Stick to offence, not defence by Gino Arcaro M.Ed. B.Sc

R. v. Côté (2011) SCC[1]

I. **Don't criticize a defence lawyer's advice.**

Stop bad-mouthing defence lawyers to suspects during an interrogation. This is the most important message that comes from this decision regarding interrogation. This is another in a long-line of case law decisions that shows the court's zero-tolerance for police officers denigrating defence lawyers and their advice to clients. The SCC has given the police leeway in the right to remain silent but not about denigrating defence lawyers. One of the biggest mistakes you can make during an interrogation is criticizing a defence lawyers's advice.

R. v. Côté involved a homicide. The accused was charged with second degree murder. The SCC acquitted her. The statement to police was excluded as well as the physical evidence. The accused walked away scot-free because of what the SCC described as "systemic disregard for the law and the Constitution" and, "disturbing and aberrant police behaviour."

The excluded statement was part of an investigation that included:

- faulty entry and search without warrant of the suspect's dwelling-house
- faulty search warrant
- the absurdity of cautioning and giving the right to counsel to the suspect for being an "important witness"
- ignoring the suspect's exhaustion
- denigrating the suspect's defence lawyer – telling the accused that "she had more life experience than her lawyer and that she was the only person who could help herself."
- ignoring over 20 invoking of the right to remain silent and, counseling the accused that:
    - "if she had planned the murder, like a member of an organized gang would have, he would advise her to remain silent because she would be in serious trouble in that kind of situation. However, given that her situation was very different, the investigator suggested that she need not remain silent."
    - "if she had committed an armed robbery he would advise her to remain silent, but again, her circumstances were quite different."

II KEY POINTS

1. Make sure you accurately classify your beliefs. The starting point of a successful interrogation is distinguishing between *mere suspicion* and *reasonable grounds* to determine who is a witness and who is to be arrested. In other words, who needs to be cautioned and informed of the right

[1] R. v. Côté, 2011 SCC 46 (CanLII) **2011-10-14** ; Citation: R. v. Côté, 2011 SCC 46 (CanLII), <http://canlii.ca/t/fndv8> retrieved on 2012-01-08

to counsel and who doesn't. Analyze the existing evidence and see who it connects to, keeping in mind the definitions of mere suspicion and reasonable grounds.

2. The *R. v. Grant* decision-making model regarding sec. 24(2) Charter violation considers oppression, right to silence, right to counsel, search & seizure in addition to the denigration of a defence lawyer. These factors, combined with the interrogation of a suspect and his/her statement form the big picture. In this case, denigrating the accused's defence lawyer was a major factor in having the suspect's statement excluded.
3. The SCC in *R. v. Burlingham* made it clear – DON'T BAD-MOUTH DEFENCE LAWYERS TO SUSPECTS. Defence lawyers are out of bounds. They're off limits. They are protected from your criticisms. The courts have shown ZERO-TOLERANCE for denigrating lawyers. It's one of the few non-negotiable issues. You can't do it. Strictly prohibited. Turn the table – imagine a defence lawyer denigrating your investigative skills, bad-mouthing your interrogations skills. Remove defence lawyers from your interrogation strategy completely. Resist all temptation to even bring up a defence lawyer's advice.
4. The police have been given leeway regarding the right to silence. The SCC has been tolerant of the police ignoring a suspect's decision to remain silent while trying to change the suspect's mind. But, there's a limit. In this case, persuasion didn't work. The actual advice the police gave the suspect combined with the denigration of the lawyer made the ignoring of the right to silence unacceptable.
5. The issue of cautioning and giving the right to counsel for being an "important witness" was absurd. There is no such law, rule, or requirement. Either the person is a witness, a suspect, or an accused. I had to read that over twice. I have never heard of such a thing in 15 years of policing and 20 years of teaching and writing about it. Think carefully about what you say and do during a major crime investigation and interrogation. The action by the investigators in this case was the equivalent of making up their own laws.

Conclusion: The key to a successful interrogation is self-discipline. Training. REPS. Like any new habit, practice doing it within the guidelines of the law. If you want to master a new skill, invest the reps. It's impossible to change habits without repetition of new ones during practice and training.

Gino Arcaro has a 36 year professional career. He is an ex-police officer (15 years including 6 as a detective), former college law enforcement professor/program coordinator (20 years teaching criminal investigation), author of 19 editions of 6 law enforcement textbooks, over 200 case law articles since 1993. Currently, he is a gym owner (X Fitness), football coach, strength coach, and author of Soul of a Lifter, *a new non-fiction book about life-lesson learned from the frontlines and the sidelines. Comments and questions are invited. Please send a message through www.ginoarcaro.com. Gino is also on Facebook, Twitter, and Linkedin.*