fruitful source of information. While the fact of detention unquestionably triggers the need for additional checks on police interrogation techniques because of the greater vulnerability of the detainee, the moment of detention does nothing to reduce the suspect's value as an important source of information. Provided that the detainee's rights are adequately protected, including the freedom to choose whether to speak or not, it is in society's interest that the police attempt to tap this valuable source.

It was also recognized in *Singh*, however, that should the police persist in interviewing a detainee who has repeatedly stated that he wishes to remain silent, there may be a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities.

[49] During the first interview, Mr. Keats told the police on more than 20 occasions that he did not wish to speak to them. I agree with defence counsel that on the facts of this *voir dire*, Mr. Keats' requests to speak to a lawyer were intertwined with his wish to exercise his right to silence. Several times during the interview Mr. Keats told the interviewer that he wished to speak to a lawyer, specifically in the context of exercising his right to silence. Examples of this intertwining are as follows:

“I don't want to talk anymore. I want to wait until I see a lawyer, I want to see a lawyer, I want to sit down with that lawyer and I want to talk to a lawyer. I don't want to speak to you guys anymore.” (p.97, 1:45 p.m.)

“I want to speak to legal counsel so I can ensure that whatever I say is said properly.” (p.104)

When Cst. MacKinnon tells Mr. Keats “It’s a pretty bizarre thing to say.” Mr. Keats (barely audible), replies, “Because why I want to a lawyer” (p.110)

“I want to speak to a lawyer so I know that I can say things properly.” (p.111)

[50] This interview started and finished with Mr. Keats attempting to exercise his right to silence. Shortly after 9:30 a.m. Mr. Keats expresses his concern to Cst. Collier that he “did not want to say something” (p.3). As the interview is coming to an end 6.5 hours later, Cst. Collier asks Mr. Keats if he wishes to say anything. Mr. Keats’ reply is “I just want to speak with a lawyer.” (p.131)

[51] Over the course of 6.5 hours, Mr. Keats’ repeated assertions that he did not wish to speak to the police were deflected or ignored. Meanwhile the questioning and monologues continued. Given that each case is fact specific, I note that in *Singh*, in contrast to this case, voluntariness had been conceded and the interviews were of relatively short duration- 70 minutes during the evening and 47 minutes the following morning.

[52] On the facts of this case, I find that the continued questioning of Mr. Keats in the face of his repeated assertions of his right to silence denied him a meaningful choice whether to speak or not. I find that voluntariness has not been established.

[53] Further, I find that the police strategy in repeatedly telling Mr. Keats that they know he is guilty, that this is his opportunity to talk, that it was important for him to give his side of the story, when considered in the context of the entirety of this interview, contributed to a breach of his right to silence and contributed as well to an atmosphere of oppression. For example:

1. Cst. Collier: When it comes down to court day and there's a witness up on there, an elderly lady that's giving a statement to say this is what happened to her and we can put you in the room and you were in there and if any DNA comes back and there's DNA where it shouldn't be...

Mr. Keats: Right

Cst. Collier: You were given an opportunity here today to explain your actions if it was a good choice or if it was a bad choice. ...if it goes to the point when you go in there and you don't say anything, but there's the evidence and this is an older lady saying. See what we're getting at?

2. Cst. Rose-Berthiaume: ...the investigators can only present the evidence...and that is James had sexual intercourse...It's factual, right. It's for the courts. And when they say they can't tell your story as to why this happened...People do forgive James, and people can understand...You're thinking about your wife, you're thinking about your son, you're thinking about your job. You're thinking about your friends and what everyone's gonna think...The evidence is going to speak for itself...that you did have sexual intercourse with this elderly lady. Whether or not you speak with me here or not, that's the foregone conclusion.

3. Cst. Collier: ...your partner came upstairs, the door was closed, she was laying in the bed and you were kneeling beside her. That's gonna be an interesting one for you to have to justify. I'm gonna leave that with ya because you haven't gave me anything to go on about your side of the story...And I know her side of the story... I know ... what we're gonna be putting forward to the Crown for prosecution. I'm leaving you with that.

[54] Similarly, the police strategy of repeatedly telling Mr. Keats that he was going to have to listen to them further contributed to an oppressive atmosphere.

Again, by way of example:

1. Cst. Collier, tells Mr. Keats "I want you to listen to me. I want you to listen to me good." (p. 93, 1:26 p.m.)
2. Mr. Keats tells Cst. MacKinnon: "I'm trying to say to you guys, I no longer wish to speak with you...And I don't know how many more times I'm gonna have to say it." (p.107, 2:13 p.m.)
To this, Cst. MacKinnon replies, "The thing is though James, we're not done speaking with you." (p.107)
3. Cst. RoseBerthiaume: "I'm gonna talk to you just like this..." (p.119) Soon after this statement is made Mr. Keats asks, "How long?"

Singh does say that there is no such thing as a right not to be spoken to by police.

But each situation is fact-specific. In this case, a considerable portion of the

'speaking' done by the officers, particularly near the end of the first interview

consisted of monologues, references being made to his family, his son's presence

at the ball field at the time of the arrest, his position in the community, whether he

was a sexual predator or if this was an isolated act. This style of 'questioning'

becomes more problematic in terms of voluntariness when it includes, as it did here, officers' assertions that they know he committed the offence and this is his opportunity to put forward his side of the story.

[55] When I consider all of the circumstances of this interview, I am satisfied that there were aspects of the initial interview (in particular between 1:25 p.m. to 4:08p.m.) which were, when viewed objectively, 'distasteful' enough that an atmosphere of oppression existed. Despite this, it should be noted that Mr. Keats did not admit to sexually assaulting B.W.

Is the Second Statement Tainted by the First Statement

[56] The post-remand statement does not appear to be involuntary. As mentioned earlier, the accused requested to speak to Cst. Collier. Indeed, when the Cst. Collier said 'you're telling me this on your, your...' Mr. Keats said, "my own free will." The law is clear. Statements which are sufficiently connected to an earlier involuntary confession may be excluded.

[57] Clearly the concerns I raised with respect to the first statement do not arise when one considers the circumstances of the second interview. Mr. Keats, on his initiative, requested to speak to Cst. Collier. Further, none of the oppressive elements which were at play during the taking of the first statement were present

during this second interview. Cst. Collier asked questions to which Mr. Keats provided answers. The ‘tainting features’ which resulted in the first statement being found inadmissible are non-existent during the second interview.

[58] That being said, it must be kept in mind that a subsequent confession may be found to be involuntary “if the fact that the first statement was made was a substantial factor contributing to the making of the second statement.” *R. v. I. (L.R.) and T. (E.)* [1993] 4 S.C.R. 504.

[59] The second statement commenced about 1.5 hours after the first statement had come to an end. Obviously, both statements were taken while Mr. Keats was in police custody, and the interviewing officer, Cst. Collier, had been involved in the taking of the first statement. It should be noted that early during the second interview Mr. Keats indicates that he ‘keep(s) wanting to talk to a lawyer, but I’m not gonna get to see a lawyer.’ He also tells the officer that he was not a predator. Further, he states, “I didn’t want you guys to think I’m a liar and everything and I knew that when I was leaving here, that’s what would happen.” These assertions with respect to not being a predator and not wanting to be considered a liar relate directly back to the first interview.

[60] In conclusion, given the close temporal connection and Mr. Keats' stated rationale for wishing to speak to the officer, that he did not want to be considered a liar or a predator, I find that the second statement was causally connected to the first. The second statement is therefore ruled involuntary.

Has a Breach of Section 9 of the Charter been Established

[61] My starting point is section 503. (1) of the Criminal Code:

503. (1) A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 494(3) or into whose custody a person is placed under subsection 163.5(3) of the *Customs Act* shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law:

(a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period,

[62] To recap the relevant evidence on this issue: Mr. Keats was arrested at 5:59 p.m. on May 30th in Kentville, transported to Windsor (Rawdon), then taken to Enfield, arriving there at 7:56 p.m. Mr. Keats was interviewed from 9:30 a.m. until 4:08 pm on the 31st. He was remanded after 4:08p.m. and before 5:30 p.m.

[63] I am aware that Ms. MacAulay, in summing up, stated that Mr. Keats was remanded at 4:45 p.m. but upon reviewing the evidence I was unable to find

evidence specifying the precise remand time. That being so, I will make a finding of fact that it was no earlier than 4:08 p.m. and before 5:30 p.m. I find that the Mr. Keats was detained in police custody for slightly over 22 hours before being brought before a Justice.

[64] In the context of determining whether or not Mr. Keats was brought before a Justice “without unreasonable delay”, I am left with a number of unanswered questions with respect to why Mr. Keats was not brought before a Justice earlier than he was. Having said that, I am mindful that section 503 does not require that Mr. Keats be brought to a Justice immediately, forthwith, or before the expiration of 24 hours. The law requires that he be taken before a Justice “without unreasonable delay.”

[65] A decision was made to transport Mr. Keats from Windsor to Enfield. Cst. Collier testified that Rawdon (Windsor) came under Enfield and that they had been requested to use the room in Enfield. Cst. Francis, whose involvement in this was quite limited, believed that the plan was for GIS from Bible Hill to bring Mr. Keats back to Windsor to lodge him. Cpl. Robinson, who, unlike Cst. Francis, had direct involvement in and knowledge of the arrest and post-arrest plan testified that Mr.

Keats was going to be brought to Windsor which is under the Enfield detachment, Enfield being closer for two of the officers involved.

[66] The evidence shows that this was a planned arrest in that a meeting had taken place in advance of the arrest. Was there any discussion at that meeting with respect to the requirement of section 503 that Mr. Keats was going to have to be brought before a justice “without unreasonable delay”? Was there any consideration as to whether Mr. Keats would be brought to Windsor Court or, for that matter, whichever Provincial Court near Enfield was sitting on the 31st? I say this, because I am prepared to take judicial notice that generally speaking, Provincial Court matters arising out of Mount Uniacke are dealt with here in Windsor. Regardless, Mr. Keats could have been brought to any available Provincial Court, including one closer to Enfield on the 31st. Was this discussed? Or was a decision made during that meeting to hold Mr. Keats overnight, question him all day Friday and then deal with him through the JP centre. My understanding is that the JP Centre only deals with people in custody after 4 pm but am reluctant to take judicial notice of that because I could be mistaken. Likewise, I am reluctant to take judicial notice as to whether the JP Centre deals with arraignments when courts are sitting or if the JP Centre ever conducts after hour bail hearings. Again there was no evidence put before the Court with respect to any of these issues.

[67] What is clear from the evidence is that a decision had been made that Mr. Keats would not be questioned until the morning of the 31st. The reason for delaying the interview was, according to the evidence, that the officers had a long day, wished to prepare for the interview and it was an ongoing investigation. As for an ongoing investigation justifying this delay in questioning Mr. Keats, a review of the evidence shows that Cpl. Robinson had queried a police information portal and was aware that there was an ongoing investigation in Halifax. The question then becomes: did the fact that there was another ongoing investigation justify waiting until the morning to question Mr. Keats? Based on the evidence, the answer to that question is no. I do find, however, that the police investigation which did justify detention of Mr. Keats was the interview of him which was going to be carried out.

[68] The law is clear. One who has been arrested may be detained by police in order that the police may continue their investigation into the charge(s). *R. v. Storrey*, [1990] 1 S.C.R. 241. In that case, Mr. Storrey had been detained for 18 hours before he was taken before a justice. He had been arrested in the evening and the police wished to carry out an identification parade. Given that the witnesses lived outside the jurisdiction it was unlikely that they could be found and brought to the line up before the next morning. The delay in taking Mr. Storrey before a

justice was found to be lawful under 454(1) of the *Code* (predecessor section to 503) and not to be a breach of section 9.

[69] The reference to 24 hours in section 503 is the "outer limit" of the permissible detention. A detainee is to be brought before a justice without unreasonable delay. In other words, an unreasonable delay may occur in less than twenty-four hours. As noted in *R. v. Koszulap*, s. 494, now s. 503 of the *Criminal Code* does not give a police officer "an unqualified right to keep such person in custody for the purposes of investigation for a period of 24 hours before taking such person before a Justice". The police must take the person before a justice without unreasonable delay and that the 24 hours is simply the outer limit of the time span.

[70] The justification given for postponing the interview until the morning of the 31st was that the officers wanted to be rested when they conducted this interview. In this case, complying with section 503 and ensuring that a detained person is taken before a justice "without unreasonable delay" ought to have taken precedence over the officers being rested. The questioning of Mr. Keats should have at least gotten underway the evening of the 30th. Mr. Keats was in police custody approximately 15 hours before the interview even began.

[71] As I indicated earlier, although there was a pre-arrest meeting I heard no evidence with respect to what steps were going to be taken to ensure that Mr. Keats would be brought to court here in Windsor or elsewhere, or brought before a justice without unreasonable delay.

[72] In the context of discussing the predecessor to s. 503, Martin J.A. wrote in *R. v. Koszulap*, at para. 32:

The administration of criminal justice in this country is predicated upon the due observance of fundamental safeguards. It is the duty of the courts, at all levels, to be vigilant in making sure that these safeguards are not overlooked or ignored.

In *R. v. Simpson*, at para. 36, Goodridge C.J.N. stated,

Section 503 may be one of the most important procedural provisions of the Criminal Code. The liberty of the subject is dominant. A person not convicted of an offence should never be held in custody except in accordance with constitutionally valid provisions of the Criminal Code or other legislation.

[73] My conclusion, based on all the evidence, is that the reference in section 503 to “a period of 24 hours” was treated as “an unqualified right to keep” Mr. Keats in custody for up to 24 hours.

[74] In conclusion, I find that the detention of Mr. Keats was not authorized by law and as such was arbitrary and a breach of Mr. Keat’s section 9 right to be free from arbitrary detention.

[75] The applicant having established a breach of his section 9 right, I will turn now to section 24 (2) of the *Charter*. Under s. 24(2), evidence will be excluded where: (1) the evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by the *Charter*; and (2) admitting the evidence would bring the administration of justice into disrepute.

[76] In determining whether the evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by the *Charter*, Justice Moldaver in *R. v. MacK*, [2014] S.C.J. No. 58, para. 38, set out the nature of the connection required between the violation and the evidence:

The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A "remote" or "tenuous" connection between the breach and the impugned evidence will not suffice (*Wittwer*, at para. 21).

[77] I find that this breach of s. 9 was temporally and contextually related to the obtaining of the statement, in that the interview occurred within the period of unreasonable delay that constituted the breach. I also find that there is a causal relationship between the breach and the evidence. If not for the arbitrary detention,

the statement would not have been made. Having found that the evidence was obtained in a manner that infringed section 9, I will now turn to section 24 (2) of the *Charter*.

[78] In determining whether admitting the evidence would bring the administration of justice into disrepute, I must consider the seriousness of the Charter infringing state conduct, the impact of the breach on the Charter protected interests of the accused, and society's interest in the adjudication of the case on its merits.

[79] With respect to the seriousness of the state conduct here, I have found a lack of regard by the police on the duty imposed on them by s. 503(1)(a), in favour of their desire to continue their interview. There was no indication that any consideration was given to the requirement that a detainee is to be brought before a justice without unreasonable delay. I find this to be serious conduct and weighs in favour of exclusion.

[80] The impact on Mr. Keats' *Charter's* protected rights was fairly serious. I think this weighs in favour of exclusion as well.

[81] Finally, there is the interest in the adjudication of this case on its merits.

Exclusion would not undermine the opportunity to have this case decided on the evidence. On balance I find this factor also favours exclusion.

[82] Accordingly, the statements of Mr. Keats will be excluded.

Claudine MacDonald, JPC