

COURT OF APPEAL FOR ONTARIO

CHARRON, BORINS and FELDMAN JJ.A.

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	C. Tier,
	)	for the respondent
	)	
Respondent	)	
	)	
- and -	)	
	)	Marie Henein and Jennifer
	)	Gleitman,
	)	for the appellant
	)	
EHAB MARCUS SABRI	)	
	)	
	)	
Appellant	)	Heard: May 13, 2002
	)	
	)	
	)	

**On appeal from the conviction imposed by Justice Robert Abbey on
November 1, 1999.**

CHARRON J.A.:

[1] [1] The appellant, Ehab Marcus Sabri, was convicted of manslaughter in relation to the death of Darryl Taylor. He was sentenced to 18 months imprisonment. He appeals against conviction only. The main issue on this appeal is whether the appellant's statements to the police were voluntary.

[2] [2] Taylor's body was found laying on a sidewalk in the early morning hours of October 25, 1998. The post-mortem examination revealed that the deceased had died as a result of a massive blunt force trauma to the head. The examination also revealed that he was intoxicated at the time of his death. There were

no witnesses to Taylor's death and initially the police had no suspect.

[3] [3] On November 10, 1998, as a result of information received from a prisoner implicating the appellant, an undercover police officer contacted the appellant and arranged to meet him in a parking lot. The appellant arrived at the agreed upon location accompanied by four men. The undercover officer gave a signal and several police officers appeared on the scene. The appellant and his four companions were arrested and charged with murder. The investigating officers conceded at trial that they had no grounds to arrest anyone other than the appellant. No charges were pursued against the other men. They were released several hours later, after they had given statements incriminating the appellant. Following the interviews with these other men, the police interviewed the appellant and obtained his version of his encounter with Taylor.

[4] [4] The appellant told the police that he had encountered Taylor walking on the street, had said hello to him, and that Taylor had sworn at him. The appellant explained that he had gone back to Taylor to ask him why he had sworn at him when Taylor pushed him, told him to "fuck off", and otherwise insulted him, at which point the appellant hit him with "just a touch" on his jaw, and Taylor fell to the ground. The appellant had been out with some friends on the evening in question and was on the way to his parked vehicle when he encountered Taylor.

[5] [5] The appellant was charged with manslaughter. His trial proceeded before a judge and jury. Much evidence was called at trial with respect to Darryl Taylor's actions on the evening before his death. In summary, this evidence revealed that Taylor had attended at the police station earlier in the evening of October 24 to lay a complaint against persons he claimed had just assaulted him. He had an injury to his left ear and was bleeding, but he refused to get medical attention. The three parties who were suspected to be responsible for Taylor's injuries were apprehended. Taylor left the police station shortly after 8:00 p.m. He went to the apartment he shared with his sister. She asked him to leave because he had been drinking. When he refused, she phoned 911 at 11:03 p.m. Taylor left before the police arrived. He went to a bar and was last seen between 1:15 a.m. and 1:30 a.m. He was intoxicated. The post-mortem examination revealed that he had 272 milligrams of alcohol in 100 milliliters of blood at the time of his death. The defence relied on this evidence of Taylor's actions in the hours that preceded his death to show that Taylor was the likely aggressor in the later encounter with the appellant.

[6] [6] One witness testified that, sometime before 2:00 a.m. on October 25, 1998, she saw three males kicking and punching Darryl Taylor, on the street close to the location where Taylor's body was found. The witness confirmed, both in a police line-up and at trial, that the appellant was not one of the three people she saw beating Taylor. It was the Crown's theory at trial that the appellant had come across the deceased on the street sometime after this beating by the three men, saw him as an easy mark, and had punched him with sufficient force to cause him to fall on the ground and meet his death. The Crown relied on statements made by the appellant to some of his friends shortly after the event and on the statements he made to the police after his arrest. In his statements to his friends, the appellant described his encounter with Taylor in much the same way as he had described it to the police, with some minor variations.

[7] [7] The appellant did not testify at his trial. The defence claimed that Taylor had been the aggressor and that he had engaged the appellant in a consensual fight, or alternatively, that the appellant had hit him in self-defence. The defence further claimed that there was insufficient proof of causation to support a conviction. It was the Crown's contention at trial that the appellant had not acted in self-defence, that he had been the aggressor and that he had deliberately hit Taylor with sufficient force to knock him to the ground thereby causing his death. Crown counsel, in his closing address to the jury, placed much reliance on the appellant's statement to the police that he had *gone back* to Taylor to ask him why he had sworn at him. Crown counsel submitted that this statement was inconsistent with the defence theory that the appellant had either engaged in a consensual fight or acted in self-defence.

[8] [8] The appellant raises four grounds of appeal against conviction. The first ground of appeal relates to the voluntariness of his statements to the police. The three other grounds relate to the trial judge's instructions to the jury. The appellant submits that the trial judge erred in his instructions on self-defence and on post-offence conduct. He also submits that the trial judge did not sufficiently relate the evidence to the question of objective foreseeability of harm.

a) The Appellant's Statements to the Police

[9] [9] A *voir dire* was conducted at trial to inquire into the voluntariness of the following statements made by the appellant: i) utterances made in the police car immediately following his arrest;

ii) an unrecorded statement made at the police station at approximately 3:35 a.m. on November 11, 1998; and iii) a videotaped statement made at approximately 4:00 a.m. after the unrecorded statement. The trial judge ruled all statements voluntary. Only the videotaped statement was introduced at trial. At issue on this appeal is the voluntariness of both the unrecorded statement and the videotaped statement. It would appear from the record that the utterance at the time of the arrest consisted of the words “I just want to know what this is about.” The voluntariness of that utterance is not in issue on this appeal.

[10] [10] In his testimony on the *voir dire*, the appellant alleged that he had been repeatedly assaulted and threatened by the police following his arrest. He testified that one of the arresting officers had pushed his face into the trunk of the police car at the scene of the arrest. He further alleged that, while in the elevator at the police station, one of the two officers who were with him had punched him on the hip causing a bruise and that the officer had also injured himself on the wrist in the process. The appellant also alleged that, later in the interview room, two other officers had repeatedly slapped him and threatened to send him and his family back to Iraq if he did not tell them what had happened in respect of Taylor’s death. He testified that he told the police about his involvement with Taylor’s death because he believed he and his family would be sent back to Iraq if he didn’t. He then repeated his statement on video as requested. The police witnesses denied that anything untoward had happened in their dealings with the appellant. In fact, they described him as compliant throughout.

[11] [11] The trial judge rejected most of the appellant’s testimony on the *voir dire* on the basis that it was inconsistent with the weight of the evidence. However, the trial judge found that the appellant had indeed been assaulted in the elevator by Detective Gould, in the presence of Detective Power. This assault took place while the two officers were transporting the appellant to the cell block approximately six hours before the same two officers obtained the first unrecorded statement from the appellant in the interview room. The trial judge found that the assault was of sufficient force to cause a bruise to the appellant’s hip, as depicted on a photograph taken by defence counsel the next day, and a cut to Gould’s wrist underneath his bracelet. Although the officer had denied striking the appellant or ever needing a bandage for his wrist on the night in question, the trial judge noted that a videotaped interview by the officer of one of the other persons arrested that evening, about one hour after the officer would have been in the elevator with the

appellant, depicted him with a bandage to his right wrist. The trial judge further noted that the bandage was missing in the later videotaped interview with the appellant and that the officer could not provide an explanation with respect to the bandage. The trial judge was satisfied on all the evidence that Gould had assaulted the appellant as alleged.

[12] [12] The trial judge concluded, however, that the assault on the appellant was “not sufficiently connected either temporally or otherwise to the statements... so as to affect the matter of their voluntariness.” He noted in particular that there was no suggestion that anything was said at the time of the assault relative to the appellant providing a statement, and that the appellant, in offering his explanation as to what motivated him to provide the initial statement in the interview room, made no reference to the assault in the elevator. The trial judge further rejected defence counsel’s submission that an adverse inference should be drawn from the fact that the appellant’s first interview with Gould and Power was not recorded. In this respect, he accepted the officers’ explanation that the investigating team did not expect the appellant to make a statement because he had been advised by his lawyer not to speak to the police.

[13] [13] The trial judge concluded that both the unrecorded statement provided by the appellant in the interview room and the subsequent videotaped statement were voluntary and admissible. The appellant submits that this conclusion was unreasonable.

[14] [14] The confessions rule requires that, before a statement made by an accused to a person in authority may be admitted in evidence, it must be proven beyond a reasonable doubt that it was given voluntarily. The onus on the Crown is a heavy one. The rationale for the confessions rule and its scope have been recently reiterated by the Supreme Court of Canada in *R. v. Hodgson*, [1998] 2 S.C.R. 449 and *R. v. Oickle*, [2000] 2 S.C.R. 3. This court also reviewed the relevant principles in the light of those cases in *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737. I do not find it necessary to repeat the principles set out in those cases in order to dispose of this appeal. With respect, in the context of this case, it is my view that, given the trial judge’s finding that the appellant had been assaulted, his conclusion that the subsequent statements were nonetheless voluntary cannot stand. I can only conclude that the trial judge misapprehended the test on voluntariness. The reasons for my conclusion can be stated succinctly.

[15] [15] The trial judge’s finding that the appellant was assaulted by Detective Gould while in police custody is supported by

the evidence and is not contested on this appeal. This finding was central on the issue of voluntariness of the appellant's statements and, in the context of this case, should have been fatal to their admissibility. I say this for two reasons.

[16] [16] First, the fact that there had been an assault in the elevator, as described by the appellant, quite apart from its likely effect on the appellant's state of mind, necessarily adversely affected the credibility of both officers Gould and Power. Their testimony on the *voir dire* was totally inconsistent with any assault having occurred in the elevator. Consequently, given his finding that there had been an assault, the trial judge should have been seriously concerned about the truthfulness of the officers' entire evidence. This concern should have been heightened by the fact that, despite the availability of recording facilities, the first interview with the appellant by these same two officers was not recorded. Because the interview was not recorded, the reliability of the evidence concerning the first statement was entirely dependent on the accuracy and truthfulness of the officers' testimony. The trial judge did not address this issue in his reasons. While he critically analyzed the credibility of the appellant's testimony about this first interview, comparing his version to the rest of the evidence, he did not subject the officers' testimony to the same scrutiny.

[17] [17] This lack of appropriate scrutiny is also apparent from the fact that the trial judge seemed to readily accept the explanation that the interview was not recorded because the officers did not expect that the appellant would give a statement after having been advised not to do so by his counsel. Hence, having accepted this explanation, he refused to draw any adverse inference from the fact that the interview was not recorded. With respect, the officers, on their own testimony, entered the interview room for the purpose of telling the appellant what information they had received from his friends, and asking for his version of the events. Whether or not the officers actually expected the appellant would answer their questions is rather beside the point. The fact that they purposely set out to conduct this interview without the use of any recording device despite its availability is sufficient to render the resulting interview suspect. In the context of this case, when the interviewing officers' credibility was seriously undermined by the trial judge's finding that one of them had assaulted their prisoner, the evidence cannot satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.

[18] [18] Hence, it is my view that the trial judge failed to appreciate the extent to which his finding that there had been an

assault necessarily impacted on the reliability of the record in relation to the first statement obtained in the interview room and, derivatively, the videotaped statement that immediately followed.

[19] [19] Second, it is my view that the trial judge erred in finding that the assault in the elevator was not sufficiently connected “temporally or otherwise” to the statements so as to affect their voluntariness. The appellant was assaulted by one officer, in the presence of a second officer, while in custody, handcuffed, and on the way to a prison cell. Some six hours later, he is brought down to an interview room, and the same two officers walk in telling him they had obtained information against him from his friends, and they now wanted his version of events. In my view, the temporal connection was not broken by the intervening hours that the appellant spent in his prison cell waiting to see what would happen. On this evidence, the court cannot be satisfied beyond a reasonable doubt that the statement was made without fear of prejudice within the meaning of the confessions rule. The concern in this respect is again heightened by the fact that the appellant testified that he told the officers what he did because they threatened that they would send him and his family back to Iraq if he didn’t, and there is no reliable record to disprove the appellant’s allegations.

[20] [20] For these reasons, the first statement in the interview room should have been ruled involuntary and inadmissible. Since the subsequent videotaped interview was derived from the first, it also failed to meet the test of voluntariness. The appellant’s statements to the police, although similar in content to other statements made by the appellant to a number of his friends, were nonetheless important to the Crown’s case in the context of the other evidence. Consequently, this is not an appropriate case for applying the curative proviso and there must be a new trial. Since there will be a new trial, I will comment on the remaining grounds of appeal only briefly.

b) The Instruction on Self-Defence

[21] [21] The appellant submits that the trial judge, in his instruction to the jury on self-defence, should have made reference to the provisions of s. 34(2) of the *Criminal Code*, in addition to s. 34(1). I see no merit to this ground of appeal. No request was made at trial for such an instruction and, more importantly, there is no air of reality to the alleged s. 34(2) defence. There was no evidence that the appellant apprehended death or grievous bodily harm, and no evidence that could support an inference that any such apprehension

would have been reasonable. See *R. v. Cinous* (2002), 162 C.C.C. (3d) 129 (S.C.C.) for a recent review of the elements of the s. 34(2) defence of self-defence.

c) The Instruction on Post-Offence Conduct

[22] [22] The Crown at trial relied on the fact that the appellant had left the scene without seeking assistance, leaving Taylor on the sidewalk, as circumstantial evidence of his guilt. The trial judge noted this evidence in his instructions to the jury and told the jury that he wanted to give them “some general direction as to the purpose and use to be made of evidence of this kind and which is described as post offence, after the offence, conduct.” The trial judge told the jury that it was the position of the Crown that the action of the accused in leaving the scene was consistent only with him having caused the death of Darryl Taylor by an unlawful act, that is, consistent only with the accused having committed the offence of manslaughter. He then instructed the jury on the manner in which this evidence should be considered in reference to the offence of manslaughter.

[23] [23] The appellant submits that it was incumbent upon the trial judge to ensure that the jury did not erroneously use the evidence of flight to leap to a conclusion of guilt. He submits that the trial judge erred in instructing the jury that the evidence of flight was relevant to determine the appellant’s guilt in respect of manslaughter. He submits, rather, that the trial judge should have instructed the jury that the evidence of flight was only relevant to their determination of whether or not the appellant had acted in self-defence.

[24] [24] The question whether the jury should be instructed in regard to post-offence conduct, and if so, the manner in which they should be instructed, turns on the nature of the evidence in question and its relevance to the real issues in dispute: see *R. v. White*, [1998] 2 S.C.R. 72 at 91, para. 32. In this case, this evidence was of some probative value to a live issue at trial – the appellant’s state of mind. The appellant did not admit any culpability in relation to Taylor’s death. He alleged consent and self-defence. The issue for the jury was, therefore, whether the appellant’s departure from the scene was consistent with his claims of consent and self-defence or only consistent with the Crown’s theory that he had committed a culpable act. If the latter, the jury could use the evidence of his flight, as one item of circumstantial evidence along with other evidence, to infer that the appellant was conscious that he had committed a culpable

act rather than having participated in a consensual fight or having acted in self-defence.

[25] [25] Although it would have been preferable if the trial judge had described the potential relevance of this evidence more clearly in terms of the particular defences advanced in this case, I am satisfied, when the instruction is read in context and as a whole, that the jury would have had a proper understanding of what use could be made of this item of evidence. The jury would have understood the reference to manslaughter as meaning a culpable act that was not justified in either manner alleged. The trial judge also properly cautioned the jury about drawing unwarranted inferences from the evidence of flight. He told the jury that post offence conduct is “simply a piece of circumstantial evidence” to be weighed with all of the other evidence. He explained that “flight” may have nothing to do with guilt because innocent people may also be motivated to flee from a crime scene. The trial judge also drew the jury’s attention to those items of evidence that arguably diminished the probative value of the appellant’s flight in this case. Finally, it is noteworthy that no objection was made to the charge. I would not give effect to this ground of appeal.

d) The Instruction on Objective Foreseeability of Harm

[26] [26] The appellant concedes that the trial judge correctly charged the jury on the element of objective foreseeability as it relates to manslaughter, but submits that he did not sufficiently relate the evidence to this issue. The trial judge correctly instructed the jury that, in order to constitute manslaughter by unlawful assault, they must be satisfied that a reasonable person in the circumstances of the accused would have recognized a risk of bodily harm, which was neither transitory nor trivial. The trial judge gave this instruction at the beginning of his charge on the elements of the offence and he repeated it at the end of that part of the charge. Immediately after, he made a fairly detailed review of the evidence. From time to time, he related that evidence to some of the issues in the case. No objection was made to the charge.

[27] [27] I see no error as contended. Objective foreseeability of harm was not a significant issue at trial. In my view, the trial judge adequately related the evidence to the issues in the case.

DISPOSITION

[28] [28] For these reasons, I would allow the appeal, set aside the conviction, and order a new trial.

RELEASED: June 6, 2002

“Charron J.A.”

“I agree S. Borins J.A.”

“I agree Feldman J.A.”