

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

DANIEL HACHE

Transcript of the Decision on the *Voir Dire* of the Honourable Justice L.A. Charbonneau sitting in Yellowknife, in the Northwest Territories, on the 4th day of July, 2019.

APPEARANCES:

M. Fane:	Counsel for the Crown
T. Boyd:	Counsel for the Defence
M. Zemnicky	Victim (By Teleconference)

Charge(s) under s. 268 of the Criminal Code of Canada

INDEX

PAGE

NONE

1 THE COURT: Daniel Hache was charged with
2 aggravated assault following events that occurred on
3 an island on Prelude Lake. A number of people were
4 at a camp on this island on the night in question,
5 including the victim of the offense, Mr. Zemnicky.
6 Initially, this matter was to go to trial, and counsel
7 sought a ruling on the admissibility of statements and
8 utterances that Mr. Hache made at different times.

9 A short time after the conclusion of the evidence
10 on the *voir dire*, because the trial was approaching, I
11 advised counsel that I was ruling the statements
12 admissible, and that I would file written reasons in due
13 course. Some time after that counsel were able to
14 come to a resolution of this matter, and Mr. Hache
15 entered a guilty plea to a charge of assault causing
16 bodily harm. At that point, sentencing was adjourned to
17 allow for the preparation of a pre-sentence report.

18 Because Mr. Hache has pleaded guilty, there is
19 less of a need for me to provide detailed reasons for my
20 conclusions about the admissibility of his statements.
21 However, because the circumstances of this case were
22 rather unusual, counsel asked that I nonetheless
23 provide reasons for my conclusions, and I have agreed
24 to do so. These reasons will not be as detailed as they
25 might otherwise have been, however.

26 First, dealing with the allegations and the
27 statements at issue at the *voir dire*, it appeared

1 undisputed at the time of the *voir dire* that during the
2 night on that island, Mr. Hache had an altercation with
3 Mr. Zemnicky and hit him on the head with an object.
4 Mr. Hache quickly realised that Mr. Zemnicky was
5 seriously hurt. He called the telephone number used to
6 contact emergency responders, police, ambulance, the
7 fire department in the Yellowknife area. Mr. Hache
8 provided the operator information about where he was
9 and how to get there. Police officers and paramedics
10 made their way to the island. Mr. Zemnicky was
11 attended to and transported to hospital. Mr. Hache was
12 placed under arrest and escorted back to the RCMP
13 detachment in Yellowknife.

14 The *voir dire* pertained to the admissibility of
15 utterances Mr. Hache made that night and a formal
16 statement that he gave the next day to the police
17 officer. The first group of utterances were things that
18 Mr. Hache said to the emergency dispatch telephone
19 operator. The first call was made at around 2:00 a.m.,
20 and there were several conversations after that. All of
21 them, except one, were initiated by Mr. Hache. The
22 other one was a call placed to him by the operator. The
23 main topic of conversation during those calls was Mr.
24 Hache trying to explain where exactly they were and
25 how the response team could get there. There was
26 also information conveyed about Mr. Zemnicky's
27 condition.

1 At certain points during those conversations, Mr.
2 Hache recounted the events that led to the altercation
3 with Mr. Zemnicky and described how he hit him on the
4 head with an object. All those conversations were
5 audio recorded.

6 The second set of utterances were things that
7 Mr. Hache said to one of the officers shortly after they
8 arrived at the island at around 3:30 a.m. Those
9 utterances were not audio recorded and were not
10 recorded word-for-word by the officer in his notes. The
11 third statement was taken by Constable Hayward the
12 next day while Mr. Hache was in custody at the
13 Yellowknife RCMP detachment. That statement was
14 video and audio recorded and took place after Mr.
15 Hache had an opportunity to speak to a lawyer.

16 There was no Charter application in this case.
17 The issue at the *voir dire* was strictly whether Crown
18 had proven beyond a reasonable doubt that Mr.
19 Hache's statement were made voluntarily.

20 The legal framework that governs the
21 voluntariness analysis is well established and stems
22 from the cases of *R. v. Oickle*, [2000] 2 S.C.R. 3 *R. v.*
23 *Singh*, [2007] 3 S.C.R. 405 and *R. v. Spencer*, [2007] 1
24 S.C.R. 151. I summarised that framework in *R. v.*
25 *Blackduck*, 2014 NWTSC 58, paragraph 50, and I will
26 not repeat that summary here. The same basic
27 framework applies.

1 A few points need to be noted at the outset.
2 First, even though there were three groups of
3 statements, the key issue for me to decide was the
4 admissibility of the first two groups. This is because of
5 fair concessions made by the parties. The Crown
6 conceded that the officer who took the formal statement
7 used the information gathered in the other utterances to
8 obtain more details from Mr. Hache about what
9 happened. The Crown conceded that if the earlier
10 utterances were not admissible, the formal statement
11 should be ruled inadmissible as well. For its part,
12 Defence conceded that there were no voluntariness
13 issues with respect to the third statement, if the first two
14 sets of utterances were admissible. Given this, I will
15 only deal with the issue of admissibility that arose with
16 respect to the first two sets of utterances.

17 The second preliminary point I want to address
18 is that, with respect to the utterances made to the
19 emergency telephone operator, the Crown made a
20 concession at the start of the *voir dire* that the operator
21 was a person in authority. That, of course, is a
22 condition precedent to the voluntariness framework to
23 be engaged. Admissions by an accused to someone
24 who is not a person in authority are generally
25 admissible. My understanding was that Crown counsel
26 made that concession, and that subsequent to that,
27 certain cases came to his attention that perhaps

1 caused him to revisit that view, but out of fairness, and
2 because Defence had agreed, on the basis of the
3 Crown's concession, that certain witnesses would not
4 need to be called at the *voir dire*, Crown counsel did not
5 resile from his concession.

6 In law, emergency call centre operators are not
7 necessarily or automatically persons in authority. This
8 issue was addressed in, among other cases, *R. v.*
9 *Butcher*, 2018 NSSC 75 and *R. v. Ziegler*, 2016 ABQB
10 150. Given the Crown's concession, I have proceeded
11 on the basis that the Crown did have to prove
12 voluntariness of these utterances beyond a reasonable
13 doubt in accordance with the *Oickle and Singh*
14 framework. But on that point, because it could have
15 been a live issue, my decision on this *voir dire* should
16 not be treated as having any precedential value
17 whatsoever.

18 The last preliminary point I want to address is
19 that even in the absence of a Charter application, the
20 authorities' respect for a person's right to remain silent
21 is not irrelevant. The overlap between the
22 voluntariness analysis and the right to silence analysis
23 was made very clear by the Supreme Court of Canada
24 in *Singh*. In this case, however, the Defence's
25 submissions at the conclusion of the *voir dire* were
26 focused on Mr. Hache's mental state when he was on
27 the island. Defence argued that, as a result of

1 everything that had happened that night, he was not in
2 the mental state needed to make voluntary statements.
3 There was no suggestion that the police ignored his
4 right to silence or tried to circumvent or defeat that right.
5 On the evidence adduced at the *voir dire*, there would
6 have been no basis to raise such an issue in any event.
7 So under the circumstances, I will not in this ruling, talk
8 about the principles that govern the interplay between
9 voluntariness and the right to silence.

10 Dealing first with the admissibility of the
11 utterances made to the emergency telephone operator,
12 as I have mentioned, all the conversations were audio
13 recorded. This, as far as assessing admissibility, is
14 extremely helpful. Being able to hear the interactions
15 between Mr. Hache and the operator is the best way to
16 get a real feel for those exchanges. Listening to
17 witnesses recounting conversations, even if it is done
18 by honest people with fantastic memories, can never
19 paint as clear or as compelling a picture of what
20 happened, as having the benefit of listening to the
21 conversations directly.

22 The *Oickle* framework requires the Court to
23 examine various factors and engage in a contextual
24 analysis to decide whether voluntariness has been
25 proven beyond a reasonable doubt. The Court must
26 examine whether the statement is a result of threats or
27 promises, or the result of oppressive circumstances

1 that prevented the accused from making an
2 independent choice about speaking to police or
3 remaining silent. The Court must also consider
4 whether the accused had an operating mind at the time
5 the statement was made, and whether the statement
6 was obtained through police trickery that is so offensive
7 that it would shock the community.

8 I am satisfied beyond a reasonable doubt that
9 the utterances made by Mr. Hache to the emergency
10 dispatch operator were voluntary for the following
11 reasons.

12 First, Mr. Hache initiated almost all the calls.
13 He chose to make the first call and several others after
14 that. No one was forcing him. One can understand
15 why he did and why he may have felt he had no choice
16 but to call for help, but no one forced him to provide any
17 details about his own involvement during those calls.
18 The operator's focus was to understand where the
19 injured person was and how to get to them.

20 Second, the operator never said anything that
21 could be interpreted by anyone in my view to mean
22 that, unless Mr. Hache provided a full account of events
23 and of his involvement, help would not be sent. There
24 was no *quid pro quo* at all during these interactions.

25 Third, throughout the calls, the main focus of
26 questions asked by the operator were not to have Mr.
27 Hache incriminate himself or assist the police in their

1 investigation of the matter. Rather, it was to get him to
2 explain where he was and how help could reach him.
3 There were also questions about the victim's
4 conditions, again with the view of supporting Mr.
5 Hache's efforts to help him. Mr. Hache was not asked
6 any questions about his involvement or responsibility
7 for the injuries sustained by the victim. The details he
8 gave to the operator were things that he volunteered.
9 He did so unprompted and repeatedly.

10 Fourth, although Mr. Hache was obviously very
11 upset on the calls, his ability to answer the questions of
12 the operator demonstrates that he was aware of his
13 surroundings, of what was happening, and of the
14 gravity of the situation. He took steps to try to assist
15 the victim, and was able to explain what he was trying
16 to do and some of the obstacles he was encountering.
17 At one point, during one of the calls, he intervened to
18 stop the victim's girlfriend from doing things that he
19 thought would make things worse. He was the one
20 trying to calm her down. In difficult circumstances, he
21 was able to provide sufficient information to the
22 operator to convey to the officers where he was and
23 how to get there.

24 Fifth, the testimony of the officers who went to
25 the island and had contact with Mr. Hache is also
26 relevant in assessing his state of mind in the preceding
27 hour and a half while he was in contact with the

1 operator. In particular, Constables Gossman and
2 Raeside, who had the most dealings with him,
3 described what they observed. They said he was
4 coherent. He was not highly intoxicated. He was able
5 to walk. He answered questions, and he spoke clearly.

6 I have carefully considered the evidence that
7 Mr. Hache had, prior to this incident, spent some time
8 in the cold lake water after the skidoo he was riding
9 stalled. When police officers arrived on the island, Mr.
10 Hache was still wet and appeared to be cold. One
11 officer testified that he appeared to be “in shock” and
12 “worn out”. I have also taken into account the tone of
13 his voice at some point during the calls, where he
14 appears to be quite panicked. I have taken into
15 account as well the evidence that he had been
16 consuming alcohol that evening and that some of the
17 officers noted that he appeared somewhat intoxicated.
18 One of the officers said he would have made a
19 breathalyzer demand had he found Mr. Hache in this
20 condition at the wheel of a vehicle.

21 But all those aspects of the evidence must be
22 weighed in the context of the overall evidence and the
23 things I've talked about already, as well as what the
24 courts have said about what the concept of operating
25 mind means in this context. At paragraph 63 in *Oickle*,
26 the Supreme Court said, the concept of an operating
27 mind does not imply a higher degree of awareness than

1 knowledge of what the accused is saying and that he is
2 saying it to persons who can use it to his detriment.
3 In *R. v. Whittle*, [1994] 2 S.C.R. 914 the same Court
4 said that the operating mind test asks whether the
5 accused possessed a limited degree of cognitive ability
6 to understand what he or she is saying and to
7 comprehend that it could be used in proceedings
8 against him.

9 On the whole of the evidence, that degree of
10 understanding has been established. Accepting that
11 Mr. Hache was under the influence of alcohol to some
12 degree, that he was cold and that he was under
13 considerable stress and was most probably worn out
14 from the events of the night, the evidence does not
15 suggest that he was in such a state of shock so as not
16 to have an operating mind.

17 There is also no evidence of any threats or
18 promises having been made to him, and there is no
19 evidence of any police trickery.

20 Those are the reasons why I found those
21 utterances admissible.

22 As for the utterances made to Constable
23 Gossman, everything I said about what was said during
24 the calls with the operator is relevant to the analysis of
25 the voluntariness of those utterances. Again, nothing
26 was done by him or any of the other officers that raises
27 any issues from the point of view of voluntariness. For

1 the same reasons that I concluded Mr. Hache had an
2 operating mind when he was speaking on the
3 telephone, I conclude he also had an operating mind
4 when he was speaking to Constable Gossman. Mr.
5 Hache made these utterances almost immediately after
6 the officers set foot on the island. Constable Gossman
7 did not elicit this information. Moreover, as soon as Mr.
8 Hache started making these utterances, Constable
9 Gossman asked him to stop talking, because he
10 needed to advise him of his rights, but Mr. Hache
11 continued to say things and to show him things.

12 The only real issue with respect to these
13 utterances is whether the evidence is sufficient to
14 establish that they were made and what their content
15 was. This is because as I said, the utterances were not
16 audio recorded, and the officer candidly acknowledged
17 that he does not have verbatim notes of what Mr.
18 Hache told him.

19 The fact that the utterances were neither audio
20 recorded nor recorded verbatim is not fatal to their
21 admissibility. But there needs to be a sufficient record
22 of the interaction between Mr. Hache and the police to
23 permit the voluntariness analysis. It is for the *voir dire*
24 judge to assess whether that evidence is there. *R. v.*
25 *Moore-McFarlane*, 56 OR. (3d) 737 at paragraph 65.

26 Given the circumstances, it is hardly surprising
27 that the utterances were not audio recorded. It is also

1 understandable that Constable Gossman was not able
2 to write down the exact words that Mr. Hache told him
3 or that he does not recall now the exact words that
4 were used. But Constable Gossman testified that in
5 substance, Mr. Hache told him that he had hit the
6 victim, that he had done so to stop him from assaulting
7 his girlfriend, that he hated having had to hit him, and
8 that he had never hit anyone before. Mr. Hache also
9 showed Constable Gossman where the event
10 happened and the object that he used to hit the victim.

11 Constable Gossman was not challenged on
12 cross-examination about his recollection of what Mr.
13 Hache said. This is not a situation where there is any
14 suggestion that the utterances were very detailed or
15 intricate or gave rise to any ambiguity. It is also not a
16 situation where the officer only recalls a few words that
17 were said, and there could be a concern about an
18 important detail or a word missing that would entirely
19 change the nature and meaning of the utterance.

20 I am satisfied that the Crown has proven
21 beyond a reasonable doubt that the utterances were
22 made, and that the substance of those utterances was
23 as described by Constable Gossman. There is also
24 ample evidence about the circumstances when they
25 were made and enough to help me assess their
26 voluntariness. In this case, the lack of audio recording
27 or verbatim notes does not raise a doubt in my mind

1 about whether the utterances were made or about
2 whether they were voluntary. I find that Mr. Hache said
3 those things to Constable Gossman spontaneously of
4 his own free will, and that they are admissible.

5 Finally, with respect to the formal statement
6 given the next day to Constable Hayward, as I have
7 said already, Defence conceded that if the first two sets
8 of utterances were admissible, the formal statement
9 taken the next day would be admissible as well. I
10 agree.

11 These were my reasons for concluding some
12 months ago that all of this evidence would be
13 admissible at trial, had the trial proceeded.

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16 **(PROCEEDINGS ADJOURNED JULY 30, 2019)**

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CERTIFICATE OF TRANSCRIPT

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 6th day of August, 2019.



Kim Neeson
Principal