

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

CITATION: R. v. J.W.C., 2011 ONCA 550

DATE: 20110810

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COURT OF APPEAL FOR ONTARIO

Rosenberg, Lang and Watt JJ.A.

BETWEEN

Her Majesty The Queen

Respondent

and

C. (J.W.)

Appellant

Timothy E. Breen and Diana Lumba, for the appellant

Susan Magotiaux, for the respondent

Heard: May 19, 2011

On appeal from conviction entered by Justice C. Marchand of the Superior Court of Justice, dated January 8, 2008.

Rosenberg J.A.:

[1] The appellant appeals his conviction for fourteen sexual offences involving eight different complainants. The charges arise out of the appellant's work as a residential counsellor at various group homes for persons with special needs. The case is unusual. There were never any complaints of wrongdoing against the appellant in the various group homes where he worked. The victims, who were developmentally handicapped, were largely unable to communicate and did not testify at the trial. Rather, the Crown's

case depended upon a statement that the appellant gave to the police, after he contacted them. The appellant, who was 33 years of age at the time he gave this statement, was suffering from clinical depression. The principal ground of appeal is an attack on the trial judge's decision to admit the appellant's statement to the police in light of the appellant's mental condition. The appellant submits that the trial judge erred in failing to find that the appellant's right to counsel under s. 10(b) of the *Charter of Rights and Freedoms* was violated.

[2] The Crown's case consisted of the statement and the evidence of the appellant's employment history, which was consistent with the extensive detail of the sexual assaults laid out by the appellant in the statement. In the statement, he described how he had perpetrated sexual assaults against specific individuals over the two-year period between 1997 and 1999. The appellant testified and denied that the content of his statement was true. He claimed that his statement was a function of his mental illness, voices telling him that he should confess to crimes he did not commit because he was deserving of punishment for them and should be sent to jail to be killed. The appellant raises other grounds of appeal concerning the charge to the jury and also submits that the verdicts should be set aside because trial Crown counsel engaged in impermissible jury vetting. We did not call on the Crown to respond to this latter ground of appeal. Cases from this court, in particular, *R. v. Emms* (2010), 104 O.R. (3d) 201 (C.A.), leave to appeal to the S.C.C. granted, [2011] S.C.C.A. No. 52, are dispositive of the issue against the appellant on the facts of his case.

[3] For the following reasons, I would dismiss the appeal.

THE FACTS

[4] The appellant is hearing impaired and reads lips when not assisted with a hearing aid. There is no suggestion that his hearing impairment posed any problem for the appellant during the police interview. After graduating from college, the appellant was employed at several care facilities. He also began a common law relationship with Tara Letcher. Over the next decade the appellant began to experience mood swings. In January 2000, the appellant met with his family physician, Dr. Murphy, who diagnosed his mental health problems as arising from bipolar disorder. Initially, the appellant's condition responded to medication, such as Lithium, but by the spring of 2003, his condition deteriorated and he had entered the manic phase. He stopped taking his medication in June 2003. He developed ideas of grandeur. He left Ms. Letcher and moved in with his sister. Although the appellant had not played hardball for almost 20 years, he believed that he could successfully pursue a career as a professional baseball player. By August 2003, the appellant's illness had switched to the depression phase.

[5] On September 3, 2003, the appellant saw Dr. Murphy and reported disjointed thoughts and suicidal thoughts. He agreed to restart his medications. By September 9, 2003, the appellant's symptoms persisted and he had become more reclusive. At Dr. Murphy's recommendation, he voluntarily entered the psychiatric unit of Soldiers' Memorial Hospital for treatment, which included medication, group therapy, recreational

programming and community passes. The appellant was of the view that he was not responding to the medication and his mood was unchanged. However, neither Dr. Murphy nor any member of the health care team saw any evidence of any psychosis or any report from the appellant that he was experiencing hallucinations or hearing voices.

[6] On October 1, 2003, the appellant called the police from the hospital and said that he wanted to confess to sexual offences that he had committed in the past. Two police officers came to the hospital at 10:45 a.m. One of the officers, Detective Constable Baskey, telephoned Dr. Murphy and asked if removing the appellant from the hospital would risk his physical well-being. Dr. Murphy assured the officer that the appellant “was of sound mind” and suffered from bipolar disorder. She also testified that she saw no reason why the appellant, who was a voluntary patient, should not be allowed to go with the police whom he had called. The appellant was brought to the nursing station and confirmed that he had called the police and he agreed to go to the station for an interview. He was then taken to the police cruiser where he was informed of his right to counsel. He agreed that he understood his rights and when asked if he wanted to call a lawyer now, said: “Not right now.” He was then taken to the police station and after smoking a cigarette outside the station was taken to an interview room. The interview began at 11:07 a.m. The appellant explained that he had been a voluntary patient at the hospital. The interview continued as follows:

BASKEY: Um now I'm gonna read a couple of things to you. I've already read them to you once but I'm gonna go over them again.

APPELLANT: Okay

BASKEY: Alright. Ah it's my duty to inform you that you have the right to obtain and instruct [counsel] without delay. You have the right to telephone any lawyer you wish. You also have the right to free advice from a Legal Aid Lawyer. If you are charged with an offence you may apply to the Ontario Legal Aid Plan for legal assistance. 1-800-265-0451 is a toll free number that will put you in contact with Legal Aid Duty [Counsel] Lawyer for free legal advice right now, do you understand?

APPELLANT: **Mm huh**

BASKEY: Ah do you wish to call a lawyer now?

APPELLANT: **Ah I don't know.**

BASKEY: Okay. Um but you do understand this [is] a, a phone number for free legal advice?

APPELLANT: **Mm huh**

BASKEY: And that we'll provide you with an opportunity to call that number, you do understand that right?

APPELLANT: **Right**

BASKEY: Um do you wish to say anything in an, now you're not charged with anything right now. Um do you wish to say anything ah you're not obliged to say anything unless you wish to do so but whatever you say may be given in evidence do you understand that?

APPELLANT: **Mm huh**

BASKEY: We're recording this and that we can use it as evidence?

APPELLANT: **Okay**

BASKEY: Okay. So what I'll do is I'll, I'll get you to um, ah just tell me a little bit about yourself and tell me why you called today. Okay? [Emphasis added.]

[7] Detective Constable Baskey continued with the interview, beginning with background information but ultimately turning to the question of the sexual assaults. The appellant stated that he had sexually assaulted a number of patients who were in his care. He gave details of the assaults and identified a number of the victims by their first name or their bedroom location and gave particulars of the facilities where the assaults took place.

[8] The appellant testified on the *voir dire* to determine the admissibility of the statement. He explained that, prior to October 1, 2003, he had begun to hear voices, like a tape-recorder, telling him that he was a bad guy that had committed sexual offences and that he should be punished for them and sent to jail where he would be killed. While the appellant did not tell any of the medical staff about these voices before October 1, he did tell Ms. Letcher and her mother. Ms. Letcher, in turn, told her friend Shayne Jose about what the appellant had said about the voices.

[9] The appellant testified and attempted to explain what he meant in his answers to Detective Constable Baskey set out above. He said that he did not fully understand what the officer was saying to him but was saying "Mm huh" to be agreeable. He claimed that while he understood he could call a free lawyer, he did not know how to do so. He said "I don't know" because he was confused and nervous. He was trying to think about whether or not he should have a lawyer. He testified that he did not ask the police to stop

the interview. He explained his position that he “was being controlled by ... by the voice in my head to continue ... continue on with ... with the interview.”

[10] Both the Crown and defence called psychiatrists to testify about the appellant’s mental state at the time he gave the statement. While the experts agreed that the appellant suffered from bipolar mood disorder and that he was in a depressed state at the time, they differed on the severity of the depression. The defence expert considered that the appellant was severely depressed. In his view, while the appellant understood what the officer was telling him, he would have difficulty comprehending or processing the information in a rapid manner.

[11] The Crown expert gave the opinion that the appellant had the capacity to understand his right to counsel. While the appellant may have been in a severe depressive state when first admitted, in her opinion, by the time he gave the statement his depression was moderate.

[12] At the conclusion of the *voir dire*, the trial judge admitted the statement. I will summarize the trial judge’s reasons below.

The Trial Evidence

[13] The Crown’s case depended upon the appellant’s statement being truthful. In the statement, the appellant described his employment history in detail and spoke about 10 to 15 acts of intercourse with residents of group homes who were profoundly disabled and unable to consent. He described anal and attempted anal intercourse of some victims

and genital touching of others, as well as his use of condoms to prevent detection. The appellant sketched a diagram of the three residences where he had worked and attempted to identify the occupants by sex or name. With this information, the police were able to identify the alleged victims. The victims were not called as witnesses.

[14] The defence was a denial that the content of the statement was true. The appellant claimed that it was a product of his illness: voices telling him that he had committed sexual offences that he must be punished and that he would be killed in jail. At the time he gave the statement, he believed it was true. As a result of further therapy, he now realized that the statement was not true. Prior to his arrest, the appellant had not told any health professionals about hearing voices. However, he testified that on September 25, 2003 he told Ms. Letcher about hearing voices. On September 29, 2003, the appellant told Ms. Letcher's mother, Marilyn Dobson, that maybe he should go to jail so someone could kill him. Ms. Letcher's best friend, Shayne Jose, testified that Ms. Letcher told her that the appellant told her he was hearing voices like a tape-recording in his head playing over and over. Although she had many conversations with Ms. Letcher about the appellant's case both before and after he was arrested, Ms. Jose believed that she was told about the voices before the appellant was arrested.

[15] Crown counsel cross-examined Ms. Letcher on the fact that she and the appellant had launched a lawsuit against Dr. Murphy and the hospital for half a million dollars. Ms. Letcher believed that the success of the lawsuit depended on proving that the appellant should not have been released to the police and allowed to confess to things he

did not do. Mrs. Dobson was cross-examined along similar lines: that she had assumed responsibility for the appellant's care and had also been in touch with a lawyer about a lawsuit. In a letter of October 5, 2003 to the psychologist at the jail written four days after the appellant's arrest and before the appellant's recantation, Mrs. Dobson suggested that the appellant should be remanded for psychiatric examination, that the appellant was hearing voices and that the confession may have been a false story.

[16] The experts who testified at the *voir dire* also testified at the trial, and gave similar evidence. The defence expert, who arrived at his initial opinion without viewing the videotape of the appellant's statement, testified that the auditory hallucinations reported by the appellant requiring him to confess were consistent with the severe guilt experienced by someone in a severe depression. The Crown expert, who had viewed the videotape, disagreed. She was of the view that the appellant's depression was moderate and that there were no clinical records to support the proposition that he was experiencing auditory hallucinations or severe depression at the time he gave his statement. She was of the opinion that the appellant's position of a false confession was belied by his detailed description of the numerous sexual abuses he said he had committed.

THE ISSUES

[17] The appellant raises the following issues:

- Did the Crown's vetting of the jury list affect the validity of the trial?
- Did the trial judge err in admitting the appellant's statement because of violation of his right to counsel because:

- The police did not give the appellant sufficient time to consider whether to exercise his right to counsel.
- When the appellant gave the “equivocal answer”: “Ah I don’t know”, were the police required to obtain a clear waiver that he did not wish to consult counsel.
- If there was a violation of s. 10(b) of the *Charter*, should the statement be excluded under s. 24(2)?
- Did the trial judge err in his directions to the jury concerning the expert evidence?
- Did the trial judge err in failing to correct Crown counsel’s assertion that Ms. Letcher and Mrs. Dobson had a motive to lie about the auditory hallucinations, and did the trial judge err in failing to refer to Ms. Jose’s evidence?

ANALYSIS

Jury Vetting

[18] As I indicated, we did not call on the Crown to respond to this ground of appeal. The proposed fresh evidence as to information that police officers may have passed on to Crown counsel for use in the jury selection was of a highly uncertain nature. In addition, the circumstances of the case very much resembled the facts in *R. v. Emms*, in which this court found no basis for overturning a jury’s verdict. Accordingly, I would not give effect to this ground of appeal.

Right to Counsel

[19] Apparently because of the manner in which the case was argued before him, the trial judge's focus on the right to counsel issue was whether the appellant had a reasonable time to consider whether he should exercise his right to counsel. The trial judge found that the appellant did have an adequate time to decide. In coming to that conclusion, the trial judge took into account that the appellant had time to consider his position. He was first read his right to counsel in the police car on the way to the detachment and given his right again at the detachment. The appellant had approximately twelve minutes between the first and second cautions to consider his right to counsel and make a decision whether to exercise that right. The twelve minutes included opportunities for the appellant to consider his position while he was having a cigarette outside the detachment and the five minutes he had in the interview room before his statement was taken. As well, the trial judge considered that the interview began with open-ended questions that were not immediately focused on the crimes to which the appellant wished to confess. In addition, after being given his right to counsel, the appellant was not immediately confronted in a manner that would have inhibited him from exercising the right to counsel. The trial judge had the advantage of a video of the entire interview in the police detachment. He concluded: "I find that the twelve or so minutes between the first reading of his right to counsel and caution to the beginning of the interview gave a person of his education, admittedly depressed at the time, sufficient time to ask for counsel."

[20] I am not satisfied that the appellant has shown that the trial judge's conclusion was unreasonable. I would therefore not interfere with the trial judge's decision that the appellant had a reasonable opportunity to decide whether or not to exercise his right to counsel.

[21] On appeal, counsel for the appellant, who was not trial counsel, advances a slightly different argument. Mr. Breen submits that the appellant's equivocal response, "I don't know", required the police to obtain a clear waiver from the appellant. The appellant submits that the circumstances known to the police compel this result. The most important circumstance, of course, was that the appellant was suffering from depression and, albeit at his own request, had been removed from a psychiatric facility.

[22] The Supreme Court of Canada has set out a framework for analysis of s. 10(b) claims in any number of cases, most recently in the *Sinclair* trilogy: *R. v. Sinclair*, [2010] 2 S.C.R. 310; *R. v. Willier*, [2010] 2 S.C.R. 429; and *R. v. McCrimmon*, [2010] 2 S.C.R. 402. This line of cases identifies two components of the right to counsel protected by s. 10(b). First, is the informational component; the cases establish what the police must tell the detainee about his right to consult counsel. No complaint is made about the police compliance with this first component. The investigating officer informed the appellant twice about his right to consult counsel immediately and of the availability of duty counsel for that purpose.

[23] The second component of the s. 10(b) right to counsel is the implementation component. This second component requires that the police give the detainee an opportunity to exercise his right to counsel. The courts have held that this second component implies that there is a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult with counsel. It was this aspect of the right that apparently was the focus of the argument before the trial judge. As I have said, the trial judge found against the appellant on that issue and that finding was open to him on the evidence. I would not interfere with that decision.

[24] The appellant submits that the second component also implies that in some circumstances the police must ensure that the detainee has actually waived his right to counsel. This may require that the police provide the detainee with further information. One circumstance where the police may be required to provide the detainee with further information is where the detainee initially invokes his right to counsel but, having been unsuccessful in obtaining legal advice, abandons the attempt. In such circumstances, the police must not only inform the detainee of the right to consult counsel again, but of the police obligation to hold off in their questioning until the detainee has had a reasonable opportunity to consult counsel. See *R. v. Willier* at paras. 31 and 32 and *R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 274. More generally, in *Sinclair*, the court clarified the circumstances in which a detainee is entitled to a second opportunity to consult counsel. While the categories are not closed, the three circumstances identified in *Sinclair* are: (1) where the police seek to resort to non-routine procedures involving the detainee, such as

asking the detainee to participate in a line-up; (2) there has been a change in jeopardy because the investigation has taken a new and more serious turn as events unfold; and (3) as events proceed, there is reason to question the detainee's understanding of the right to consult counsel.

[25] In this case, the appellant's response to the second caution was simply, "Ah, I don't know". If that phrase constituted a positive indication of uncertainty as to the content of the right to counsel, the police would be obliged to provide the appellant with further and better information. As the court said in *R. v. Willier* at para. 31, "should a detainee positively indicate that he or she does not understand his or her right to counsel, the police cannot rely on a mechanical recitation of that right and must facilitate that understanding". However, that is not this case. In this case, "Ah, I don't know" was not an expression of uncertainty about the content of the right, which the appellant admitted he understood. Nor was it an invocation of the right to counsel and, by itself, would not trigger an obligation on the police to obtain a clear waiver. After the appellant said "Ah, I don't know", Constable Baskey confirmed with the appellant that he understood his rights:

Baskey: Okay. Um but you do understand that this a, a phone number for free legal advice?

Appellant: Mm hum

Baskey: And that we'll provide you with an opportunity to call that number, you do understand that right?

Appellant: Right

[26] Even taking into account the appellant's psychiatric condition as was appropriate, there is nothing to indicate that the appellant did not understand that he had the right to immediately consult counsel, if he wished to do so. There is no aspect of the interview that indicates that the appellant did not understand his right to counsel or that he was in any way deprived of the opportunity to exercise that right had he chosen to do so.

[27] The issue then is whether having regard to the broader context in which this interchange took place, the police were required to go further and obtain a clearer waiver from the appellant. One example of the circumstances where the police may be required to go further is where the detainee was informed of his rights at a time when he may have been uncertain of the jeopardy he faced.

[28] This is not a case such as *R. v. Small* (1998), 123 C.C.C. (3d) 560 (Alta.C.A.), upon which the appellant relied. In that case, when the accused was first detained, he was simply told that he was being detained for sexual assault. The officer testified that while the accused waived his right to counsel, he "seemed bewildered". It was only as the interview progressed and the accused realized that the investigation concerned his encounter with a woman the night before that the accused seemed to understand the basis for the interview. At this point, the accused asked the officer if he should telephone a lawyer. In those circumstances, the Court of Appeal found, at p. 570, that the officer should have obtained a clear waiver:

The question posed by the appellant to the police officer, i.e., "[d]o you think I should phone a lawyer?", was either a

request for an opportunity to contact counsel or, at least ambiguous as to whether or not the Appellant wished to exercise his s. 10(b) right. The police officer responded that "maybe he should [contact a lawyer] due to the fact that it was a serious offence". In our view, in the face of the Appellant's question, the police officer was obliged to pursue the issue further and to either obtain a clear and unequivocal waiver or afford the Appellant a reasonable opportunity to exercise his right to counsel. He did neither. Instead he proceeded to obtain the statement.

[29] *Small* falls within one or two of the categories identified in *Sinclair* for when a detainee is entitled to a further opportunity to consult with counsel; namely, a change in jeopardy or where there is reason to doubt the detainee's understanding of the right to consult counsel. This case is different than *Small*. Whereas, in *Small*, it was the detainee who was unsure of the nature of the allegations when he expressed uncertainty about whether to contact counsel, in this case, it was the detainee and not the police who had the exclusive knowledge and control over the information about the abuse he alleged that he committed. It was the appellant who contacted the police.

[30] In another case, a particular detainee's mental illness could be a very important factor, that might well lead to a finding that the detainee did not understand the right to consult counsel. However, in this case the appellant was a voluntary patient at the hospital and his treating physician was of the opinion that it was appropriate that he be allowed to participate in the police interview that he sought. Moreover, the appellant understood his right to counsel and appreciated that he could have exercised that right. He had adequate opportunity to consider whether he would do so. In the face of the

appellant's statement that he did not know whether to consult counsel, Detective Constable Baskey reiterated in plain language that the appellant could have immediate access to free legal advice. Given these circumstances, in my view, the police were not required to do more than Detective Constable Baskey did. Since the appellant has not established that his s. 10(b) rights were violated, it is unnecessary to consider the application of s. 24(2) of the *Charter*.

Instructions on the Expert Evidence

[31] The expert evidence adduced by the parties was an important aspect of this case. The appellant relied upon the evidence of his expert to bolster his claim that his statement was false and a product of his mental illness. The appellant complains about these directions that the trial judge gave the jury concerning expert evidence:

You must also consider the facts relied upon and the opinion itself. You must ask whether the opinion of the expert is based on certain assumed facts. You will decide the facts that are the basis of the expert opinion which have been established. If you find that none of the supporting facts have been established then the opinion is worthless as not being based upon accepted facts.

If you find that only some of the supporting facts are proven then you will give to the opinion the weight that you feel it deserves. If, in your opinion, the expert is qualified in the field and the facts upon which he bases his opinion or her opinion, are established, then you should not reject the opinion unless you feel that you have a good reason to do so. The expert's opinion may be rejected entirely if you find it to be unreasonable.

[32] The appellant submits that the effect of this instruction was to require the appellant to establish the facts upon which the opinion was based before the opinion could be given any weight. He submits that where the opinion is based upon the appellant's testimony such an instruction is inconsistent with the presumption of innocence. The appellant takes particular exception to the instruction: "If you find that none of the supporting facts have been established then the opinion is worthless as not being based upon accepted facts." The appellant submits that an opinion favouring an accused can be dismissed as worthless only where the factual foundation of the opinion is rejected.

[33] I would not give effect to this ground of appeal. The trial judge's instructions were in accordance with authorities from this court and the Supreme Court of Canada. See for example: *R. v. Davey* (2010), 103 O.R. (3d) 161 (C.A.), leave to appeal granted, [2011] S.C.C.A. No. 148; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Lavallee*, [1990] 1 S.C.R. 852; and *R. v. Kirkby*, (1985), 21 C.C.C. (3d) 31 (Ont. C.A.), leave to appeal dismissed (1986), 18 O.A.C. 160 (S.C.C.). Further, there is no substance to the appellant's submission that the jury could reject the expert opinion as "worthless. The trial judge told the jury that the opinion could rejected as worthless only if "none of the supporting facts" had been established. That was manifestly not a concern in this case. Many of the underlying facts, such as the appellant's underlying mental illness and that he was suffering from depression were not in dispute.

Instructions on the Defence Witnesses' Motive to Lie

[34] The appellant submits that the trial judge erred in instructing the jury that the appellant's witnesses, especially Ms. Letcher and Ms. Dobson, had a motive to lie. In reviewing the defence evidence, the trial judge referred to the fact that Ms. Letcher had launched a civil action against the hospital and Dr. Murphy and that it was the Crown's position that this civil action might be a motive for them to give an untrue version of the facts. In my view, this position was one that was available on the facts. Ms. Letcher testified that she believed that the success of the lawsuit turned on whether the appellant was convicted. It was beside the point that this belief may have been inaccurate; the fact that she believed it, was a basis for Crown counsel's submission. It was also open to Crown counsel to make the submission that the appellant's evidence was concocted.

[35] Finally, the appellant submits that the trial judge erred in failing to specifically refer to the evidence of Ms. Jose. She testified that some time after September 25, 2003, presumably before the appellant confessed, Ms. Letcher told her that the appellant told her that he was hearing voices.

[36] It will be unusual for a conviction to be set aside, where the charge to the jury is otherwise unobjectionable, because the trial judge has failed to refer to a single piece of evidence. The trial judge's duty is well established and, for example, was described by Spence J. in *R. v. Colpitts*, [1965] S.C.R. 739, at p. 752, as requiring the trial judge to not only outline the theory of the defence "but to give to the jury matters of evidence essential in arriving at a just conclusion in reference to that defence".

[37] In my view, Ms. Jose's evidence did not fall within this principle. Her evidence was third-hand hearsay, a report of what Ms. Letcher told her about what the appellant told her at some unspecified time, albeit probably prior to the confession. Defence counsel at trial, not Mr. Breen, did not raise any objection to the trial judge's review of the evidence and did not ask that the trial judge to refer to Ms. Jose's evidence. It is apparent that Ms. Jose was closely allied with Ms. Letcher. Her evidence was not so pivotal to the defence case that the trial judge's failure to refer to it resulted in a miscarriage of justice. I would not give effect to this ground of appeal.

DISPOSITION

[38] Accordingly, I would dismiss the appeal from conviction.

Signed: "M. Rosenberg J.A."

"I agree S. E. Lang J.A."

"I agree David Watt J.A."

RELEASED: "MR" August 10, 2011