

BURYING ROTHMAN: THE SUPREME COURT AND THE RIGHT TO REMAIN SILENT

Bruce P. Elman

When it was decided nine years ago, the case of *Rothman v. The Queen* [1981] 2 S.C.R. 64 represented an important statement on the law of confessions in Canada. Principally, the *Rothman* case stood for two propositions:

- Sometimes, in dealing with shrewd and sophisticated criminals, the police, of necessity, must resort to trickery and deceit. The authorities, in their efforts to suppress crime, should not be hampered by a rule which excludes evidence obtained by trickery; and, in any event,
- Illegally obtained evidence would be excluded only if the admission of the impugned evidence would "shock the community".

Consequently, prior to the advent of the *Charter*, rarely was evidence excluded because of the methods used by the police in obtaining it. A virtually absolute rule of admission existed: "Evidence which is relevant is admissible, regardless of the methods by which it has been obtained". Confessions would only be excluded if they were involuntary, i.e. obtained by "fear of prejudice or hope of advantage held out or exercised by a person in authority". Of course, if the accused was unaware that the person to whom he was speaking was a police officer (as in the case of a 'jailhouse plant'), it could hardly be said that confession was involuntary.

The *Charter* seems to have changed all of this. In *Collins v. The Queen* [1987] 1 S.C.R. 265, the Supreme Court held that the so-called 'shock the community' test was inappropriate for determining whether unconstitutionally obtained evidence would be admissible. But, in spite of the numerous rights granted to arrested, detained, and accused individuals in the *Charter*, the proposition permitting confession by trickery, advanced in *Rothman*, remained uncontroverted until the recent case of *Hebert v. The Queen* (S.C.C. judgment delivered June 21, 1990).

THE FACTS:

At 6:00 o'clock on the morning of January 11th, 1987, a male person, wearing a ski mask, approached the front desk clerk at the Klondike Inn and demanded that the clerk hand over the money. When the clerk hesitated, the robber raised a claw hammer in the air and repeated his demand. On this occasion the clerk complied, handing over the contents of the till —

\$180.00. The perpetrator advised the clerk not to call the police for 10 minutes and then fled. During the next several months, the police received confidential information from three informants that the defendant, Neil Gerald Hebert, was the individual responsible for the robbery.

Acting upon this information, the police, on the evening of April 15th, arrested the defendant in the lounge of the Taku Hotel in Whitehorse. He was advised of his right to retain and instruct counsel and taken to R.C.M.P. headquarters. Once at the detachment, Hebert contacted counsel. He refused to make any statements to the police at that time.

Hebert was placed in a cell with Corporal Daun Miller who was disguised in plainclothes. Miller was pretending to be a suspect under police investigation. While in the cell, the Constable engaged Hebert in conversation, during which Hebert made certain incriminating statements implicating him in the robbery of the Klondike Hotel on the 11th of January.

IN THE LOWER COURTS:

The matter came on for trial before Justice Maddison of Yukon Supreme Court. At the conclusion of a *voir dire* held prior to the trial, Justice Maddison ruled [See: (1987), 3 Y.R. 88.] that the police had violated Hebert's right to counsel and his right to remain silent as guaranteed by sections 10(b) and 7 of the *Charter*, respectively. Furthermore, he held that the 'jailhouse' confessions made to Constable Miller were not admissible at trial. The Crown offered no other evidence and an acquittal followed. The Yukon Court of Appeal reversed Justice Maddison's ruling and ordered a new trial. [See: (1988), 43 C.C.C. (3d) 56.]

IN THE SUPREME COURT OF CANADA:

As in most *Charter* litigation, this case can be broken down into two issues. First, were the accused's rights under the *Charter* infringed? And second, if they were infringed, was the statement made to Constable Miller, nevertheless, admissible under section 24(2) of the *Charter*?

The Majority:

As regards the first issue, the case was argued on two bases: (a) Was the accused's right to silence infringed? and; (b) was the accused's right to counsel infringed? Although these issues

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had been argued separately in the lower Courts, the majority of the Supreme Court saw them as intertwined. Writing for the majority, Justice McLachlin characterized the central issue of the case as follows: "The question...is whether, bearing in mind the *Charter* guarantee of right to counsel and other provisions of the *Charter*, the accused's right to remain silent has been infringed."

Both sides agreed that section 7 of the *Charter* accorded the right to remain silent to a detained person. The real dispute involved the scope of that right. The Crown's contention was that the right to remain silent was defined by the common law rule governing the admissibility of confessions, i.e. only voluntary confessions are admissible. If the Crown's position were adopted, statements obtained by trickery, such as the one here, would generally be admissible. The defence was of the view that the ambit of the right to remain silent protected by section 7 was broader than the common law confessions rule, and that the use of trickery to obtain a confession after the accused had indicated that he did not want to give a statement was a violation of the *Charter*.

Alternatively, we might analyze the issue this way. Section 7 of the *Charter* states that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the **principles of fundamental justice**." There is no doubt that Hebert's liberty was at stake. The question was whether the police conduct, in obtaining the confession in the manner they did, violated the principles of fundamental justice. Does obtaining confessions by trickery violate the principles of fundamental justice? How does one ascertain this? The Crown's view was that the Court should consult the traditional common law rules for determining the admissibility of confessions, while in the defence's opinion the principles of fundamental justice had to be given a broader meaning, more in keeping with the constitutionalization of the right to silence in section 7 of the *Charter*.

Initially, Justice McLachlin acknowledged that common law principles regarding confessions, the privilege against self-incrimination, and the right to counsel, might assist the Court in determining the scope of an accused person's right to remain silent. The inquiry, however, should be more far-reaching. In addition to assessing the appropriate common law rules, the scope of fundamental justice will depend upon "the general philosophy and purpose of the *Charter*, the purpose of the right in question, and the need to reconcile that right with others guaranteed by the *Charter*".

In Justice McLachlin's opinion, the right to remain silent

extended beyond the "narrow formulation of the confessions rule". In the pre-trial detention period, the right of a person to remain silent is based on the notion that the suspect has the right to freely choose whether to speak with the authorities or remain silent.

Justice McLachlin, however, went on to note that section 7 of the *Charter* attempts to effect a balance between the rights of the detained person and the interests of the state. Thus the right to remain silent is not an absolute right but rather, is qualified by the interests of the state as well as considerations for the reputation of our judicial system. Consequently the standards set in *Clarkson v. Queen* [1986] 1 S.C.R. 383 regarding waiver of a constitutional right have no application to the right to remain silent pursuant to section 7 of the *Charter*. [One should recall that, in *Clarkson*, the Supreme Court would only permit the Crown to claim that an accused had waived the right to counsel if it is "clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights that the procedure was designed to protect and of the effect the waiver will have on those rights in the process". (at 394 - 95)]

Thus, as Justice McLachlin noted: "Our courts must adopt an approach to pre-trial interrogation which emphasizes the right of the detained person to make a meaningful choice and permits the rejection of statements which have been obtained unfairly in circumstances which violate that right of choice". The right to remain silent must extend to a situation where the authorities trick a suspect into making a statement after he or she has conferred with counsel and has declined to make a statement. The trickery employed by the police in such a situation has robbed the accused of the right to choose whether to give a statement or remain silent and, therefore infringed his or her rights.

There are, in addition, some limitations on the rule against eliciting confessions by trickery in the pre-trial detention period. Justice McLachlin pointed out the following:

1. Nothing in the rule prohibits the police from questioning an accused in the absence of counsel after counsel has been retained. Thus, if an accused, in spite of the advice of his counsel, bows to "police persuasion" and volunteers a statement, no *Charter* violation will have occurred.
2. The rule applies only after detention. In the pre-detention period, there is, according to Justice McLachlin, no need to protect the suspect from the coercive powers of the state; after detention, however, the state becomes the guarantor of the accused's rights.

3. The rule does not affect voluntary confessions made to cellmates. The real issue is whether the cellmate is a police officer or an agent of the police.
4. The rule applies to the active solicitation of evidence in violation of the accused's right to remain silent. It does not apply to undercover agents whose task is to observe the suspect only. If the accused makes a voluntary statement to the undercover agent in the latter situation, it will be his bad fortune.

Justice McLachlin found that Hebert's right to remain silent had been violated in the circumstances of this case and that the statements should be excluded from evidence.

Concurring Judgments:

Although all nine members of the Court agreed to restore the original acquittal, they were not in complete agreement on some important aspects of the right to remain silent. Justices Sopinka and Wilson attacked Justice McLachlin's decision on three counts. First, there is some dispute over the point in time when the right to remain silent will arise. Justice McLachlin's assertion was that the right only arose after detention. Justices Wilson and Sopinka recognized that, in some cases, the damage would have already taken place by the time the suspect was in custody. Rather, Justice Sopinka argued that the right to remain silent arises when the "coercive power of the state is brought to bear on the individual — either formally (by arrest or charge) or informally (by detention or accusation)..." (My emphasis). In the words of Justice Wilson, the right to remain silent "... could well predate detention and extend to police interrogation of a suspect".

Justice Wilson also took issue with Justice McLachlin's assertion that the right to remain silent pursuant to section 7 is a qualified right. In Justice Wilson's view, the right, at least within the section 7 context, is absolute. Following this premise, it is inappropriate, when determining if the right has been violated, to inject into the inquiry consideration such as the interests of the state or the integrity of the judicial system. Justice Wilson argued that considerations of the integrity of the judicial system should not arise at this state of the litigation. It should be saved for the section 24(2) inquiry into whether the evidence should be excluded.

Finally, there is disagreement on the issue of "waiver". Once again, in Justice McLachlin's opinion, the doctrine of waiver does not apply to the right to remain silent. Justice Wilson saw "... no reason why the doctrine of waiver should not apply to the right to silence as it does to other rights in the *Charter*". Justice Sopinka concurred, noting that "... any waiver of the right to remain silent must, similar to the right to counsel, pass

an 'awareness of consequences' test". As they support an even more expansive definition of the right to remain silent, Justices Sopinka and Wilson, quite naturally, concurred with the majority in restoring the original acquittal.

COMMENT:

Even given the majority judgment's limitations, as exposed in the judgments of Justices Sopinka and Wilson, *Hebert* is a remarkable case. On its most basic level, of course, the constitutionalization of the right to remain silent in section 7 of the *Charter* is affirmed without dissent. Further, the *Hebert* decision will dramatically reduce the ability of the state to obtain confessions by trickery in the pre-trial detention stage. To this extent, the principles articulated in *Rothman* may now be consigned to the footnotes of legal history. *Hebert* has shown, once again, that the Court is not reticent about departing from pre-*Charter* precedent and that common law principles cannot limit the scope of *Charter* rights. What other common law principles may be elevated to constitutional rights and expanded in the process? Finally, it appears that the Court, in spite of personnel changes, remains strongly committed to the fundamental importance of the right to counsel (and other associated rights such as the right to remain silent) in our criminal justice system.

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