# SUPREME COURT OF YUKON

Citation: *R. v. Evans*, 2021 YKSC 10

Date: 20210219
S.C. No. 20-01502
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

AND

TRAVIS THOMAS EVANS

Before Justice T. Ducharme

Appearances:
Paul Battin — Counsel for the Crown
Amy Steele — Counsel for the Accused

**RULING**
**(on *Voir Dire*)**

## INTRODUCTION

[1] Mr. Travis Evans is before the court on a charge of arson. It is alleged that he made a spontaneous utterance to Cst. Turner on the day of his arrest, February 18, 2019. The Crown has brought an application for a ruling that this spontaneous utterance was made voluntarily and is admissible at trial. Ms. Steele, for Mr. Evans, argues that the record surrounding the alleged utterance is inadequate and therefore the Crown cannot discharge the onus resting upon them to prove voluntariness.

**The Evidence**

***Constable Wiltse***

[2] RCMP Cst. Wiltse testified that on February 18, 2019, he was approached by Cst. Turner who told him that Mr. Evans was at the detachment and that he wanted Cst. Wiltse to arrest him. Cst. Wiltse did not recall why Cst. Turner made this request, although in cross-examination he conceded that it might be that Cst. Turner wanted to avoid some of the hostility that might be directed at the officer making the arrest. Avoiding the hostility might make it easier for Cst. Turner to take a cautioned statement from Mr. Evans later.

[3] Cst. Turner and Cst. Wiltse went to the public entrance and one of them asked Mr. Evans to come into a small room off to the side which is used to take fingerprints or shorter statements. Cst. Wiltse thought he had asked Mr. Evans to come in although he was not sure and could not recall exactly what was said to Mr. Evans or whether they were inside or outside the small room. Cst. Wiltse did say that he did most of the talking. At 12:38 p.m., Cst. Wiltse told Mr. Evans that he was under arrest for arson, advised him of his *Charter* rights and read him the standard police warning. Mr. Evans said that he wished to speak to his lawyer, Amy Steele. Mr. Evans became angry as soon as he was arrested. Cst. Wiltse spoke of de-escalation but he could not remember what was said. Mr. Evans seemed to be angry that some new legal problem was coming up. Mr. Evans said he wished to speak to his pregnant girlfriend who was in a car outside of the detachment. They agreed that Mr. Evans could speak to his girlfriend although this was not held out to Mr. Evans as a promise.

[4] Cst. Wiltse moved the unmarked truck he had been driving to the side of the detachment. He returned to the room and then left with Mr. Evans and Cst. Turner. He did not remember when the handcuffs were put on Mr. Evans. He did not remember when he left Cst. Turner and Mr. Evans, but estimated it was for two minutes. He saw Mr. Evans speak to his girlfriend, although he could not remember if it was at the front of the detachment or around the back. He also could not remember if he spoke to the girlfriend before she spoke to Mr. Evans.

[5] At 12:53 p.m., Cst. Wiltse then drove Mr. Evans and Cst. Turner to the Arrest Processing Unit ("APU"). It took three to four minutes to get there. When they got to the APU, Cst. Wiltse called Ms. Steele's office and was told that she was out of the office but would call at 2:30 or 4:30 p.m. He told Mr. Evans that Ms. Steele would not be available for some time and asked if he wished to speak to someone else. Mr. Evans declined the offer.

[6] Cst. Wiltse said that Mr. Evans did not appear inebriated or under the influence of drugs and appeared to understand what they were saying to him. No threats or promises were made to him. Mr. Evans made no complaint about the handcuffs. Cst. Wiltse agreed that he had a handheld recorder, but he did not have one with him at the time of his interactions with Mr. Evans. He said there were two rooms in the detachment that were set up to do audio and video recording.

***Constable Turner***

[7] Cst. Turner testified that on February 18, 2019, he was told by someone that Mr. Evans was at the detachment. At this point, Mr. Evans was the lead suspect in an arson investigation and the police had had grounds to make an arrest for approximately

six months. Cst. Turner went to the front counter with Cst. Wiltse. They introduced themselves to Mr. Evans and asked him to come into the small room. Once in the room, Cst. Wiltse arrested Mr. Evans, although Cst. Turner did not remember why it was Cst. Wiltse who made the formal arrest. Cst. Wiltse advised Mr. Evans of his *Charter* rights and Mr. Evans said he wished to speak to Ms. Steele. As a result, Cst. Turner no longer intended to take a statement. In re-examination, Cst. Turner testified that, if Mr. Evans had declined to exercise his right to counsel, he would have taken him to one of the rooms in the detachment with audio and video recording equipment in order to take a statement.

[8] Cst. Turner asked Cst. Wiltse to move the police vehicle around to the side of the detachment where there was a secure pod. Mr. Evans said his girlfriend was outside the detachment and he wanted to speak to her. In examination-in-chief, Cst. Turner seemed to testify that this comment about Mr. Evan's girlfriend was made when Cst. Wiltse was still in the room. In cross-examination, Cst. Turner agreed that this comment was made after Cst. Wiltse had left the room.

[9] After Cst. Wiltse left the room, Cst. Turner and Mr. Evans remained in the room for about ten minutes. Mr. Evans became agitated when he was arrested but he calmed down after being allowed to visit with his girlfriend. Cst. Turner could not remember exactly what Mr. Evans said. Cst. Turner also did not remember Cst. Wiltse being involved in any de-escalation.

[10] After Mr. Evans said he wanted to speak to Ms. Steele, Cst. Turner asked no questions and he testified that it was awkward in the room. In cross-examination, Cst. Turner added that "there was not a whole bunch of conversation as far as I

remember." They were facing one another with Mr. Evans having his back towards the window and Cst. Turner having his back towards the door of the room. Mr. Evans then said, "I am not going down for this. It was those Silverfox bitches. They paid me to do it." In his notes, Cst. Turner wrote that Mr. Evans said, "those Silverfox bitches. They paid me to do it." He later included the beginning of the quote in his typed report which he did later that afternoon. Cst. Turner agreed that he did not remember what was said before the utterance that he recorded in his handwritten notes.

[11] Mr. Evans was handcuffed, had a cigarette and spoke to his girlfriend. He was then transported to the APU where his handcuffs were removed.

[12] Cst. Turner testified that Mr. Evans did not appear inebriated or under the influence of drugs and appeared to understand who they were and what they were saying to him. No threats or promises were made to him. Cst. Turner testified that he had a handheld recorder, but he did not remember where it was, and it had not crossed his mind to record the interaction with Mr. Evans.

***Constable Imrie***

[13] An agreed statement of facts was tendered with respect to Cst. Imrie. On February 18, 2019, he was informed that Mr. Evans had been arrested by Constables Turner and Wiltse. At 2:45 p.m., Cst. Imrie attended the APU at Whitehorse Correctional Centre for the purposes of obtaining a warned, cautioned statement from Mr. Evans.

[14] Cst. Imrie first interacted with Mr. Evans at the APU around 2:58 p.m. He advised Mr. Evans that Ms. Steele was on the phone and asked if he wished to speak with her. Mr. Evans indicated that he did, and he was put onto the phone with Ms. Steele. Mr. Evans ended his phone call with Ms. Steele at 3:24 p.m.

[15] At 3:53 p.m. Cst. Imrie completed a warned, cautioned statement with Mr. Evans. This statement was video and audio recorded in a room designed for recording interviews. It is agreed that the statement that Mr. Evans gave to Cst. Imrie was voluntary and the content of that statement is admissible for the purposes of cross-examination.

**The Law**

[16] Under the confessions rule the court must consider not only whether an accused was threatened, or any inducement was held out to him, but also whether he had an operating mind and made the statement in question in circumstances that were free from oppression. Each of these issues should not be addressed "as a discrete inquiry completely divorced from the rest of the confessions rule": *R. v. Oickle*, 2000 SCC 38, at para. 63.

[17] Ms. Steele is not alleging any specific threats or inducements, any specific oppression, or any specific trickery. Nor is she suggesting that Mr. Evans was not properly cautioned or that he did not have an operating mind. Rather she relies on *R. v. Moore-McFarlane*, [2001] 56 O.R. (3d) 737 (Ont. C.A.) ("*Moore*-McFarlane"), and Charron J.'s comments about the importance of the police recording statements of an accused. Ms. Steele submits that the officers could easily have recorded their interaction with Mr. Evans but failed to do so. She submits that Cst. Turner deliberately interrogated Mr. Evans without making any attempt to record the conversation when it would have been easy to do so. She also points to inconsistencies between the testimony of Cst. Wiltse and Cst. Turner to argue that the record is so incomplete that the Crown cannot discharge the onus of proving that the statement was voluntary.

[18] I disagree with these submissions.

[19] First, Cst. Turner did not interrogate Mr. Evans. I accept the testimony of Cst. Turner that the utterance was made spontaneously and not in response to a question by him. Second, there appear to be possible inconsistencies between the evidence of Cst. Wiltse and Cst. Turner: (a) Cst. Wiltse spoke of de-escalating the situation with Mr. Evans while Cst. Turner did not recall Cst. Wiltse being involved with any de-escalation; (b) Cst. Wiltse recalled a conversation about letting Mr. Evans speak to his girlfriend, while Cst. Turner testified that this conversation took place after Cst. Wiltse left the room; and (c) Cst. Wiltse said he spoke to Mr. Evans about getting all this stuff behind him and Cst. Turner made no mention of this conversation. But neither officer was questioned in any detail about these inconsistencies. I am not sure what Cst. Wiltse did to assist in de-escalating the situation. Similarly, while Cst. Wiltse said that they let Mr. Evans speak to his girlfriend, it is not clear if he spoke to Mr. Evans about this. Finally, I am not sure exactly when Cst. Wiltse spoke to Mr. Evans about taking care of stuff. Thus, I cannot assess whether these actually are inconsistencies and, if they are, how important the inconsistencies are. The significance of these inconsistencies is not as great as Ms. Steele suggests. At most they suggest that both officers' memories are vague about some details of the interaction with Mr. Evans. But none of these inconsistencies suggest that the statement was not voluntary or undermine the overall narrative of Cst. Turner.

[20] More importantly, when the utterance was allegedly made, Mr. Evans was alone in the room with Cst. Turner. None of the foregoing inconsistencies give any reason to doubt that. Cst. Turner admitted that he did not remember exactly what was said before

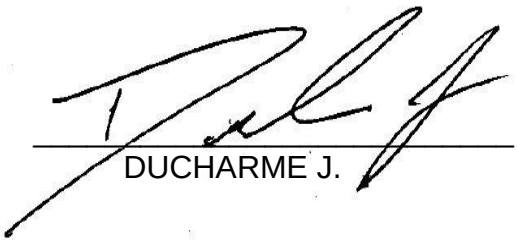
the utterance. However, he also testified that he did not ask Mr. Evans any questions and he described the atmosphere in the room as quiet and awkward. The utterance is readily understandable without any greater degree of context. Moreover, as I accept Cst. Turner's testimony that he asked no questions and the room was quiet and awkward, I find that he did nothing to render the utterance involuntary.

[21] I note that in *Moore-McFarlane*, Charron J. did not say that it was absolutely necessary to record every utterance of an accused. Certainly, since *Moore-McFarlane*, it has repeatedly been held that the failure of a police officer to record the statement of an accused verbatim is not necessarily fatal to the Crown proving the statement voluntary: *R. v. Backhouse* (2005), 195 O.A.C. 80, at paras. 117-119 ("*Backhouse*"); *R. v. Narwal*, 2009 BCCA 410, at paras. 36-39.

[22] In retrospect, it will always be better for the police to record their interactions with an accused person. If this is done it greatly reduces the potential for any dispute over voluntariness of a statement or other *Charter* issues. But in this case, I note that the arrest was unplanned as Mr. Evans' appearance at the detachment was unexpected and that neither officer had any intention of taking a statement in the small room. Neither officer can be faulted for failing to foresee the making of this utterance.

[23] I have enough of a record of what transpired to be fully satisfied that there was no untoward conduct by either Cst. Wiltse or Cst. Turner that would vitiate the voluntariness of any of the accused's utterances. I find that "[t]his...is not a case where there [are] reasons to believe that the failure to record the statements was suspect": *Backhouse*, at para. 118.

[24] In reaching the conclusion that the Crown has discharged its onus of proving that the statement was voluntary, I do not mean to preclude the defence from arguing at trial that the utterance was never made. As Code J. made clear in *R. v. Learning*, 2010 ONSC 3816, at para. 62, “the accuracy and completeness of the record of a voluntary statement is an issue of weight that is determined at trial.” Thus, the questions of whether Mr. Evans made any utterance to Cst. Turner and what exactly that utterance was are to be determined ultimately by the trier of fact at trial.



DUCHARME J.