IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Kelly*, 2019 NLCA 23
Date: April 11, 2019
Docket Number: 201701H0081 & 201701H0082

BETWEEN:

SEAN KELLY — APPELLANT/ RESPONDENT BY CROSS-APPEAL

AND:

HER MAJESTY THE QUEEN — RESPONDENT/ APPELLANT BY CROSS-APPEAL

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201504G0080
(2017 NLTD(G) 148)

Appeal and Cross-Appeal Heard: November 19, 2018
Judgment Rendered: April 11, 2019

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Welsh and White JJ.A.

Counsel for the Appellant: Robby D. Ash
Counsel for the Respondent: Sheldon Steeves

Hoegg J.A.:

INTRODUCTION

[1] Sean Kelly appeals the decision of a Summary Conviction Appeal Court (SCAC) Judge upholding his convictions and sentence for making an indecent phone call and public mischief.

BACKGROUND

[2] While at work on the morning of October 17, 2012, A. H. received an obscene phone call from a male caller whom she could not identify. She received a second call from the same man a few hours later, but could not recall whether the call was of a sexual nature. A. H. filed a complaint with the police. The calls were traced to the phone number of Mr. Kelly's police-issued phone. At the time, Mr. Kelly was a Royal Newfoundland Constabulary officer. When the police officer who took A. H.'s complaint called the identified number, Mr. Kelly answered and spoke to the officer but denied involvement in the calls to A. H. Sergeant Buckle subsequently called Mr. Kelly at the same number and Mr. Kelly answered and confirmed to Sergeant Buckle that he was not involved in making the calls to A. H.

[3] A police investigation ensued and Staff Sergeant Elliott was assigned to investigate. In the following weeks, Mr. Kelly initiated several conversations with Staff Sergeant Elliott to inquire on the status of the investigation, all the while denying involvement in the matter. Mr. Kelly was not viewed by Staff Sergeant Elliott as a suspect. On November 21, 2012 Mr. Kelly provided Staff Sergeant Elliott with a written statement and on November 23, 2012 provided written answers to Staff Sergeant Elliott's follow-up questions. Mr. Kelly said in his written statements that he had lent his police-issued phone to an individual, Mr. X, on the date and at the times the calls were made to A. H. Staff Sergeant Elliott interviewed Mr. X, who denied ever using Mr. Kelly's police-issued phone and denied any involvement in the matter. Mr. X also provided an alibi for the date and times of the calls made to A. H. Consequently, Mr. Kelly became a suspect.

[4] Mr. Kelly was subsequently charged with making an indecent phone call to A. H. (contrary to section 372(2) of the *Criminal Code*) and with mischief for making a false statement intended to divert suspicion from himself or cause another person to be suspected of having committed an offence that the other person did not commit (contrary to section 140(1)(b) of the *Code*).

[5] At trial in Provincial Court, the Crown tendered similar fact evidence which was admitted by the Provincial Court Judge (PCJ). The similar fact evidence related to obscene phone calls made to other women on other dates, which were also traced to the phone number of Mr. Kelly's police-issued phone. The PCJ also admitted into evidence Mr. Kelly's verbal statement to Sergeant Buckle and his verbal and written statements to Staff Sergeant Elliott.

[6] On February 19, 2015, the PCJ convicted Mr. Kelly of the charges, and sentenced him to 10 months in jail – four months for the breach of section 372(2) and six months for the breach of section 140(1)(b).

[7] Mr. Kelly appealed his convictions and sentence to the Supreme Court of Newfoundland and Labrador, General Division sitting as the SCAC. A justice of the Supreme Court sitting as the SCAC Judge heard the appeal. He concluded that although the PCJ had erred in admitting into evidence the similar fact evidence and Mr. Kelly's statements, the remaining evidence was "so overwhelming a court would inevitably convict". Accordingly, he applied the curative proviso in section 686(1)(b)(iii) of the *Code* and dismissed Mr. Kelly's convictions appeal. The Judge also dismissed Mr. Kelly's sentence appeal, referring to the PCJ's findings that Mr. Kelly's lying and falsely blaming of an innocent man was "planned and deliberate" conduct and a "breach of the public trust placed in him as a police officer", and "so egregious that a conditional sentence would not achieve the denunciatory effect required".

THE APPEALS

[8] Mr. Kelly appeals the SCAC decision to this Court, arguing that the SCAC Judge erred in applying the section 686(1)(b)(iii) curative proviso to uphold the convictions. Mr. Kelly also argues that the SCAC Judge drew an inappropriate inference from and misapprehended some of the remaining evidence such that the convictions cannot be sustained.

[9] In his written submission to this Court, Mr. Kelly argued that if the result of the appeal and cross-appeal is that he is acquitted of mischief but remains convicted of making the obscene phone call, his four-month sentence for making

the obscene phone call ought to be modified to a conditional sentence. He argued that the facts supporting the conviction for mischief weighed heavily in the SCAC Judge's decision to uphold the 10-month jail sentence. At the appeal hearing, Mr. Kelly's submission on sentence expanded to the effect that even if both convictions were upheld, his 10-month sentence ought to be modified to a conditional sentence.

[10] The Crown cross-appeals, alleging that the SCAC Judge erred in concluding that the PCJ had erroneously admitted into evidence both the similar fact evidence and Mr. Kelly's verbal and written statements.

[11] The Crown concedes that the SCAC Judge erred in relying on the curative proviso to uphold the convictions after excluding the similar fact evidence and Mr. Kelly's statements. This concession acknowledges that much of the evidence in support of the convictions is no longer available if the similar fact evidence and Mr. Kelly's statements are properly excluded.

[12] If the Crown's cross-appeal is allowed on both issues, and the similar fact evidence and Mr. Kelly's statements are restored into evidence, the PCJ's decision would stand, the convictions would be maintained and there would be no need to decide Mr. Kelly's appeal respecting the SCAC Judge's application of the curative proviso. In light of the Crown's concession noted above, it would also not be necessary to consider Mr. Kelly's grounds of appeal if the cross-appeal is dismissed on both counts. These circumstances suggest that, from a practical point of view, the issues raised in the Crown's cross-appeal ought to be decided before the issues raised in Mr. Kelly's appeal.

ISSUES

[13] The central issues are whether the SCAC Judge erred (1) in concluding that the PCJ erroneously admitted into evidence (a) Mr. Kelly's verbal and written statements and (b) the similar fact evidence, and (2) in applying the section 686(1)(b)(iii) proviso to uphold the convictions. Mr. Kelly argues that resolution of the section 686(1)(b)(iii) issue involves determining whether the SCAC Judge erred (a) in inferring the time zone applicable to the telephone records respecting the time of the indecent call to A. H. and (b) by misapprehending the evidence of witnesses B. C., Tammy Kelly, Brent Kelly and the appellant, Mr. Kelly. Whether Mr. Kelly's sentence ought to be served conditionally must also be decided.

LEAVE TO APPEAL

[14] At the commencement of the appeal hearing, the Court granted leave to appeal to Mr. Kelly and leave to cross-appeal to the Crown, indicating it was satisfied the test for leave to appeal was met by both parties. Section 839(1) of the *Code* restricts appeals to this Court from decisions of a SCAC to questions of law alone in respect of which leave to appeal has been granted. Obtaining leave requires that the appeal has a reasonable possibility of success or the proposed question of law has significance to the administration of justice (*R. v. Jerrett*, 2017 NLCA 65, 356 C.C.C. (3d) 285, at para. 6, and *R. v. Adams*, 2011 NLCA 3, 303 Nfld. & P.E.I.R. 247, at paras. 7-8).

[15] Canadian law has consistently held that the admissibility of evidence is a question of law. In *R. v. G.B.*, [1990] 2 S.C.R. 57, 56 C.C.C. (3d) 181, the Supreme Court of Canada listed the admissibility of evidence as one of the "clearly-established questions of law" (at page 71).

[16] Whether section 686(1)(b)(iii) is properly applied by an appellate court is also a question of law. The Supreme Court of Canada decided this issue in *Mahoney v. R.*, [1982] 1 S.C.R. 834 wherein the Court stated at pages 852-853 that a "Court of Appeal must give substance to the concept of 'miscarriage of justice', and this involves a legal determination, […] [T]he application of the proviso must always involve a question of law …".

[17] The alleged errors in the SCAC Judge's decision respecting the admissibility of Mr. Kelly's statements and the similar fact evidence, as well as the SCAC Judge's application of section 686(1)(b)(iii) of the *Code*, all relate to whether important legal standards have been properly applied to accepted evidence. The resolution of each of these issues is important to the administration of justice.

DID THE SCAC JUDGE ERR IN CONCLUDING THAT THE PCJ ERRONEOUSLY ADMITTED MR. KELLY'S VERBAL AND WRITTEN STATEMENTS AT TRIAL?

The Law

[18] The admissibility of a defendant's statements made to persons in authority depends on whether the statements were voluntarily made. If the statements are determined not to have been made voluntarily, they are not admissible (*R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3). Voluntariness is a legal standard long known to our law. It was historically based on the concern that coerced or

otherwise involuntary statements are not likely to be reliable (*R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at para. 29). Further, it matters not whether the statements sought to be admitted are inculpatory or exculpatory – the same rule governs (*Piché v. R.* (1970), [1971] S.C.R. 23, at 36).

[19] In *Oickle*, the Court described voluntariness as the touchstone of the confessions rule, identifying threats or promises, the lack of an operating mind, and police trickery that unfairly denies an accused's right to silence as concerns that inform its determination (paragraph 69). At paragraph 70, the Court explained voluntariness by quoting from *Wigmore on Evidence* (Chadbourne rev. 1970), vol. 3, section 826, at 351, who said that voluntariness is "shorthand for a complex of values". In *Singh*, at paragraph 30, the Supreme Court elaborated on these values, saying that they "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".

[20] The *Oickle* Court went on to explain that mere inducements do not automatically render a statement inadmissible. Rather, the question is whether an inducement is strong enough to raise a reasonable doubt about whether the will of the subject has been overborne (paragraph 57).

The SCAC Judge's Decision

[21] In this case the SCAC Judge determined that "the trial judge committed an error in admitting [Mr. Kelly's] oral statements and [his] written statement provided on November 21, 2012" (*R. v. Kelly*, 2017 NLTD(G) 148, at para. 67). The Judge does not state how the PCJ erred in admitting Mr. Kelly's statements. However, his conclusion directly follows references to cases respecting the voluntariness of accuseds' statements, and his comment that:

> Sergeant Buckle and Staff Sergeant Elliott had many unrecorded or undocumented discussions with Mr. Kelly from October 17, 2012 to December 3, 2012 with no specific dates as to the times of these conversations. Therefore, cross-examination would not have served any useful purpose.

The Judge's decision therefore suggests that he concluded the Crown had not proved Mr. Kelly's statements to have been voluntarily made because not all of the interactions between the police and Mr. Kelly had been documented or recorded.

Analysis

[22] On appeal, the Crown asserts that the SCAC Judge erred in overturning the PCJ's admission of Mr. Kelly's statements into evidence. On appeal, Mr. Kelly submits that the Crown failed to show a complete picture of his interactions with the police.

[23] At trial, Mr. Kelly's argument that his written statements were not voluntarily made was based on his contention that Staff Sergeant Elliott had ordered him to provide a written statement so that the investigation into A. H.'s complaint could be concluded. His position was that as a police officer, he had to provide a statement to a "superior" officer when asked to do so. Accordingly, he obliged by providing his written statement of November 21, 2012 and by providing written answers to the follow up questions posed by Staff Sergeant Elliott on November 23, 2012. With respect to the admissibility of his verbal statements, first to Sergeant Buckle and then to Staff Sergeant Elliott, Mr. Kelly maintained that he had been required to speak with Sergeant Buckle and Staff Sergeant Elliott respecting A. H.'s complaint because they were superior officers and legislation and police policy required it.

[24] The PCJ heard these arguments and rejected them with reasons (360 Nfld. & P.E.I.R. 91). The PCJ found that Mr. Kelly was never ordered to provide a written statement to Staff Sergeant Elliott, and neither was he induced, threatened or tricked into doing so. The PCJ accepted the evidence of Staff Sergeant Elliott as to his interaction with Mr. Kelly over the course of the investigation into A. H.'s complaint, noting that Staff Sergeant Elliott was visibly surprised at the notion that Mr. Kelly would testify he believed he had been coerced into providing or ordered to provide the written statement.

[25] In his decision, the SCAC Judge reviewed some of the evidence surrounding Mr. Kelly's oral and written statements to police. He also relied on cases which touched on the voluntariness of statements in cases where evidence respecting the circumstances in which these statements were made was argued to be incomplete.

[26] It is useful to review the cases on which the SCAC Judge relied. In *Sankey v. R.*, [1927] S.C.R. 436, the accused was an illiterate Aboriginal man in custody respecting a murder. He had been questioned by several police officers several times, and the Crown sought to have a confession he made during the fourth period of questioning on the day following his arrest admitted into evidence. Only one police officer testified, and his testimony was with respect

to the fourth period of questioning only. According to this 1927 decision, the officer simply provided "meagre details" along with his opinion that the accused had made the impugned statement voluntarily. The confession was ruled inadmissible.

[27] In *R. v. Magnowski*, 2011 BCSC 967, the accused was charged with impaired driving. He had given a statement to police that he had drunk 12 beers before driving. Three police officers were present when the statement was made, but only two testified. A SCAC judge found that the PCJ erred in admitting the statement because the third officer did not testify and the Crown did not explain why there was no evidence respecting the third officer's interaction with the accused. The SCAC judge remarked that while it is not necessary for the Crown witnesses to recall in precise detail all conversations with an accused, the Court must be in a position to determine if the tendered statement was voluntary.

[28] In *R. v. Woodward* (1975), 23 C.C.C. (2d) 508 (Ont. C.A.), the accused was charged with trafficking marijuana. He had been approached by a police officer in a park and asked if he had marijuana. He said nothing, but proceeded to empty his pockets of several bags of marijuana. Another officer was present for this encounter, but there was no indication that there was any conversation between the second officer and the accused. The accused was then driven by the officers to his home and a field where the officers executed a search warrant. Two officers were present with the accused, and the accused spoke with both officers during the search. After the search, the first officer took a statement from the accused. The statement was preceded by the "usual caution." At the *voir dire*, only the first officer testified, and the written statement was entered into evidence. The Court of Appeal found that the written statement should not have been admitted due to the failure of the second officer to testify.

[29] In *R. v. Albrecht* (1965), 49 C.R. 314, [1966] 1 C.C.C. 281 (N.B.S.C. (A.D.)), the accused was acquitted at trial of possessing counterfeit money. The accused had been transported and was otherwise under the supervision of several police officers before giving a statement. It appears from the decision that all of the officers gave evidence as to the nature of their interactions with the accused. The majority and the concurring judge agreed that the trial judge had erred in finding the ultimate statement involuntary and therefore inadmissible saying:

> There is not the slightest suggestion in the evidence that the second statement was not given freely and voluntarily. When ruling against its admission, the magistrate merely

> stated that in view of the circumstances it had not been established beyond a reasonable doubt that it was given voluntarily. He mentioned no circumstances whatever which caused him to make his finding.

[30] *R. v. Plowman* (1958), 28 C.R. 394, 123 C.C.C. 76 is a 1958 decision of the Supreme Court of Newfoundland sitting *en banc*. The accused was charged with breaking and entering as well as theft, and had provided a written statement to police. At trial, the accused identified his signature, and the statement was entered as evidence. The police officer testified that he "cautioned" the accused, but it appears no further details were provided. The court found that this was insufficient evidence to determine whether the statement was voluntary.

[31] The factual circumstances in *Sankey*, *Magnowski*, *Woodward*, and *Plowman* all involved gaps in evidence respecting the circumstances in which the statements were given which led to respective conclusions that voluntariness had not been proved. *Albrecht* stands for the proposition that a court must give reasons when ruling against the admissibility of a statement. None of these cases stands for the proposition that all interactions with a witness, person of interest, or defendant must be recorded or documented.

[32] In this case, there were no gaps in the evidence. Sergeant Buckle, Staff Sergeant Elliott, and Mr. Kelly were examined and cross-examined on the circumstances surrounding Mr. Kelly's verbal statement to Sergeant Buckle on October 17, 2012 and their subsequent discussions in which Sergeant Buckle acted as an advisor to Mr. Kelly. Likewise, the evidence was complete respecting Mr. Kelly's verbal statements to Staff Sergeant Elliott including the conversations which were documented and those that were neither documented nor recorded. Moreover, there was no suggestion that anything untoward occurred in an undocumented or unrecorded conversation which could have been resolved or assisted by documentation or a record.

[33] The SCAC Judge's decision appears to rule that all of the interactions and statements made by Mr. Kelly throughout the investigation of A. H.'s complaint ought to have been recorded. The PCJ found, and the SCAC Judge did not rule otherwise, that Mr. Kelly was not under investigation or viewed as a suspect by Staff Sergeant Elliott until December 4, 2012. Until then, Mr. Kelly was a colleague working in the same detachment as Staff Sergeant Elliott, and whom Staff Sergeant Elliott, according to the evidence, viewed as a witness but was seeking to exonerate. Importantly, it was Mr. Kelly who initiated the interactions and conversations with Staff Sergeant Elliott, expressing his interest in the status of the investigation into A. H.'s complaint. These circumstances

are very different from police interviewing a defendant, suspect or person of interest. Such interviews are generally expected to be documented. In the circumstances at play between Mr. Kelly and his colleagues prior to December 4, 2012, it is understandable that Sergeant Buckle and Staff Sergeant Elliott would not be recording or documenting every contact or conversation with Mr. Kelly concerning A. H.'s complaint.

[34] This is not to endorse the way the RNC chose to investigate A. H.'s complaint. Given that the calls to A. H. came from Constable Kelly's police-issued phone, it is curious indeed why the investigation was not conducted by an independent agency. Nevertheless, the reality is that when Mr. Kelly made the impugned statements, he was considered a witness and not considered a suspect and Staff Sergeant Elliott.

[35] Mr. Kelly's argument that his statements were involuntary because he was required to speak with superior officers was rejected by the PCJ. The SCAC Judge did not rule otherwise. Mr. Kelly was a police officer of some ten years' experience in giving police cautions and *Charter* rights to accused persons. Not only did he know and understand that he was at liberty not to speak with the police about the investigation of A. H.'s complaint, but he himself initiated most, if not all, of the advisory discussions with Sergeant Buckle and his discussions with Staff Sergeant Elliott. Mr. Kelly even asked to meet with Staff Sergeant Elliott in an unmarked car to discuss the matter, all with a view to pressing Staff Sergeant Elliott for a quick end to the investigation of A. H.'s complaint. In these circumstances, it is not open to Mr. Kelly's to claim that he was induced or tricked into conversing with Staff Sergeant Elliott or Sergeant Buckle or that his will was overborne by either police officer such that his participation in those discussions was coerced.

[36] Mr. Kelly also argued at trial that he was ordered to provide a written statement to Staff Sergeant Elliott. Mr. Kelly and Staff Sergeant Elliott met just prior to Mr. Kelly producing his November 21, 2012 written statement. They discussed the fact that the use of Mr. Kelly's police-issued phone by anyone other than Mr. Kelly was unexplained. At this time Mr. Kelly was viewed as a witness who may be able to solve the mystery. After all, it was his phone that was used to make the calls to A. H.

[37] After his conversation with Staff Sergeant Elliott, Mr. Kelly consulted with legal counsel and thereafter provided his November 21, 2012 typed statement, signed by him. The Staff Sergeant had questions, which he discussed with Mr. Kelly's legal counsel, and Mr. Kelly subsequently reconferred with his

counsel and thereafter produced written answers to Staff Sergeant Elliott's questions on November 23, 2012.

[38] Mr. Kelly's position that Staff Sergeant Elliott had ordered him to provide a statement was rejected by the PCJ. The SCAC Judge did not rule otherwise. Neither did the SCAC Judge interfere with the PCJ's credibility assessments of Staff Sergeant Elliott or Mr. Kelly, or the PCJ's factual findings with respect to the evidence on voluntariness. In fact, the SCAC Judge's comments respecting his application of the curative proviso would tend to confirm the PCJ's findings.

[39] The SCAC Judge also implied that the Crown did not prove that his statements were voluntary because Staff Sergeant Elliott and Sergeant Buckle were not asked directly by Crown counsel whether they had threatened Mr. Kelly or offered him promises or inducements to provide his statements.

[40] The determination as to whether a statement is voluntary does not depend on direct denials of threats, promises, and inducements from the persons in authority who received the statements or were otherwise involved when the statements were made. Indeed in the vast majority of cases the answer to such a direct question would be predictably "no". Voluntariness is determined in consideration of all of the evidence respecting how, why, when, and where a statement in issue was made. What is required to prove or disprove voluntariness is evidence that gives a true picture of the circumstances in which the statements were made. There is no rigid formula that must be adhered to or determinative question which must be asked.

[41] Likewise, there is no rule of law that requires all conversations or interactions with a defendant to be documented or recorded. While such a practice may be preferable, practical circumstances may well dictate otherwise. More important in the context of this case, there is no rule of law that requires documenting or recording all interactions with a person, like Mr. Kelly, who is viewed as a witness at the time he or she made the statements, but who later becomes a suspect or defendant.

[42] In the result, the SCAC Judge erred in law by misapprehending and misappling the law respecting voluntariness in ruling that Mr. Kelly's statements were not voluntary merely because some of his interactions with police were not recorded or documented. While this error is sufficient to restore the statements into evidence, a further comment specifically on the SCAC Judge's exclusion of the statements in respect of the mischief charge is warranted.

The *Actus Reus* of the Mischief Charge

[43] The foundation for the mischief charge is the information Mr. Kelly provided in his November 2012 statements that he lent his police-issued telephone to Mr. X at two different times and at two different locations in Corner Brook on October 17, 2012. The date and times when Mr. Kelly said he lent his police-issued phone to Mr. X happen to be the same date and times when the phone calls to A. H. were made from his police-issued phone.

[44] Upon receipt of Mr. Kelly's written statements, the police investigated Mr. X, who testified at trial. Mr. X testified that he had not used Mr. Kelly's police-issued cell phone on October 17, 2012, or any other occasion. Moreover, he provided an alibi for the date and times of the calls made to A. H. Mr. Kelly's evidence was to the same effect as what he said in his statements.

[45] The PCJ accepted Mr. X's trial evidence and rejected Mr. Kelly's evidence, concluding that Mr. Kelly's implication of Mr. X in the calls to A. H. was a false and deliberate attempt to divert suspicion from himself and cause Mr. X to become suspected of having made the calls to A. H. The SCAC Judge did not interfere with the PCJ's credibility assessments or factual findings in this regard.

[46] When Mr. Kelly made the November statements in which he implicated Mr. X, he was not being investigated for mischief, nor was he a suspect in the matter of A. H's complaint. His November statements were essentially witness statements given to Staff Sergeant Elliott in the hope of bringing an end to the investigation of A. H.'s complaint. When Mr. Kelly provided his written statements there was no mischief charge. The genesis of the mischief charge was Mr. Kelly's statements. Mr. Kelly's false and deliberate implication of Mr. X as the person who called A. H., made in his written statements to Staff Sergeant Elliott, constituted the *actus reus* of the mischief offence, and led to the charge of mischief being laid against him.

[47] The voluntariness rule does not apply to information which constitutes the *actus reus* of a different, and theretofore non-existent, offence. This would be so even if Mr. Kelly had been under investigation at the time he gave his statements, or even if his statements were involuntary for the purposes of prosecution of the offence under investigation when the statements were made.

[48] In *R. v. Stapleton* (1982), 134 D.L.R. (3d) 239, 26 C.R. (3d) 361 (Ont. C.A.), the Ontario Court of Appeal considered the admissibility of statements

made by accused persons which provide foundational information for mischief charges. In *Stapleton,* the accused was charged with mischief for providing written statements in which he alleged an offence which had not been committed, and which caused the police to embark upon an investigation. At trial, the accused sought a ruling that his statements were not voluntary and therefore inadmissible. The trial judge admitted the statements, ruling that the confessions rule did not apply to his statements because they constituted the gravamen of his offence. The Ontario Court of Appeal agreed, ruling that the accused's statements constituted the *actus reus* of the offence charged and that the confessions rule does not apply in such situations (paragraphs 6-7).

[49] The same reasoning was applied by the Supreme Court of Newfoundland and Labrador in *R. v. Goulding* (1997), 157 Nfld. & P.E.I.R. 16. In *Goulding,* the accused was charged with arson and mischief. He gave a statement which provided false information as to the source of the fire in an arson investigation. The statement was ruled inadmissible respecting the charge of arson but admissible respecting the information which constituted the *actus reus* of the mischief charge (paragraphs 22-24). In other words, the Crown was only permitted to use the information in the accused's statement for the purposes of the mischief charge, and not the arson charge.

[50] I agree with the reasoning in *Stapleton* and *Goulding*. The confessions rule does not apply to a statement or information in a statement that constitutes the *actus reus* of a mischief charge. Were it otherwise, accused persons could make false allegations against innocent persons without fear of reprisal.

[51] In the result, the information given by Mr. Kelly in his November 21 and 23, 2012 written statements, insofar as it grounds the mischief charge, would be admissible evidence against Mr. Kelly regardless of the voluntariness rule. The SCAC Judge could have upheld the mischief conviction on this basis. However, he did not articulate why he upheld this conviction in relying on section 686(1)(b)(iii) to do so.

[52] In summary, the SCAC Judge erred in law in ruling that the PCJ erroneously admitted Mr. Kelly's statements into evidence. He misapprehended the law respecting voluntariness and applied incorrect law to the facts of the case by ruling that Mr. Kelly's statements were not voluntary because some of the interaction between him and the police had not been recorded. He also erred in law by failing to find that the voluntariness rule did not apply to Mr. Kelly's statements insofar as they provided the foundation for the mischief charge.

Breach of Section 7 of the *Charter*

[53] At the voluntariness *voir dire*, Mr. Kelly also argued that the written statements were obtained in violation of his right to silence as protected by section 7 of the *Charter*. Mr. Kelly argued that because he had a duty as a police officer to provide a statement to a superior officer, the statement constituted compelled speech, and admitting the evidence would result in a violation of his right to silence.

[54] The PCJ rejected this argument, and found that the statement was given by exercise of Mr. Kelly's free will, and not as a result of a statutory duty.

[55] While the PJC's finding on section 7 was appealed to the SCAC, the SCAC Judge did not address it in light of his ruling on voluntariness. Given that the SCAC Judge's ruling has been reversed, fairness to Mr. Kelly requires that this Court consider the PCJ's conclusion that Mr. Kelly's right to silence was not violated.

[56] Under the *Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17, an officer is prohibited from "disobey[ing] lawful orders or fail[ing] to carry out orders of his or her superior officers," while the *Royal Newfoundland Constabulary Regulations*, C.N.L.R. 802/96 similarly prohibit "disobey[ing] the lawful command of any other police officer who is superior in rank or is in a supervisory capacity over the police officer."

[57] The issue before the PCJ was whether Mr. Kelly's statements were provided as a function of this statutory obligation to follow lawful orders of his superior officers. Mr. Kelly's November 21, 2012 written statement opened with the following:

> This report is being made at the request of Staff Sergeant Roy Elliott and is made without prejudice. I object to and claim privilege from the use of all, any part, or parts, of this statement in any proceedings whether criminal or civil and including disciplinary proceedings, or in any investigations or inquiry.

[58] The November 23, 2012 letter, sent by Mr. Kelly's legal counsel, similarly stated that it was without prejudice, and was "not to be used against him." These unilateral statements do not determine the legal issues raised by Mr. Kelly's section 7 argument. As the Alberta Court of Appeal stated at paragraph 25 of *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 "a communication that is not in substance privileged does not become so just because one party places "without prejudice" on it."

[59] In *R. v. White*, [1999] 2 S.C.R. 417, 174 D.L.R. (4th) 111, the Supreme Court of Canada ruled that, in some circumstances, admitting into evidence statements made by an accused under statutory compulsion could result in a violation of the right to silence protected by section 7. The *White* Court referenced the four relevant contextual factors for determining whether the principle against self-incrimination is violated which had been set out by the Supreme Court of Canada in *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, 129 D.L.R. (4th) 129:

(1) the lack of real coercion by the state in obtaining the statements;

(2) the lack of an adversarial relationship between the accused and the state at the time the statements were obtained;

(3) the absence of an increased risk of unreliable confessions as a result of the statutory compulsion; and

(4) the absence of an increased risk of abuses of power by the state as a result of the statutory compulsion.

[60] The *White* Court also stated that an accused's honest and reasonably held belief that he or she was required by law to provide the statement is a separate factor for consideration, saying that if "a declarant gives [a statement] freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements. The declarant would then be speaking to police on the basis of motivating factors other than [the statute]."

[61] In his analysis, the PCJ made the factual finding that "Mr. Kelly freely spoke to Sergeant Buckle and Staff Sergeant Elliott. Mr. Kelly did not speak to either of them because he felt compelled to do so." While the PCJ's factual findings are not unassailable, they are entitled to significant deference. The finding that Mr. Kelly not only chose to speak to but initiated the conversations with Sergeant Buckle and Staff Sergeant Elliott and chose to provide the November written statements to Sergeant Elliott is entirely consistent with the PCJ's finding that the statements were made voluntarily. This finding of voluntariness is confirmed in the above reasons.

[62] For the statement of an accused to be admissible, the Crown is required to prove that the statement was voluntary beyond a reasonable doubt. To exclude the statement on the basis of the right to silence under section 7 of the *Charter*, the accused must show that it infringed the right on the balance of probabilities.

As noted by the Supreme Court of Canada in *Singh*, this results in "considerable overlap" between the confessions rule and the section 7 right to silence. While a finding that a statement to the police was voluntary does not absolutely preclude a finding of a violation of the section 7 right to silence, there is no basis to find such a violation in the present case.

[63] Accordingly, I would affirm the PCJ's finding that the admission of the statements does not infringe Mr. Kelly's right to silence under section 7 of the *Charter*.

DID THE SCAC JUDGE ERR IN CONCLUDING THAT THE PCJ ERRONEOUSLY ADMITTED THE SIMILAR FACT EVIDENCE?

[64] The similar fact evidence tendered by the Crown at trial was evidence from two women – Y and Z – who had received obscene phone calls on different dates between May and October 2012 from a male caller calling from Mr. Kelly's police-issued phone. The Crown argued at trial that the probative value of this similar fact evidence outweighed its prejudicial effect because "it would defy common sense to conclude" that their evidence was not so strikingly similar to the evidence respecting the calls made to A. H. that the calls had to have been made by the same person. The PCJ admitted the evidence at trial (360 Nfld & P.E.I.R. 145). On appeal to the SCAC, Mr. Kelly argued that its admission was improper.

The SCAC Judge's Decision

[65] The SCAC ruled that the PCJ had erred in admitting the similar fact evidence because he considered the link between Mr. Kelly's police-issued phone and the calls made to Y and Z in the first step of his admissibility analysis. The SCAC Judge said this would tend to confirm Mr. Kelly's involvement which was an improper consideration at that stage. He reasoned that the PCJ ought to have assessed the similarities and dissimilarities between the evidence respecting the calls to A. H. and the proffered similar fact evidence before focusing on identifying Mr. Kelly as the caller (paragraphs 20-27 of the SCAC Judge's decision).

The Law

[66] Evidence of similar facts committed by an accused or alleged to have been committed by an accused is presumptively inadmissible (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 55). This presumption can be overcome if the Crown shows that, overall, the probative value of the proffered similar fact

evidence outweighs its prejudicial effect (*Handy* at paragraph 55 and *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716, at para. 48).

[67] When the identities of the defendant and the perpetrator of the acts alleged to be similar to the charges before the court are in issue, the similar fact evidence is generally proffered on the basis that such similarity could only be exhibited by the same person.

[68] The Supreme Court of Canada considered how determining admissibility of similar fact evidence when identity is an issue should be approached in *R. v. Arp*, [1998] 3 S.C.R. 339, 166 D.L.R. (4th) 296. The Court stated that in such situations a trial judge must first consider whether the alleged similar acts disclose sufficient similarity to the acts alleged to establish the objective improbability of coincidence. The Court explained that the manner in which the acts were committed and not the evidence as to the accused's involvement in each act should be considered at this stage. The Court also stated that there may well be exceptions to this approach, but as a general rule, if there is such a degree of similarity between the acts that it is likely that they were committed by the same person then the similar fact evidence will ordinarily have sufficient probative value to outweigh its prejudicial effect.

[69] As a second step, the Court endorsed the principle set out in *R. v. Sweitzer*, [1982] 1 S.C.R. 949, 137 D.L.R. (3d) 202 that a link between the allegedly similar facts and the accused is a precondition to admissibility, as otherwise the similar facts would have no relevance (page 954).

[70] The use of similar fact evidence to support proof of identity was again considered in *R. v. Perrier*, 2004 SCC 56, [2004] 3 S.C.R. 228. In *Perrier*, the Supreme Court of Canada described the test for admissibility when identity is in issue as having two steps, saying the first step is to compare the similarity of the acts themselves, and if a high degree of similarity is found, the second step is to consider whether the defendant is linked to the similar acts (paragraphs 20-23).

Analysis

[71] In this case, the SCAC Judge faulted the PCJ for linking Mr. Kelly's police-issued phone to the calls received by Y and Z, saying that the linking went to identity and "tended to confirm Mr. Kelly's involvement and not the manner in which the similar acts were carried out". With respect, I cannot agree with this characterization of both the evidence and the SCAC Judge's analysis of the issue.

[72] The fact that the calls received by Y and Z were from the same phone as the calls to A. H. goes directly to the manner in which the similar acts were committed. It is how the calls were made to Y and Z. On its own, it provides striking similarity to the evidence respecting the manner in which the calls were made to A. H. It is akin to a hallmark. In addition to this striking similarity, there were other similarities – the calls were obscene in nature, the callers were male, and the calls were all made within a period of a few months during 2012, as the PCJ found.

[73] Identifying a high degree of similarity in the manner in which the similar acts were committed is the first part of the inquiry. However, such similarity does not prove that Mr. Kelly was the caller.

[74] Determining whether there is a link between Mr. Kelly and the similar fact evidence is the second stage of the inquiry. The fact that the calls to Y and Z came from Mr. Kelly's police-issued phone provides the link to Mr. Kelly. Such a link is required for admissibility, as stated in *Arp* and *Sweitzer* and described in *Jesse* at paragraphs 15 and 18. The fact that the calls to A. H. and Y and Z came from Mr. Kelly's police-issued phone establishes a high degree of similarity to the evidence respecting the calls to A. H., *as well as* a link to Mr. Kelly. Just because similarity is established by the involvement of Mr. Kelly's police-issued phone in the calls to A. H., Y and Z does not mean that linkage cannot be established by the same evidence.

[75] The SCAC Judge was also concerned that the words spoken in the obscene calls were not strikingly similar to each other. Obscene phone calls can involve as many obscene words and expressions as there are people. The fact that they are obscene, as opposed to a wrong number or a prank call, establishes some degree of similarity. While it may be that the same or similar words or expressions in obscene calls can establish a striking degree of similarity, the fact that the same words and expressions were not used in the obscene phone calls does not disprove similarity. To require that the same words or expressions be used to establish the degree of similarity required for admissibility would be an unrealistic and virtually insurmountable burden for the Crown to meet.

[76] In this case the caller's words and expressions primarily referenced oral sex. The fact that the calls were obscene in nature and generally referenced oral sex may or may not have been sufficient to establish the required similarity in this case. However, the obscene nature of the calls, in combination with the fact that the calls were made by a male caller from the same police-issued phone

more than establishes the high degree of similarity required for meeting the first step in the analysis.

[77] In Mr. Kelly's statements and testimony, he did not dispute that his police-issued phone was used to call A. H. However, he disputed that he was the caller. His evidence was that Mr. X had borrowed his police-issued phone momentarily at two different times on the same date as the calls were made to A. H., and that therefore Mr. X must have been the caller. While Mr. Kelly had an explanation for how the calls to A. H. had been made from his police-issued phone, he offered no explanation for how the calls to Y and Z had come from the same phone. Because there was no evidence of anyone other than Mr. Kelly who could have called Y and Z from Mr. Kelly's police-issued phone, the similar fact evidence supported the Crown's theory that Mr. Kelly had made the calls to A. H.

[78] The PCJ listed the factors which led him to admit the similar fact evidence. While he did not describe the test as set out in *Perrier*, his reasoning and analysis, including his linking of the calls to Mr. Kelly because they came from Mr. Kelly's police-issued phone, are in accordance with the analytical framework set out in the cases and well supported by the evidence. I add only that the "stages" test set out in *Arp* and *Perrier* is meant to provide a useful approach to ensuring that "a high degree of similarity" and "linkage to the accused" exist before proffered similar fact evidence is admitted when identity is in issue. The test is not meant to be applied as a rigid chronological formula. Rather, the lines can sometimes be blurred, and the same evidence can support each stage of the analysis.

[79] In summary, the SCAC Judge erred in law in ruling that the PCJ had erroneously admitted the similar fact evidence. He misapprehended the law respecting similar fact evidence and applied incorrect law to the PCJ's decision to admit the similar fact evidence.

THE SENTENCE APPEAL

[80] Mr. Kelly argues that the SCAC Judge erred in upholding Mr. Kelly's ten-month jail sentence by overemphasizing the sentencing objectives of denunciation and deterrence. While Mr. Kelly agrees that police officers who commit criminal offences are to be held to a higher standard than ordinary people because of the public trust placed in them, he argues that he did not abuse his position as a police officer in committing the within offences.

[81] At sentencing in the trial court, the PCJ described Mr. Kelly's conduct as "two serious offences involving a massive breach of public trust". With regard to the indecent phone call, he noted that Mr. Kelly was on duty and using his police-issued phone when he called A. H., and that he made reference to the fact that he knew that A. H. was alone and what she was wearing. In regard to the mischief offence, the PCJ stated "to purposely blame an innocent person for a crime you committed is as egregious an act as a police officer can commit. This offence requires concentration on denunciation and general deterrence".

[82] The SCAC Judge described the PCJ's assessment of Mr. Kelly's conduct as "planned and deliberate", "a massive breach of the public trust placed in him as a police officer" and "so egregious that a conditional sentence would not achieve the denunciatory effect required". In dismissing Mr. Kelly's sentence appeal, the SCAC Judge stated that the PCJ had "reviewed the appropriate principles relating to the offences committed and the relevant circumstances including the consideration that the offender was a police officer".

[83] It is well established in sentencing case law that law enforcement officers who break the law breach the public trust placed in them, especially when the offence committed is related to the officer's duties. Such breaches are regarded as serious, and call for emphasis on denunciation and deterrence in sentencing. See *R. v. Webster*, 2014 NLTD(G) 135, 357 Nfld. & P.E.I.R. 321; *R. v. LeBlanc*, 2003 NBCA 75, 264 N.B.R. (2d) 341; *R. v. Cusack* (1978), 26 N.S.R. (2d) 379, 41 C.C.C. (2d) 289 (N.S.C.A.); and *R. v. Greenhalgh*, 2012 BCCA 236.

[84] In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, Lamer C.J.C. explained the sentencing objective of denunciation (section 718(a) of the *Code*) at paragraph 81:

> … The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass". The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by

> which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code* .

[85] The former Chief Justice reiterated his above comments in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, a case dealing with the appropriateness of a conditional sentence for an offender convicted of dangerous driving causing death while under the influence of alcohol. In *Proulx*, an appellate court had substituted a conditional sentence for the sentencing judge's 18-month jail sentence, saying the sentencing judge had placed too much weight on denunciation. The Supreme Court restored the sentencing judge's jail sentence. At several points in *Proulx*, Chief Justice Lamer stated that a conditional sentence is a more lenient sentence than a jail term of equivalent duration (see paragraphs 40-44, 54, and 102).

[86] Deterrence is almost always an important sentencing consideration. In this case the message must be sent that people who breach the public trust in their implication of others in order to divert suspicion from themselves will be dealt with harshly.

[87] Mr. Kelly's sentencing argument concerns two offences: making an obscene phone call and mischief. While a conditional sentence for making an obscene phone call could, on its own and depending on the facts and circumstances, be appropriate, the facts and circumstances of Mr. Kelly's obscene phone call offence, set out in paragraph 80 above, demonstrate shameful on-duty conduct warranting a period of incarceration.

[88] The facts and circumstances of Mr. Kelly's conviction for mischief demonstrate more shameful conduct. Mr. Kelly diverted suspicion from himself by causing Mr. X to be suspected of committing an offence that Mr. X did not commit. Mr. Kelly caused Mr. X to become a suspect when Mr. X had nothing whatsoever to do with the matter and was completely innocent.

[89] Mr. X was not just any person who Mr. Kelly could have said borrowed his police-issued phone at the times the calls were made to A. H. Rather, Mr. X was someone Mr. Kelly said he was cultivating as an informant in relation to his police work, meaning that Mr. Kelly used knowledge and opportunity gained through his police work to further his objective of diverting suspicion from himself. His choice of Mr. X, who was someone with apparent criminal

connections and therefore vulnerable to suspicion, was because Mr. X could be unlikely to be believed either by the police or the court.

[90] Both Mr. X and A. H. have been hurt by Mr. Kelly's conduct and both say they have lost trust in the police. Moreover, Mr. Kelly's exposure of Mr. X as a potential informant was hurtful and endangering to him.

[91] Accordingly, Mr. Kelly's conduct, by any measure, did involve abuse of his position as a police officer and breach of the public trust placed in him. The actions underlying his mischief conviction are reprehensible in and of themselves as well as antithetical to his duties and responsibilities to society as a police officer. As such, his actions "encroach on our society's basic code of values" making denunciation and deterrence the foremost sentencing objectives in this case (*M. (C.A.)*).

[92] Like the PCJ and the SCAC Judge, I am of the view that the circumstances of Mr. Kelly's offences are egregious, and that a conditional sentence would not serve the sentencing objectives of denunciation and deterrence. Nor would it promote Mr. Kelly taking responsibility for his actions and acknowledging the harm done to A. H., Mr. X, and the community. In short, the service of Mr. Kelly's 10-month sentence in jail is more proportionate to the gravity of his offences than a conditional sentence would be.

[93] In my view, the SCAC Judge did not err in upholding the PCJ's ten-month incarcerating sentence. Accordingly, I would not allow Mr. Kelly's sentencing appeal.

DISPOSITION

[94] In the result, on my analaysis the SCAC Judge erred in law in his appreciation and application of the law respecting the admissibility of Mr. Kelly's statements and in his appreciation and application of the law of similar fact evidence to the decisions of the PCJ. Accordingly, I would allow the Crown's cross-appeal on both issues and restore the admission into evidence of Mr. Kelly's verbal and written statements and the similar fact evidence of Y and Z. I would also uphold the SCAC Judge's 10-month jail sentence for Mr. Kelly.

[95] This disposition means that the basis for the PCJ's decision to convict Mr. Kelly on both charges is restored. It also means that the SCAC Judge's ultimate conclusion to uphold Mr. Kelly's convictions and sentence is undisturbed. In these circumstances, it is not necessary to consider Mr. Kelly's argument concerning application of the curative proviso.

[96] In the result, I would allow the cross-appeal and dismiss the appeal, and uphold the SCAC Judge's decision upholding Mr. Kelly's convictions for making an obscene phone call to A. H. and mischief, and his 10-month jail sentence.

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L. R. Hoegg J.A.

I Concur: _____

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.