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Criminal

'Failure to exclude' statements made to police 'error in law,' court rules; new trial ordered

By **Amanda Jerome**

(August 2, 2023, 1:10 PM EDT) -- The Court of Appeal for Ontario has ordered a new trial in a second degree murder case as the "trial judge erred in admitting some of the statements made by the appellant to the police." Counsel for the appellant noted that the decision "gives an excellent summary of the law of detention and provides a detailed analysis of the application of the law to the facts of this case."

"Detention is an important legal concept that underlies several Charter rights — but it can be very difficult to apply the law of detention in practice. The *Corner* decision gives an excellent summary of the law of detention and provides a detailed analysis of the application of the law to the facts of this case. For this reason, it will be very useful to criminal and constitutional lawyers," said the appellant's counsel, Stephanie DiGiuseppe and Jessica Zita, in a joint statement.

In *R. v. Corner*, 2023 ONCA 509, the court heard that the appellant, Keenan Corner, "shot and killed his friend and drug dealing partner, Shabir Niazi."

Stephanie DiGiuseppe, Ruby, Shiller, Enenajor, DiGiuseppe, Barristers

The shooting occurred in February 2014 in Corner's parents' garage after a dispute over a perceived "shortfall in the proceeds from their joint drug sales."

According to court documents, in the "minutes, hours, days, and weeks that followed the homicide, the appellant told a friend, the 9-1-1 operator, other friends, family members, family members of Mr. Niazi, and several police officers, that Mr. Niazi had been shot and killed during a 'drug rip off.' "

Corner, the court noted, told "different versions of this story, some more detailed than others," indicating that "several men had burst into the garage intent upon stealing the marihuana that he and Mr. Niazi stored there."

The court referred to this narrative as the "Robbery Story".

"Not only did the appellant repeatedly tell the Robbery Story, but on February 26, 2014, seven days after the homicide, the appellant placed an anonymous call to the Crime Stoppers tip line, reporting

that he had seen four men fleeing the scene of the homicide," the court added, noting that shortly after, the police found the gun used to kill Niazi as well as a sweatshirt Corner was wearing during the shooting.

Both items were found hidden in a "wooded area near his home."

Corner "abandoned" the Robbery Story by the trial, instead testifying that he had killed Niazi in "self-defence."

"The appellant explained that he repeatedly told the false Robbery Story because he feared retaliation from Mr. Niazi's family, if he admitted killing Mr. Niazi," the court added.

A jury "convicted the appellant of second degree murder" and the trial judge, Justice Michael McKelvey of the Superior Court of Justice, ordered a "sentence of life imprisonment without eligibility for parole for 14 years."

Corner appealed both the conviction and sentence, raising three issues:

- "Did the trial judge err in failing to stay the proceedings on the ground that the appellant had been denied his right to trial within a reasonable time?
- Did the trial judge err in refusing to admit certain expert evidence proffered on behalf of the appellant?
- Did the trial judge err in admitting the appellant's statements to the police made on February 19, 2014, the day of the homicide, and on March 1, 2014, the day of the appellant's arrest?"

On the first argument, Justice David Doherty, writing for the Court of Appeal, noted that "Like many murder trials in present day Ontario, this trial took a long and winding road from charge to verdict through the seemingly ever-increasing complexities of the criminal process."

"However," he added, "unlike almost every other murder case, this trial's path to completion took a detour through the Supreme Court of Canada for an interlocutory appeal brought with leave of that court by a third party while the criminal trial was ongoing."

According to court documents, "Crime Stoppers received an anonymous call" a week after the shooting, claiming to have "information about the homicide."

However, the Crown had "evidence that the anonymous caller was in fact the appellant."

"The Crown contended that the false report to Crime Stoppers was intended to support the Robbery Story that the appellant had already told to the 9-1-1 operator, police officers, and several other persons. The Crown maintained that informer privilege, which attaches to the identity of a Crime Stoppers tipster, did not apply in circumstances in which the tip was made in an effort to interfere with the due administration of justice," the court explained, noting that in a pretrial conference form, the Crown indicated it would rely on an "alleged statement made by the appellant to the police after the shooting."

"This was a misleading reference to the appellant's call to Crime Stoppers," the court added.

During arguments on "admissibility of evidence of the identity of the Crime Stoppers tipster, counsel for Crime Stoppers advised the court that, should the court grant the Crown's motion to admit the evidence, Crime Stoppers would likely seek a stay of that order so that it could bring an appeal to the Court of Appeal."

Crime Stoppers eventually "brought an application for leave to appeal to the Supreme Court of Canada from the trial judge's decision permitting disclosure of the appellant as the Crime Stoppers tipster."

Supreme Court Justice Michael Moldaver, as he then was, held that "the trial judge had correctly determined that the appellant's call to Crime Stoppers was admissible."

"The scope of the informer privilege did not extend to the identity of persons engaged in conduct intended to further criminal activity or interfere with the administration of justice," the court explained of the Crime Stopper appeal.

While the appeal to the Supreme Court was being determined, the trial was delayed. Justice Doherty noted that the "delay between April 2017 and September 2017 seems directly attributable to the outstanding proceedings in the Supreme Court of Canada, something neither the Crown, nor the defence could possibly control or influence."

The Court of Appeal, therefore, determined that Justice McKelvey "correctly held that the interlocutory appeal brought with leave to the Supreme Court of Canada by Crime Stoppers was a discrete event, constituting exceptional circumstances for the purposes of the *Jordan* calculation."

"He properly deducted 5 months and 22 days (April 3, 2017, to September 25, 2017) from the total delay, leaving a net delay of slightly over 27 months. The trial judge did not err in dismissing the s. 11(b) motion," explained Justice Doherty.

On the second issue, the court noted that Corner "sought to put forward the evidence of Dr. Julian Gojer, a psychiatrist, as expert evidence" at trial.

"Counsel proposed to elicit evidence from Dr. Gojer laying out the behavioural, neurological and physiological explanations for conduct associated with 'fight or flight' syndrome," the court explained.

However, Justice McKelvey determined the expert evidence was "not necessary for the jury to properly understand and assess the appellant's testimony about how he reacted to Mr. Niazi's threats."

Justice Doherty upheld the trial judge's conclusion, dismissing the second ground of appeal.

On the third issue, the court addressed statements made by the appellant to the police "on February 19, the day of the homicide, and on March 1-2, after the appellant's arrest on the murder charge."

"In a hard-fought *voir dire*, the defence argued that all of the statements were inadmissible, because they were involuntary, and/or infringed s. 9 and s. 10 of the *Charter*, and should be excluded under s. 24(2) of the *Charter*. The Crown took the position that all of the statements were admissible. The trial judge ultimately admitted some of the statements, and excluded others," the court noted.

On appeal, the appellant argued that "all of the statements admitted at trial should also have been excluded."

The appellant made statements to police while detained on Feb. 19. With regards to that detention, Justice Doherty determined that the police "assumed total and exclusive control over the appellant from the time he arrived at the police station."

"They relinquished that control only some ten hours later when the appellant left the station. That control was clearly designed to isolate the appellant from anyone other than the police while the police were engaged in taking various investigative measures, some of which targeted at the appellant. The police never told the appellant that he was free to leave the police station if he wished to do so," he added, noting that Corner was "detained within the meaning of s. 9 of the Charter from the time he entered the interview room."

The judge also found that Corner was "not informed of the reason for his detention, advised of his right to counsel, or given an opportunity to exercise that right. Consequently, his rights under ss. 10(a) and 10(b) of the *Charter* were also infringed."

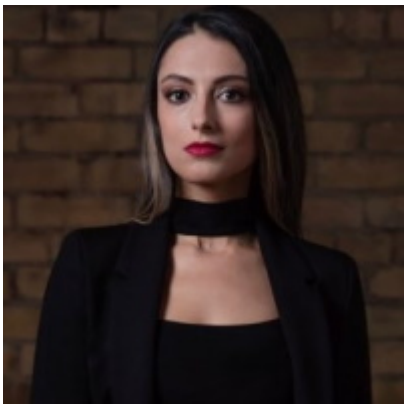
Justice Doherty determined that the "breaches of ss. 9 and 10 of the *Charter* that occurred when the interview began at about 5:50 p.m. only exacerbated the seriousness of the *Charter*-infringing conduct identified by the trial judge as occurring after about 7:40 p.m."

"The impact of the breaches beginning at 5:50 p.m. on the appellant's *Charter*-protected interests,

also rendered more serious the overall impact of the breaches which occurred while he was in the police interview room,” he added.

Justice Doherty, with Justices Kathryn Feldman and Gary Trotter, ruled that the “failure to exclude” the statements taken by the police “at the station on February 19 before 7:45 p.m. is an error in law.”

“The appeal is allowed. The conviction is quashed and a new trial is ordered on the charge of second degree murder,” the court ordered in a decision released July 27.



Jessica Zita, Lockyer Zaduk Zeeh

DiGiuseppe, of Ruby, Shiller, Enenajor, DiGiuseppe, Barristers, and Zita, of Lockyer Zaduk Zeeh, noted that, “recently in *Beaver*, the Supreme Court highlighted the importance of causal connection to the analysis under 24(2) for exclusion of statements following a s. 10 *Charter* breach” and “*Corner* provides a useful counterpoint to *Beaver*.”

“Notwithstanding the fact that the court found a weak causal connection between the breach and the subsequent statement, Doherty J. was careful to point out that causal connection is only one factor in the 24(2) analysis, and he upheld the exclusion of evidence notwithstanding the lack of strong causal connection,” they added, noting that this case will be “very useful for practitioners who are trying to resist arguments about casual connection in future cases.”

The Ministry of the Attorney General, on behalf of the Crown, did not respond to request for comment before press time.

If you have any information, story ideas or news tips for Law360 Canada, please contact Amanda Jerome at Amanda.Jerome@lexisnexis.ca or 416-524-2152.