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1991 SSB No. 402

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

INFORMANT

- and -

KENNETH JAMES MUNROE

ACCUSED

HEARD: At Shelburne, Nova Scotia, before the Honourable Mr. Justice D.W. Gruchy on June 4 and 5, 1991

DECISION: June 6, 1991

COUNSEL: Mr. J.H. Burrill
Mr. R.M.J. Prince, Crown Attorneys

Mr. C.M. Garson, Defence Attorney

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GRUCHY, J. (Orally)

(The accused, Kenneth James Munroe, was charged with the first degree murder of Hallett Corkum on or about the 1st day of August, 1989. Several statements were taken from the accused. Prior to the empanelling of the jury a series of voir dires were held to determine the admissibility of such statements. The following is the decision rendered orally on the completion of voir dire # 2.)

On August 17, 1989, Constables Urquhart and Oldford went to the residence of the accused. They felt that at that time they had reasonable and probable cause to arrest the accused for the murder with which he was subsequently charged. Indeed, that cause had been crystalized by Russell Schumacher who had attended at the R.C.M.P. station on August 9 and had told Constable Urquhart of a plan which the accused had conceived

whereby Hallett Corkum would be robbed and/or possibly injured or killed. The officers had elicited the assistance of Schumacher in an attempted and eventually aborted recording of a conversation between Schumacher and the accused. I will say more of this below, but it does become clear that the accused realized what was being attempted.

The two officers picked up the accused at 8:39 p.m. at Lake George near Shelburne. Constable Urquhart went to the front door of the accused's residence and took him by his arm and escorted him to the police car, relieving him of a large type of pocket knife which he had on his person. He was then taken directly to the R.C.M.P. station in Shelburne. The accused showed no signs of drinking alcohol or any mental or physical problems. He was told to listen very carefully and he was told of his right to counsel, which the accused appeared to understand. He was read the standard police caution or warning, which he appeared to understand. The accused appeared nervous and flushed. Urquhart noted a pulsing of his temples and Constable Oldford noticed a similar symptom.

The accused was taken directly to the interview room with no interference by any other person. The room was described. There was nothing oppressive about the physical layout of the room. By pre-arrangement the conversation between the police and the accused was to be recorded surreptitiously, and it was. It was done in that fashion as the police said they were concerned that the presence of a recording device would make the accused nervous and reticent.

The accused and police entered the building at 8:50 p.m. The interview began a minute or two later. The police made certain that any contact with counsel by phone or in person was not recorded. There was a phone in the interview room,

together with a directory and the accused was free at any time to contact counsel. He was repeatedly told of his right to counsel. The recording is not of a particularly good quality. There was a fan running in the room and the sound of it interfered with the quality, and occasionally the accused, or perhaps an officer, moved things on the desk and that created noise. A transcript of the interview recording was made. Constable Urquhart has listened to the tape and has read the transcript. He has said, and I accept, that the transcript is accurate. As the tape was played in Court I, as well, read the transcript and I felt it to be accurate, but clearly, subject, of course, to the limitation that I could not recognize voices and did not make any use of replays to check accuracy. It did, however, appear to me to be accurate.

At 9:00 o'clock the accused asked for counsel. The officers assisted the accused in obtaining his lawyer's phone number. They did not record his phone call and immediately stopped all questioning of any nature.

Mr. Miller, then the lawyer for the accused, is according to the officers, a man who practices in criminal law. He arrived at the station at 9:30. He was given a private office with the accused where there was no recording device. He was told what charges were pending against the accused before he interviewed him and was told of some of the evidence. Mr. Miller made it clear to the R.C.M.P. that he had advised the accused that he did not need to answer any questions and that he should not do so. The R.C.M.P. on the other hand made it clear that that was the right of the accused, but that they intended to continue the interview. Constable Urquhart said that while that was the right of the accused and his counsel, they also had a right to question him. Mr. Miller saw the accused from 9:35 p.m. to 9:50 p.m. He then had a conversation with Constable

Urquhart when their respective positions were stated and counsel's advice was repeated. The officer said that the accused would be allowed to call counsel any time he wanted and the phone and the book were right there. Counsel said to the accused in the presence of the officers, "Call me if you need me. I'll be there."

After Mr. Miller left, the interview began.

After approximately fifty minutes of monologue by Constable Urquhart, or soliloquy as Crown counsel has called it, there was an interruption. Mr. Miller had come back to the station. A message was given to the accused that if he wanted, Mr. Miller would come into the room with him. The accused gave his reply which is found at page 49 of the transcript of the interview. He said, "No, I don't want him in. I just want to go to jail wherever the hell you're going to take me"..."Nah! it's all right, tell him to go home."

There was an interval between Mr. Miller's arrival at the station and when the message was given to the accused but in that time nothing inculpatory was said. After the interruption the monologue continued. In total, the monologue or lecture or plea or soliloquy lasted for 55 minutes, essentially only interrupted by the accused. On several occasions the accused suggested or requested that the questioning be put off until the next day but the officer refused politely and continued. At other points in the conversation the accused requested that the statement be given the next day. Those requests were related to the timing of the statements; they did not appear to be in the form of a refusal. The monologue consisted variously of appeals to conscience, appeals to religion, references to the acquaintanceship of the officer to the accused and his family, flattery of the accused, flattery of the family of the accused,

accusations of the murder, pleas to get it over with, statements of the knowledge of the police as a result of the investigation, a recognition of the agony of mind of the accused, pleas that the accused would feel better if he talked about what had happened. There is no question that the monologue was persistent.

After the monologue of slightly less than an hour, the accused indicated a willingness to give a statement. The timing of the interview was as follows: Mr. Miller left at 9:50 and the monologue recommenced. At 11:00 o'clock the Constable started to write the statment. At 11:22 the first part of the statement was signed. After that, further questions were put to the accused and he answered them, apparently willingly. The tape shows that he was quiet and subdued in his manner. There was no sign of antagonism by the accused towards Constable Urquhart and none by that officer to the accused. At one point the accused asked that Constable Oldford not be present during the taking of the statement because he, the accused, apparently had taken a dislike to that officer.

If I thought there was any oppressive atmosphere created by the monologue (and I am not necessarily saying that I did) that impression would have disappeared during the statement itself. Oppressiveness, of course, must be judged largely by the subjective effect upon the accused. By listening to the monologue being delivered one had the impression that the accused was at first taciturn and uncommunicative. But the atmosphere seemed to change and that change was described by Constable Urquhart in his testimony. I perceived that the very atmosphere which I had felt throughout the monologue seemed to dissipate. That was as Constable Urquhart described it.

There is an excellent passage on the matter of oppression quoted in **Marin's Admissibility of Statements**, (7th

ed.), 6 from **R. v. Priestly**, (1966), 50 Cr.App.R. 183, as follows:

> There I mentioned that I had not been referred to any authority on the meaning of the word "oppression" as used in the preamble to the Judges' Rules, nor would I venture on such a definition, and far less try to compile a list of categories of oppression, but, to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary...Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is a tough character and an experienced man of the world.

In this regard, although not apparently important at first blush, the reference of the attempts by Schumacher to record conversations are of relevance for various reasons. Firstly, the accused's reference to the attempts at the recording was done in a mocking manner by the accused. The Constable referred to it as being perhaps a return of cockiness. It certainly indicated to me that the accused had his own independence to the point where he was able to mock the police somewhat lightheartedly. Secondly, it indicated to me that the accused had known from the time of the attempts onward that the police were after him. He had recognized the wire and knew what it meant. Therefore, while the precise time of the apprehension of the accused by the police had not been known or guessed by the accused, it surely could not have been any great surprise to him. But in this context, at the point of mocking the police, clearly the accused had his own operating mind and if there had

been any type of oppression (and I'm not saying there was), it was all over at that point. There was also clear evidence of his operating mind in that the accused refused to have Constable Oldford ("that idiot") present while giving his statement. Later he refused to go to the crime scene. Those are all items of evidence of his independence and of his own operating mind.

The Constable said the accused appeared to be relieved to be telling his story. I believe that to be true. The accused had previously called a lawyer and had had the experience of having the interview halted until he obtained legal advice. He had a telephone beside him throughout the interview. He made no attempt to avail himself of it. His counsel returned to the R.C.M.P. station and offered to come into the interview room. The accused declined that opportunity. This is significant, both from the point of view of his right to counsel and, as well, to show that if the interrogation was oppressive, the escape hatch was present and available.

I am grateful to counsel for having set out the various issues in law for my consideration. At the risk of repetition, I will set forth the subjects as they were set before me and I will make the necessary rulings and outline very briefly my reasons. I am sure I will probably miss some of the subjects which have been suggested but the following are subjects I wish to address:

1. Voluntariness
2. Oppressiveness and the Operating Mind
3. The Right to Silence, as enunciated by **R. v. Hébert** (1990), 57 C.C.C. (3d) 1 (S.C.C.) and by the **Charter of Rights**
4. The Right to be Informed, as required by Section 10 of the **Charter**
5. The Right to Retain and Instruct Counsel, pursuant to Section 10 of the **Charter**

6. Surreptitious Recordings

In reaching my decisions on these various matters I've referred extensively to material found in **Marin** (supra) which I found to be a most useful text in a trial setting.

1. Voluntariness - At the request of both counsel, I have tried to keep in mind the totality of the circumstances of the accused, his apparent personality and the apparent personality of the interviewers in the whole context of the statements. While it is possible to go through the whole of the interview and find individual items which may be indication of compulsion, I have to say that the whole of the atmosphere convinced me that there was voluntariness. I am satisfied that the statement or confession given by the accused in this case was voluntary within the meaning of **Hébert** (supra). There was no temporal inducement offered to the accused. The inducements were to relieve his conscience and to explain to the police and to the community what had happened in the killing. It was similar to the situation in **R. v. Martell** (1984), unreported No. C.R. 3095 (B.C.S.C.) where Finch, J. said at p.5:

> To vitiate voluntariness, the inducement must contain some hope of advantage or some fear of prejudice. In other words, the accused must have been led to believe he will obtain a benefit, not otherwise available by making a statement, or if he does not make a statement, he might suffer some harm.
>
> Neither of those elements is present in this case. The strategy and tactics followed by the police were all premised on the suggestion the accused would feel better himself if he told the truth. That is not the sort of advantage, nor the sort of prejudice, which the case authorities describe when considering the question of voluntariness.
>
> On my view of the law, an appeal to the accused's conscience with the suggestion that he will feel better if he tells the truth, is within the legally acceptable

limits of police interrogation...

Further, at page 6 of the judgment, he continued:

> The safe guards erected by the law against the admission of statements extracted against an accused's will were designed to ensure that only statements which have a probability of truth would be accepted in evidence....

The holding out, if that was what it really was, that one-sided facts would not be presented to the Court and a threat that the facts of the killing would be presented coldly were not, in my view, intended nor could they seriously be perceived as inducements or threats outside the legally acceptable limits.

I find that the police did not in any way hold out to the accused that by co-operating he might be afforded bail. Clearly, as the interview developed, the accused did not get that impression and in fact I find that such an impression was not present. I cannot accept the notion that the various requests to tell the truth so that people would know was any more than an invitation or even cajolery to embark on telling his story in the sense referred to by Madam Justice L'Heureux-Dube in **R. v. Smith**, 50 C.C.C. (3d) 308.

On the matter of voluntariness it is necessary for the Crown to show the activity and actions of all persons in authority who came into contact with the accused preparatory to making the statements. In this regard the defence has taken the position that Russell Schumacher may be a person in authority and that his activity with the accused has not been accounted for. I hold that for the purposes of this matter Mr. Schumacher was not a person in authority.

2. <u>Oppression and the Operating Mind</u> - As I have found above, there was no meaningful oppression present here. While I have

described the monologue of the police officer variously, perhaps the best description of it was that of an exhortation. But it did not surpass the bounds of reasonableness. I cite various factors which I have considered:

(a) The accused was not exhorted or questioned for an inordinate length of time. Time, of course, has a subjective effect on an accused but in this case the exhortation lasted about one hour. The taking of the statement consumed about another hour. I contrast that length of time to the questioning in **R. v. Owen** (1983), 4 C.C.C. (3d) 538 - some thirteen hours in much less than ideal conditions - and **R. v. Fayant** (1983), 6 C.C.C. (3d) 507, when a statement was given fourteen hours after the detention of the accused. I reviewed carefully the decision of MacDonald, J.A. in **R. v. Owen** (supra) which I found very helpful and informative. His synopsis of the law as of that date, prior to the **Charter**, forms an excellent platform upon which an understanding of the law regarding the voluntariness of statements may be based. Having reviewed the law and the facts of the case before him, he summed up the questions to be addressed in any case such as this in the following terms:

> I doubt if any person suspected of committing a crime likes to be questioned by police officers.

and further he says:

> Just because suspected persons are questioned and make statements against interest does not mean that such statements are inadmissible in evidence as not having been made freely and voluntarily. The question always is whether there are circumstances connected with the taking of the statement from which it may be inferred that it was not freely and voluntarily made either because of some

> fear of prejudice or hope of advantage made or held out by a person in authority or because of a doubt whether the statement was the utterance of an operating mind.

(b) The tone of the interview was not oppressive. It was clear that there was an escape available. The accused was apparently receptive to that tone. I accept the evidence of Constable Urquhart when he described the reactions of the accused to the exhortation. There were times when he wished to defer the questioning but I will address that subject later.

(c) The physical circumstances were ideal. There was nothing oppressive about the office. In fact, the police appear to have gone out of their way to make the accused comfortable.

(d) The accused was sober and not on drugs. He was alert, attentive and responsive. He answered the questions put to him correctly and was well oriented. He showed at all times that he had an operating mind, as that expression is used in **R. v. Hovath** (1979), 44 C.C.C. (2d) 385.

3. **The Right to Silence** and
5. **The Right to Counsel** - For purposes of this decision, I will combine these two subjects. I wish to quote extensively from an as yet, unfortunately, unpublished paper by **The Honourable Jean-Guy Boillard** of the Quebec Superior Court dated January, 1991:

> Once it is established that the person detained was in possession of his mental faculties when he made the statement, it is not necessary to establish that he was able to evaluate the situation or assess the alternatives open to him. This subjective criterion would place an onus on the prosecution which it would often be difficult, if not impossible, for it to discharge. Instead, the determining criterion for

judging whether a confession is admissible will be the assurance that the person detained was able to obtain judicious advice in order to make this choice, by consulting counsel. It is therefore an objective criterion: in fact, if it is shown that the accused was informed at the appropriate time of his right to counsel and that the authorities provided him with the means to exercise it before being questioned, the confession subsequently obtained is reputed to be the result of the deponent's free choice, failing evidence of police behaviour which would have prevented the accused from truly choosing to speak to them.

...

This rule of informed free choice which some believed they had found in **Horvath vs. R.** (Supreme Court)(1979) 44 C.C.C. (2) p.396, 7 C.R. (3) p.97 and **Hobbins vs. R.** (Supreme Court)(1982) 66 C.C.C. (2) p.289, 27 C.R. (3) p.289, does not forbid the police to question a detained person in the absence of his counsel, or to prove statements made by the accused to another person under detention who was not at that time in the pay of the police. Neither does it prohibit reporting statements by the accused which were heard by police officers in disguise, provided the officers did not act intentionally to provoke them.

This new rule does not grant a person under detention an absolute right to silence, where the confession would be admissible only if the deponent was in a position to assess the consequences of this choice and waived his right. On the contrary, although this is the new formulation of the concept of the free and voluntary statement, i.e. in positive terms (to make a free and informed decision to speak to the police or not), rather than negative terms (to speak to the police in the absence of promises or threats), it still remains an objective criterion for admissibility, apart, of course, from the detained person's mental capacity to make a statement.

On this subject Madam Justice McLaughlin in **Hébert** at pages 40, 41 and 42 said:

The decision in **Hébert** does not make obsolete the jurisprudence created at the time when the free and

voluntary nature of confessions was determined by the absence of promises or threats.

In fact, even though the formulation of the rule governing the admissibility of confessions has been substantially modified, the test is still the same. For an out-of-court statement to be admissible, it must be established beyond reasonable doubt that such statement was made freely and voluntarily by a deponent in possession of his mental faculties. This rule stated by a unanimous Court in **Ward vs. R.** (Supreme Court) (1979) 44 C.C.C. (2) p.498, on page 506, 7 C.R. (3) p.153, has not been modified by **Hébert** supra.

...

The absence of hope of advantage or fear of a threat, the lack of a form of constraint and the assurance that the incriminating statements were made by a person in possession of his mental faculties are still important considerations in determining the voluntary nature of the statement, i.e. the result of the choice the deponent has, to speak to the police or not. In the future, this will have to be demonstrated beyond reasonable doubt, as it was in the past. Furthermore, it will be necessary to prove, also beyond reasonable doubt, that the deponent was aware that he had the right to remain silent and that he was able to obtain advice in order to exercise it. This new aspect of the admissibility test set forth in **Hébert** supra is first demonstrated by the usual caution, where it is stated that the person questioned is not obliged to say anything whatever in response to police officers' questions. This evidence is also established by satisfying the trial judge that the deponent's constitutional rights to consult counsel and to be informed of this right have been respected.

Mr. Justice Boillard concluded as follows:

In conclusion, there are two prerequisites for a confession to be admissible. It must be the result of a conscious, considered decision freely made by a deponent who knew that he had the choice to speak to the police or not, or to answer their questions. The trial judge will have to be convinced beyond reasonable doubt that this is the case, once he has heard the evidence furnished at the voir dire.

I am satisfied beyond a reasonable doubt on both these prerequisites.

The defence has said that on four occasions in the transcript the accused refused to give a statement. That is not the way I interpret those occasions. They were all requests to postpone the taking of the statement - not a refusal.

On the final occasion the request for postponement was accompanied by the conditional consent that the statement was to be taken away from "that idiot" (meaning Constable Oldford), a request which was complied with.

4. The Right to be Informed

I find that the accused was advised of the reason for his being detained. He was told that the death of Hallett Corkum was being investigated, he was read his rights to counsel and he was given the police caution. Within minutes of his arrival at the police station he requested counsel. His counsel was informed before he saw the accused what the offence was - either first-degree or second-degree murder. In the course of the interview the questions by the accused convinced me that he knew in fair precision the charge against him. Indeed, the transcript shows that he knew he was being charged with murder.

Constable Oldford made a mistake in his testimony in the preliminary inquiry and mentioned manslaughter as a possible charge. I accept his explanation of this matter.

There was sufficient compliance with the requirement to be informed, pursuant to the **Charter**, as that right is enunciated in **R. v. Smith** (supra). Although not precisely on this point, I want to deal here with the matter of tricks,

artifices, lies or even deceit. **Marin** (supra), at page 230, sets forth the criteria to be applied to determine voluntariness:

> The absence of criteria to be applied has made the tests somewhat subjective. Some have found shelter in the reasons for judgment of Lamer J. in **Rothman** where he said at pp.74-5 C.C.C.:
>
> > The Judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.

I am convinced if Constable Urquhart did resort to a trick or a lie, and I am not sure that what he did could be so classified, it was not such as would shock the community. Indeed, it would be the other way around. The community would be shocked if the police did not do everything reasonable within

their power and within the law to discover the truth. I also find that references to "living here" and "going home" were in no way intended to be, nor could they be seen to be, any sort of an inducement.

There were references to the imprisonment which the accused could anticipate. If anything, the Constable overstated the possible term which cannot possibly be construed as an inducement to confess. It was perfectly clear to the accused that, as far as the police were concerned, he was going to jail. I cannot find any suggestion otherwise and certainly not in the form of an inducement.

5. Right to Counsel

Although mentioned above, I do wish to address this matter again briefly. I find that the accused was given his right to counsel and exercised that right. He also obviously made the informed and free choice to give a statement to the police, albeit, after some exhortation. That right to counsel continued throughout the interview. When his counsel returned to the police station the accused declined his assistance. I accept the evidence of the police officers of the incident surrounding his declining to have his lawyer present. It also seems clear to me that any such right is that of the accused, not the lawyer's. I find that the three obligations in this regard, as set forth in **R. v. Manninen** (1987), 34 C.C.C. (3d) 385 were all met. I further find the decision of Goodridge, J.A. in **R. v. Cuff** (1989), 49 C.C.C. (3d) 65, a case with some strong similarity to the present, to be very helpful.

6. Surreptitious Recordings

The accused was clearly warned that whatever he said

could be used against him. In such a circumstance a recording of the interview is not only permissible but desirable. The fact that the police felt that the obvious presence of the tape recorder would intimidate or inhibit the taking of a statement was accurate and understandable. I found nothing wrong with that position. The police did not mislead the accused in any way. The accuracy of the tape was proven to my complete satisfaction by the combined evidence of the two R.C.M.P. officers and the admission with respect to Constable Rioux.

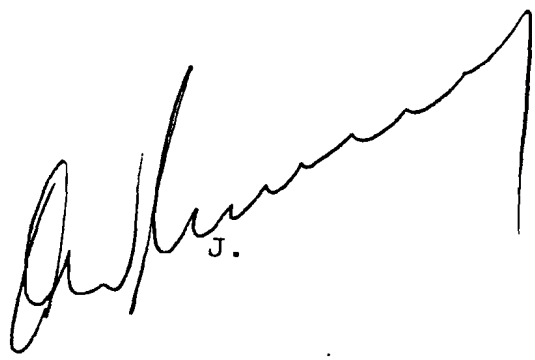
I also find that the communication from the accused to the R.C.M.P. was not a private communication as that term is defined by Section 183 of the Code. The accused had been warned that whatever he said could be used. I also note that this statement was taken prior to the decision in **R. v. Duarte** (1990) 53 C.C.C. (3d) 1. **Marin** (supra) sets forth that **Charter** violations which result in exclusion of a confession should meet two conditions:

1. the infringement must bring the administration of justice into disrepute; and
2. the statement must have been obtained in a manner that infringed or denied any rights or freedoms guaranteed by the **Charter.**

I earlier quoted **Rothman** (supra) in this regard. I now refer to the article quoted by **Marin** (supra) by Professor J.A. Morton in Canada Bar Review, which points out that sometimes the exclusion of a statement may penalize society as a whole rather than a person who has improperly instigated the statement. I can think of no cogent reason in the circumstances before me why I should consider the statement unreliable. I found that it has the ring of truth to it, although that is for the jury.

This was a statement, in my view, of a young man caught in a nightmare, admittedly brought on by himself, but one with whom it would be easy to relate as we have all had nightmares from time to time.

I am satisfied that the statements of the accused of August 17, 1989, were given freely and voluntarily and were the product of a working mind. It may be introduced into evidence in the trial of this matter before the jury. It will undoubtedly require some editing and I am prepared to hear counsel concerning the matter.



J.

Shelburne, N.S.
June 6, 1991