SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Webber*, 2018 NSSC 341

Date: 20180906
Docket: CRH No. 462516
Registry: Halifax

Between:

Her Majesty the Queen

v.

Renee Allison Webber

Voir-Dire #5 –Voluntariness of the Accused's Utterances
Restriction on Publication: s.486.4 & 486.5, 517(1) and 539(1) cc

Judge:	The Honourable Justice Christa M. Brothers
Heard:	September 5, 2018, in Halifax, Nova Scotia
Oral Decision:	September 6, 2018, in Halifax, Nova Scotia
Written Release:	May 9, 2019
Counsel:	Cory Roberts and Erica Koresawa, for the Crown Donald C. Murray, Q.C., for the Accused

Overview

[1] This decision pertains to the fifth *voir dire* conducted in the course of Renee Allison Webber's trial on an eight-count indictment, relating to charges of exploitation, human trafficking, sexual assault, and obstruction.

[2] In keeping with *R. v. Jordan*, 2016 SCC 27, and *R. v. Cody*, 2017 SCC 31, I determined that it was most efficient to provide counsel with a bottom line decision with regards to the admissibility of these utterances, with detailed reasons to follow. The following are my written reasons.

[3] The Crown seeks to admit as evidence at trial before the jury utterances allegedly made by the accused to two police officers. The Crown seeks to admit this evidence, in relation to the sixth count in the indictment, which alleges:

> 6 Renee Allison Webber of Halifax, in the County of Halifax, stands charged that she between the 1st day of October 2015 and the 22nd day of May, 2016, at or near Halifax, in the County of Halifax in the Province of Nova Scotia did unlawfully and willfully obstruct Cst. Daniel Bérubé and D/Cst. Jennifer Murray, Peace Officers, while engaged in the lawful execution of their duty, contrary to Section 129(a) of the *Criminal Code.*

[4] The Defence contested the voluntariness of those utterances. On September 6, 2018, after hearing evidence from Cst. Jennifer Murray and Cst. Daniel Bérubé, and after submissions from counsel, I held that the utterances were admissible.

Evidence
D/Cst. Jennifer Murray

[5] Detective Constable Jennifer Murray has been with the Halifax Regional Police for 14 years. She is currently with the Internet Child Exploitation Vice Unit. She was the investigating officer in relation to this matter.

[6] D/Cst. Murray testified that a missing persons report was placed by S.S. in relation to her daughter M.S. D/Cst. Murray contacted M.S. via text to request to meet her. They arranged to meet at Sobey's on Lacewood Drive in Clayton Park. At that point, D/Cst. Murray neither knew who the accused was nor expected her to attend the meeting. At that time, the accused was not a suspect. Furthermore, D/Cst. Murray had no information about the accused. D/Cst. Murray had information that S.S. had not heard from her daughter, M.S. for a period of time.

[7] D/Cst. Murray arrived in plain clothes to meet M.S. D/Cst. Murray had a sidearm, but it was not visible. When D/Cst. Murray met M.S., who was with the accused, she advised M.S. that her mother had placed a missing person report and she was checking up on her.

[8] D/Cst. Murray testified that there was no threat made toward the accused, and no hope of advantage suggested if she cooperated. The accused appeared in good health and appeared to understand what was happening. D/Cst. Murray said she did not suggest that any disadvantage would come from not speaking to her.

[9] D/Cst. Murray testified that during this meeting the accused told her that M.S. was dating her son, Anthony Fraser. She said that the accused also admitted that she had lied to police the day before about M.S.'s whereabouts. While she knew where M.S. was, she did not advise police because she wanted to know first from M.S. what was going on and why the police were at her home.

[10] The accused told D/Cst. Murray that M.S. was living with her. D/Cst. Murray testified that she posed no specific questions to the accused and was unsure what prompted the accused to speak with her. She testified that when she was speaking with M.S., the accused would step in and speak to her, that is, with the officer herself.

[11] The next time D/Cst. Murray encountered the accused was on May 24, 2016.

[12] On cross-examination D/Cst. Murray indicated she was with the Vice Unit in November 2015 and at that time would monitor websites involved in child exploitation, including Backpages. The Vice Unit was aware that a police officer was sent to the accused's door. The meeting with M.S. was set up on November 24, 2015. D/Cst. Murray was asked whether she had access to the running file concerning M.S. and she indicated she could not recall whether she was on holidays that weekend. However, she did indicate that November 24, 2015, was not the first time she had heard the name M.S. M.S.'s mother, S.S., reported her suspicion that her daughter was being exploited and expressed concern about her daughter not being at home. D/Cst. Murray was aware that in October 2015, S.S. had contacted the police seeking information about her daughter's involvement in the provision of sexual services.

[13] Between October and November 2015, there were efforts to contact M.S. D/Cst. Murray had her text number and could text her. While she had not met the accused before November 24, 2015, D/Cst. Murray, had received information from

Cst. Bérubé that he had been to the accused's home the day before and had been given information by S.S. as to who the accused was.

[14] D/Cst. Murray testified that she was neither conducting an investigation nor a missing person inquiry but still spent 15 to 20 minutes with M.S. and the accused finding out what was going on.

[15] D/Cst. Murray did not provide advice to either M.S. or the accused concerning any criminal consequences as a result of what was told to police the day before or what either of them were telling her during the meeting. D/Cst. Murray agreed that she did not have a notebook or pen with her at the time of the meeting and she did not write down in her notebook, after the fact, the details of the conversation. She agreed it had been three years and two months since that conversation.

[16] D/Cst. Murray was asked whether during the interim time it occurred to her to write down her best recollection of what the accused said to her. She responded that she had a specific recollection that the accused admitted she had lied to the police when asked the day before. She had a specific recall that the accused said she had lied when she said she did not know M.S.'s whereabouts because she wanted to hear from M.S. first as to what was going on.

Cst. Bérubé

[17] Cst. Daniel Bérubé testified. He has been a member of the Halifax Regional Police since May 2015. On November 23, 2015, he was assigned to the West Division in the Bedford/Sambro area. He was dispatched in relation to a missing person report originating from M.S's mother, S.S., who suggested various avenues to look for M.S. One avenue led him to K.P., a friend of M.S. at the time. He testified that K.P. told him that a good place to look for M.S. was at Kingsmere Court, an address associated with the accused. This was the information he had concerning the accused.

[18] Cst. Bérubé arrived at the accused's door and advised her he was trying to locate a missing youth. He was dressed in a patrol uniform and had a visible sidearm. He told the accused that he had received information which directed him to the door of the accused.

[19] The female who opened the door identified herself as Renee Forgeron. Cst. Bérubé identified the accused as the individual who was at the door. He inquired whether she knew M.S., and whether she knew M.S.'s whereabouts. He testified that he did not have any physical contact with the accused, did not threaten her, did not

offer an advantage for cooperation, and did not threaten a disadvantage for non-cooperation.

[20] He believed that this encounter with the accused lasted less than five minutes. Cst. Bérubé did not investigate further but referred the matter back to the Vice Unit to continue the inquiries.

[21] According to Cst. Bérubé, the accused indicated she believed she heard of the name before but did not know where she was or much about her. The conversation transitioned, with the accused saying that M.S. may have stayed there a month prior, but the accused said she did not know M.S.'s current whereabouts.

[22] Cst. Bérubé said he had not heard of the accused before this, she was not a known suspect, and consequently he did not provide her with a police caution.

[23] He testified that upon asking the accused if she knew M.S. she had no reaction to the name and gave a blank stare. He described this as body language appearing as if she had never heard of the person before.

[24] Cst. Bérubé testified that when a missing person issue arises, most are turned into investigations. He was dispatched to deal with this matter and he agreed that any time officers are dispatched they are conducting an investigation. He was asked whether during his training before he started with the Halifax Regional Police in 2015, when he was attending training in Algonquin, Ottawa, he understood that anytime he was asking questions he is asking them as part of an investigation. He agreed that if any false information is given in response to the questions asked in the course of those investigations charges of obstruction can be laid. Cst. Bérubé was asked whether he took any steps to make the accused aware that if he determined that inaccurate information was given, the accused could be charged criminally. He answered that he did not provide that information to her.

[25] Cst. Bérubé agreed that he heard that M.S. was probably involved in underage prostitution. He was unsure who had provided that information. He could not recall whether he advised the accused that the concern motivating the inquiries was that M.S. was probably involved in underage sex work.

Crown's Position

[26] The Crown submitted that when Cst. Bérubé was making inquiries of the accused at her home, he was merely collecting information concerning a missing person report. The Crown argues that the accused was not a suspect at that time but

that there was information indicating that she may have knowledge concerning where M.S. was staying.

[27] The Crown submitted that the admission by the accused to D/Cst. Murray should be admitted into evidence because it was not made during an interrogation. The accused was not arrested, was not charged, and was not under detention at the time.

[28] The Crown argued the accused chose to show up at that meeting with M.S. and that she volunteered information. The Crown argued that the police are allowed to ask questions, and not everyone needs to be cautioned. There was no charge in relation to the missing person investigation.

[29] The Crown submitted that the evidence of both officers is relevant to whether or not the accused obstructed an officer. The question is whether the statements were voluntary. With regards to the evidence of Cst. Bérubé, the Crown argued there was no element of oppression, threats or promises made, or trickery employed.

[30] The Crown argued that the police are allowed to make inquiries concerning the location of missing persons without warning. Furthermore, there is no evidence that the accused did not have an operating mind at the time of either discussion.

[31] The Crown argues that there is no evidence to raise a reasonable doubt that the accused did not know she was speaking to police officers.

Defence Position

[32] The Defence argues that Cst. Bérubé was performing an investigation and consequently, he had an obligation to warn the accused. Given that the accused could be subject to charges after providing answers, a caution should have been given.

[33] Defence counsel made reference to *R. v. Sandeson*, 2017 NSSC 197.

[34] The Defence submits that an individual providing information during the investigation of a missing person is entitled to be provided with enough information by the police to make an informed choice whether she wants to speak to the police.

[35] Additionally, the Defence argues that neither officer has any notes about the exact words uttered by Ms. Webber. The Defence initially submitted that both of the utterances made by the accused to both officers should be rule inadmissible because the accused was not provided information with regards of the consequences of

speaking to the police. However, later the Defence conceded that the second statement, to D/Cst. Murray, was admissible.

[36] The Defence argues that because Cst. Bérubé believed he was investigating a missing person he had to advise the accused and provide a warning that this was not just a simple inquiry and the accused should not jeopardize herself and should appreciate that false answers could result in charges of obstruction or other charges.

[37] In summary, the Defence submits that a caution was required. The defence concedes there was no threat or promise made by Cst. Bérubé, no detention, no restriction, and that the accused had an operating mind.

Law and Analysis

[38] I have reviewed the case law generally as to voluntariness including *R. v. Oickle*, 2000 SCC 38, *R. v. Sandeson*, 2017 NSSC 197, *R. v. Singh*, 2007 SCC 48, and *R. v. Garnier*, 2017 NSSC 338.

[39] The Crown bears the burden of proof. The Crown must prove, beyond a reasonable doubt, that the statement given to Cst. Daniel Bérubé was made voluntarily by the accused. The statement was made on November 23, 2015 and was given to a person in authority.

[40] When Cst. Bérubé went to Kingsmere Court, the accused was neither a person of interest nor a suspect. The accused was a person Cst. Bérubé was told might have information concerning the whereabouts of M.S. The accused was not detained.

[41] Before asking her questions about a missing person report, did Cst. Bérubé have to caution or warn Ms. Webber? Does the failure to do so raise a reasonable doubt as to the voluntariness of the statement given.

[42] I have reached the following conclusions. First, there was no Charter issue raised. Secondly, there was no reason at the time, based on all of the evidence I heard, for Cst. Bérubé to give a caution or warning. I heard that he subjectively and, perhaps erroneously, thought, as a new officer, that he was conducting an investigation. However, he did not believe that the accused was a person of interest or a suspect or otherwise in legal jeopardy. The Court had been directed to no case law to support a contention otherwise.

[43] I reviewed *R. v. Garnier*, 2017 NSSC 338, and in particular paragraphs 36-46, with regards to the responsibilities of a reasonably competent investigator. The Court in that case stated:

> [36] In *R. v. Worrall*, 2002 CarswellOnt 5171, [2002] O.J. No. 2711 (Ont. Sup. Ct. J.), Watt J. (as he then was) held that an individual must be cautioned by the police if there is information that would alert a reasonably competent investigator to that person being associated with committing a crime. Justice Watt made the following comments about the law of voluntariness generally:
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> > 93 The challenge to admissibility on common law grounds requires Crown counsel
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> > > i. to introduce some evidence that the remarks or statement attributed to the accused were made; and
> > >
> > > ii. to prove beyond a reasonable doubt that the remarks or statement were or was voluntary. ...
> >
> > 94 To determine whether something said to persons in authority by one later accused of crime was voluntary requires consideration of all the circumstances in which the accused person spoke.

[44] There was nothing that alerted either Cst. Bérubé at the time that the accused was associated with committing a crime.

[45] Arnold, J. continued in *R.v. Garnier, supra*, as follows:

> [37] Having reviewed voluntariness principles generally, in *Worrall*, Watt J. went on to review the circumstances of the case:
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> > 99 When Detective Scott and Detective Constable Chiasson arrived at 50 Gerrard Street East around eight o'clock in the evening on January 2, 2000, they were reasonably certain that the person whose dead body had been found at 500 Richmond Street West was Brendan Carlin. They knew of the family and work relationship between Brendan Carlin and Joseph Worrall. They knew they lived together. Joseph Worrall was a logical place to start to find out something about Brendan Carlin: his habits, activities, friends, associates, and perhaps his recent whereabouts.
> >
> > 100 There were also quite a few things that Scott and Chiasson didn't know about Brendan Carlin. When did he die? What was he doing before he died? Where had he been? With whom? How did he die? The officers had no reason to suspect foul play, much less the involvement of Joseph Worrall in any unlawful killing there may have been of Brendan Carlin.
> >
> > 101 Nothing that happened or didn't happen at 50 Gerrard Street East, or en route to 14 Division raises the slightest doubt in my mind that what Joseph Worrall said there was anything but voluntary. I do not consider

> his story about the finding of marijuana and the assurances given to be worthy of serious consideration.

[46] Similarly, in this case, Cst. Bérubé had no reason to caution the accused. He was given her name as well as other names of people to speak with to determine whether they knew where M.S. was living. He had no evidence of a crime, much less any grounds to consider the accused's involvement in a crime.

[47] Arnold, J. continued in *R. v. Garnier*, *supra*, again quoting from *Worrall*:

> 102 Investigators had no reason to caution Joseph Worrall at 50 Gerrard Street East. They had no evidence of crime, much less any grounds to consider his involvement in it. There was nothing said or done to raise any doubt about Joseph Worrall's freedom to choose whether to speak or not. He wanted to cooperate.
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> [38] The situation changed in that case when the investigators spoke to Mr. Worrall again outside the police station. This led Watt J. to apply the "reasonably competent investigator" test, for determining if, and when, Mr. Worrall became a suspect:
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> > 103 The police investigation took a turn, however, when Joseph Worrall and Detective Constable Chiasson were talking outside 14 Division police station. It was there that the officer learned, for the first time:
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> > i. that the accused and deceased had been using heroin shortly before the last time the accused saw the deceased;
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> > ii. that when the accused gave Brendan Carlin heroin, he (Worrall) thought he may have given him too much;
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> > iii. that Brendan Carlin was really "mashed" on ecstasy and too much booze at the time Worrall gave him the heroin;
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> > iv. that the accused knew that heroin suppresses the lungs and that Brendan Carlin was "a bad asthmatic"; and
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> > v. that the accused thought he should have stayed with Brendan Carlin.
> >
> > 104 This information, as it seems to me, would alert any reasonably competent investigator to the realistic prospect that Brendan Carlin's death may have been associated with the consumption of heroin provided by the speaker, Joseph Worrall. Supplying heroin to another is trafficking in heroin, an unlawful act.
> >
> > 105 Despite this admission and its communication to Detective Scott by Detective Constable Chiasson before the video statement began, neither officer thought it appropriate or prudent to caution Joseph Worrall. He was

> never told that he was not required to answer police questions, or that anything he did say would be taken down and could be used in evidence.
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> 106 Voluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them. Neither Detective Constable Chiasson nor Detective Scott told Joseph Worrall (after this disclosure) that what he said could be used in his prosecution for an offence arising out of his conduct in connection with the death of Brendan Carlin. This informational deficit assumes an added importance when there is factored in the implicit suggestion that the identification process must await the interview of Joseph Worrall.
>
> 107 In the result, I am simply not satisfied in all the circumstances that Crown counsel has proven beyond a reasonable doubt that the remarks and interview that took place after this disclosure to Detective Constable Chiasson were voluntary. They are inadmissible on that basis in these proceedings.

[48] Here, there was no evidence to alert any reasonably competent investigator that the accused was possibly involved in a crime. The accused was not yet a suspect. There was no information pointing to a crime.

[49] The test for a reasonably competent investigator was examined in detail in *R.v. Garnier, supra*; which I will quote at length:

> [39] In *R. v. Buchanan* (2006), 38 C.R. (6th) 330, [2006] O.J. No. 814 (Ont. Sup. Ct. J.), Dambrot J. also referred to the "reasonably competent investigator" test, stating:
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> > 23 At the end of his re-examination, I was unclear about what Det. Buchanan meant when he used the word suspect, and asked him for his definition. He indicated that a person would be a suspect if he had definite information linking him to a crime, such as positive identification by the victim. I referred him to the definition of a suspect found in the Ontario Major Crime Manual, mentioned in my judgment in *R. v. Dalzell*, [2003] O.J. No. 4901 at para. 70, that is, a suspect is "[a] person an investigator reasonably believes may possess a degree of culpability in the commission of the criminal offence being investigated and there is some incriminating information linking the person to the crime." He agreed, in re-examination, that he was taught this definition in his training.
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> [40] In *R. v Smyth* (2006), 74 W.C.B. (2d) 8, [2006] O.J. No. 5527 (Ont. Sup. Ct. J.), Tratford J. also discussed the "reasonably competent investigator" test when determining if a suspect should be cautioned, and said:
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> > 81 Where a police officer is questioning a "suspect," there is an obligation, at common law, to caution him. The failure to advise a

"suspect" of the right to silence, the potential jeopardy that he faces and the fact that any of his statements may be used as evidence at trial is a factor against voluntariness. See *Boudreau v. R.* (1949), 7 C.R. 427 (S.C.C.). Depending upon the other circumstances of the case, the failure to caution a "suspect" may lead to a reasonable doubt on the issue of voluntariness.

82 While this rule is easily stated, and well established at common law, it is more difficult to define a "suspect." In my view, the definition of a "suspect" must be formulated for the purpose of giving effective, practical recognition to the right to silence. The right to silence is a cornerstone of our values as a free and democratic society. No one is required to speak with the police at any time, let alone while he is implicated in a crime. The most effective way of recognizing the right to silence is to define the term "suspect" objectively. Thus, where the information collected during an investigation, objectively viewed, tends to implicate a person in a crime, the person is a "suspect." The objective nature of the test is critical to its efficacy as a means of recognizing the right to silence. A police officer cannot avoid the obligation to caution a "suspect," objectively viewed, by a subjective analysis to the contrary. The fact that a person who is a "suspect," objectively viewed, may also be a witness, or a victim, does not affect the application of the rule to the investigation. As O'Connor J. said in *R. v. J.R.*, [2003] O.J. No. 718 (S.C.J.) said at para. 18:

> Mere witnesses, who have no likelihood of becoming accused persons have no need for the protections afforded by the rule. They are in no jeopardy of prosecution and thus of providing evidence against themselves. However, a person whom the police reasonably suspect may become an accused person must also be afforded the protection of the rule. The police cannot simply declare a person only a witness, against whom they have evidence of involvement in a crime and are continuing to acquire evidence, in order to avoid providing the cautions and the right to counsel, out of a concern the person will avail himself of these rights and refuse to provide a statement. [Emphasis added.]

Thus, in this case, the belief by Detective Gordon and Constable DeMelo that the defendant was a "person of interest," in that he was possibly a witness, possibly a victim or possibly a "suspect" did not alter their obligation to caution him at the outset of their contact with him at the Schoolhouse. The information available to Detective Gordon when he arrived at the Schoolhouse around 2:45 am on June 1, 2004, objectively viewed, tended to implicate the defendant in the death of David Mascarin. The defendant's identification card was in the wallet of the jeans located in a pile of clothing near the body of the deceased, who appeared to have been sexually assaulted during an assault that led to his death. These circumstances tended to identify him as the perpetrator. To delay

> cautioning the defendant as a "suspect," as Detective Gordon and Detective Sergeant Cashman did, until such time as they had an articulable basis to discount the possibility that the defendant was a witness, or a victim, is to equate the definition of a "suspect" with the concept of probable cause to arrest someone. See *Chartier v. (Quebec) A.G.* (1979), 9 C.R. (3d) 97 (S.C.C.) and *R. v. Storrey* (1990), 53 C.C.C. (3d) 316 (S.C.C.). When a police officer is arresting someone, s/he cannot merely rely on incriminating information, ignoring exculpatory information. There must be an articulable basis to discount the exculpatory information before it can be said, as a matter of law, that reasonable grounds exist to support a belief in the commission of a crime. To approach the definition of "suspect" in the same way would, in most cases, delay the caution, thereby giving a less effective recognition to the value of the right to silence in the criminal process.
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> 83 Of course, the objective test is premised upon an analysis of the information by a reasonably competent investigator. As Watt J. said in *R. v. Worrall*, [2002] O.J. No. 2711 (S.C.J.) at para 104:
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> > This information, as it seems to me, would alert any reasonably competent investigator to the realistic prospect that Brendan Carlin's death may have been associated with the consumption of heroin provided by the speaker, Joseph Worrall. Supplying heroin to another is trafficking in heroin, an unlawful act. …

[41] In *R. v. Carter*, 2012 ONSC 94, [2012] O.J. No. 1003, the accused was in custody after an arrest for possession of narcotics and stolen property when he became a suspect in a missing persons investigation. He gave statements to the police in relation to the missing persons investigation in July 2008. The victims' bodies were discovered in December 2008 and the accused was arrested for murder in January 2009. He argued that the 2008 statements should be excluded, claiming that the police had concealed the fact of the murder investigation. He also claimed that a statement given after his arrest for the murders should be excluded due to a nexus with the 2008 statements. After concluding that the police were aware in July 2008 that they were investigating homicides, Pomerance J. discussed the s. 10(a) *Charter* issue regarding admissibility of the June 2008 statements and stated:

> [18] The central issue to be determined is whether the police were obliged to advise Mr. Carter that he was a suspect in a murder investigation when they interviewed him on July 7 and 8, 2008. At the outset of the July interviews, the officers told Mr. Carter that he was a suspect in a "missing persons investigation". They did not tell him that he was under investigation for homicide. It was argued, on behalf of Mr. Carter, that the officers deliberately minimized his jeopardy so as to lull him into making a statement to the police. The officers testified that this was not the case. They insisted that they did not mention a homicide

> investigation because they did not, at that time, believe that a homicide had occurred.

[42] Justice Pomerance excluded the July 2008 statements, finding that the police violated the accused's rights by failing to provide him with his s. 10(a) *Charter* rights (not the police caution relating to voluntariness):

> [39] On the whole of the evidence, I find it likely that, on July 7 and 8, 2008, the interviewing officers did believe that the missing persons had been murdered. If the officers did believe that the victims were dead, that they had been murdered, and that Mr. Carter was implicated in the crimes, they were constitutionally obliged to inform Mr. Carter that he was a suspect in a homicide investigation, not an innocuous inquiry into "missing persons".
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> [40] If I am wrong, and the interviewing officers did not know that the investigation was focused on murder, this is something that they ought to have known. Other officers within the Windsor Police service believed, on cogent grounds, that the victims had been murdered. The Windsor Police Service was conducting a murder investigation. It is this institutional knowledge that must set the standard for the necessary *Charter* warning. The police cannot sidestep constitutional obligations merely by keeping certain strategically placed officers uninformed. This is not acceptable as a deliberate strategy. Nor is it acceptable as a product of systemic negligence. In either instance, it must be found that the suspect's rights to be informed of his jeopardy under s. 10(a) was infringed.
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> [41] Finally, the obligation under s.10(a) was triggered even if the police did not have reasonable grounds to believe that the victims had been murdered. On the strength of the evidence presented to Mr. Carter during his interview, there was certainly a reasonable suspicion to believe that the victims had been murdered. Mr. Carter was being detained in relation to that suspicion (even though he had been arrested for other offences). To the extent that the detention was linked to suspected homicides, Mr. Carter had the right to know that. He was entitled to be cautioned on the offence of homicide whether he was arrested on reasonable grounds or simply detained on reasonable suspicion (see *R. v. Suberu*, 2009 SCC 33, [2009] S.C.J. No. 33). He was entitled to be given that information before he waived his right to counsel at the beginning of the July 7, 2008 interview.
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> [42] The police were under no obligation to charge Mr. Carter with murder at the time of the interviews. They were entitled to wait until the bodies were found before laying formal charges. However, if the police wished to question Mr. Carter about the murders under investigation, they had to tell him what he was really being questioned about (see *R. v. Borden*, [1994] S.C.J. No. 82). [Emphasis added]

[43] Alternatively, applying the analysis described by Hoegg J.A. in *Folker*, even if the police had "a lurking suspicion" of Mr. Garnier at the time of the first interview this would not have necessarily converted the interview into detention:

> [28] On July 24, 27 and 28, 2010 and until much later that summer, Mr. Folker was treated as a bereaved family member and was included with Ms. Shirran's family members in police updates on the investigation. Police continued to investigate alleged sightings of Ms. Shirran, and Mr. Folker continued to initiate contact with the police to volunteer information (in one case suggesting that an acquaintance of his ought to be investigated for possible involvement in Ms. Shirran's disappearance) to assist them. Even if police had a lurking suspicion that Mr. Folker was involved in Ms. Shirran's disappearance when they interviewed him in July, they had nothing concrete on which to base it, and certainly had no grounds for charging him or for a warrant to search his premises. In any event, even focussed suspicion does not turn an interview into a detention, as was held in *Grant*. [Emphasis added]

[44] In *R. v. Belbin*, 2015 ONSC 5346) [2015] O.J. No. 4843, the court considered when a "person of interest" would require a police caution or *Charter* warning prior to giving a statement. The Crown argued that Mr. Belbin was a person of interest not requiring a caution, but the defence argued that he had been "well along the spectrum to being a suspect" at the time of the interview (paras. 101-102). The court said:

> 103 It is clear that if an individual is considered to be a "suspect," then a caution is required. The Ontario Major Case Manual defines "suspect" as follows:
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> > A person an investigator reasonably believes may possess a degree of culpability in the commission of the criminal offence being investigated and there is some incriminating information linking the person to the crime.
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> 104 The Ontario Major Case Manual defines a "person of interest" as:
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> > A person whose background, relationship to the victim or the opportunity to commit the offence may warrant further inquiry but at that time no other grounds exist to suggest culpability in the crime being investigated.
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> 105 The case law indicates that there are circumstances in which an individual is neither under arrest nor detention but where a caution is nevertheless mandated. This question was considered by Dambrot J. in *R. v. Dalzell*, [2003] O.J. No. 4901, at paras. 61-75. In that case, the Crown sought to prove the voluntariness of a statement made by the accused prior to his arrest and at a time when he was considered by the police to be a "person of interest."

> 106 In his review of the case law, Dambrot J. referred to *R. v. Morrison*, [2000] O.J. No. 5733 (Sup. Ct.), *R. v. Worrall, supra*, and *R. v. J.R.*,[2003] O.J. No. 718 (Sup. Ct.).
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> 107 In *Morrison*, Trafford J. held that the police terminology as to whether an individual is a person of interest or a suspect is not determinative nor is it necessarily instructive. He defined the test as follows: "A person is a suspect when, objectively viewed, the information collected during an investigation tends to implicate him/her in the crime." It is an objective test, not a subjective one, and is to be applied to the totality of the information. [See also Trafford J.'s reasons in *R. v. Smyth*, [2006] O.J. No. 5527 at paras. 81-84.]
>
> 108 In *Worrall*, Watt J. expressed the view that once a police officer has information that "would alert any reasonably competent investigator to the realistic prospect" that the death of the deceased may have been associated with an unlawful act committed by a person being questioned, the officer should tell that person that his or her answers could be used in evidence in a prosecution brought against him, even where that person is neither arrested nor detained. The "informational deficit" arising from a failure to so caution the accused is a consideration when the voluntariness of the statement is considered at trial: *Dalzell* at paras. 67 and 72.
>
> 109 In *J.R.*, O'Connor J. applied the protection of the voluntariness rule to any person whom the police "reasonably suspect may become an accused person." Failure to caution such a person is a factor for consideration on the issue of voluntariness: *Dalzell* at para. 68.
>
> 110 Following his review of the case law, Dambrot J., at para. 75, concluded as follows:
>
> > In the end, I do not see a great deal of difference in these various formulations. The trigger for an expectation that the police will give a person being questioned a caution respecting the right to silence must be less than reasonable grounds to believe that the person committed an offence, but must surely be more than speculation, knowledge that other persons suspect that person, or even reliable information that, to use the words of the Major Case Manual, a person's "background, relationship to the victim or the opportunity to commit the offence may warrant further inquiry."
>
> 111 I agree with and adopt Dambrot J.'s reasoning in *Dalzell*. [Emphasis added]

[45] Justice Garton went on to consider the specific circumstances of the taking of Mr. Belbin’s statement in view of the caselaw:

> 112 In the present case, the police had the following information about Mr. Belbin:

> 1. Mr. Belbin lived on the same street where the abduction took place;
>
> 2. He told the canvassing officers that he was at home when the complainant was abducted. He also told them that he lived alone;
>
> 3. He had delivered newspapers to houses on the street up until about two weeks prior to the abduction;
>
> 4. He did not let the police into his apartment when he was canvassed, claiming that his apartment was messy because he had been cooking;
>
> 5. He appeared somewhat nervous during the canvas;
>
> 6. He did not provide the canvassing officers with contact information for his mother;
>
> 7. He had a history of apprehensions under the *Mental Health Act*, the last one having occurred some years earlier, in July 2006, when his mother voiced concern about his lack of personal hygiene;
>
> 8. At the time of the interview on January 13, 2012, the complainant's father, her grandfather, and R.G. had been excluded as contributors to the DNA found on the complainant's pyjamas; and
>
> 9. Mr. Greenspan and Mr. Hofstedter, who were asked to provide consent DNA samples as a result of having been named by the complainant's family, had alibis that would have been easy to confirm.

[46] Justice Garton was not satisfied that any of these factors led to the conclusion that Belbin was being singled out for focussed investigation or being linked to the office. In the final analysis, Garton J. concluded that no caution had been required in Mr. Belbin's case:

> 120 Taking into account the totality of the above information and viewing it objectively, I find that it falls far short of tending to implicate Mr. Belbin in the crime (the *Morrison* formulation). It would certainly not have alerted a reasonably competent investigator to the realistic prospect that Mr. Belbin abducted the complainant (the *Worrall* formulation). Further, it did not provide the police with reasonable grounds to suspect that Mr. Belbin committed the offence (the *J.R.* formulation).
>
> 121 In *Dalzell*, Dambrot J. found that based on the information that the police possessed in that case, it could be said that the accused might have committed the offence. But in no relevant sense did the information implicate the accused in the offence or point to him as having committed it. I draw a similar conclusion in this case. Based on the information in the possession of the police, one could speculate that Mr. Belbin might have abducted the complainant, but the information did not, in any relevant

> sense, implicate him in the offence or point to him as having committed it. The information was certainly sufficient for the police to regard Mr. Belbin as a person of interest, whose background and opportunity to commit the offence "may warrant further inquiry." However, it was not enough to move him sufficiently along the spectrum from person of interest to suspect.
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> 122 In *Dalzell*, Dambrot J., at para. 78, concluded as follows:
>
> > If information such as this were sufficient to compel the police to caution those that they wish to interview, it would cast the net far wider than I can conceive as being appropriate. It would serve to encourage silence from those with little or nothing to fear. It would hamper the effectiveness of legitimate police investigation, without meaningfully enhancing constitutional rights.
>
> 123 I have come to the same conclusion in the present case. I find that Det. Cst. Villaflor was not compelled to caution Mr. Belbin prior to conducting the interview on January 13, 2012.
>
> 124 The general tone of the 15-minute interview was friendly and polite. Det. Cst. Villaflor made no threats or promises. He offered no inducements. There was a complete absence of oppressive circumstances. The "operating mind" requirement was met. Based on all of the evidence, there can be no doubt that Mr. Belbin's statement to Det. Cst. Villaflor was voluntary. It is therefore admissible at trial.

[50] Applying the objective test, was the accused a suspect? There was no information that implicated the accused in a crime. The only information the officer had was that the accused may know where a youth was who could not be found by her mother. A youth who had left her home. Furthermore, the accused was not, at the time, well along to being a suspect.

[51] There was no information indicating that the accused was involved in M.S.'s possible involvement in underage sex work. Given this, the failure to caution is not an issue impacting voluntariness. The precondition to a caution must be speculation or knowledge that others suspect a person. Here, taking into account the totality of the information, that is:

1. S.S had not heard from her daughter;
2. S.S wanted help finding her daughter;
3. S.S. suspected her daughter was involved in underage sex work; and,
4. Cst. Bérubé was given avenues to look for M.S. and one of the addresses was the accused.

[52] This taken together falls short of implicating the accused in any crime.

[53] There were no reasonable grounds to indicate that the accused was involved in any crimes, such as human trafficking.

[54] I have concluded, based on the evidence provided to me and the caselaw that I have referenced, that the Crown has proven beyond a reasonable doubt that the statement given by the accused to Cst. Bérubé was given voluntarily and that her will was not overborne.

[55] It was a short interaction. There were no threats or promises made. No inducements were offered. There were no oppressive circumstances. Based on all the evidence, there is no doubt that the accused's statements to Cst. Bérubé was voluntary and is admissible at trial.

Brothers, J.