Citation: *R. v. Jacques,* 2025 YKTC 10

Date: 20250321
Docket: 23-00613
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

WESLEY JACQUES and REIMI NAKAMURA

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:

Caroline N. Lirette	Counsel for the Crown
Amy Chandler	Counsel for the Defence, R. Nakamura
Kevin Drolet	Counsel for the Defence, W. Jacques

RULING ON *VOIR DIRE*

[1] Wesley Jacques and Reimi Nakamura are before me for trial on a count alleging that, on August 3, 2022, they committed a sexual assault on K.K. contrary to s. 271 of the *Criminal Code*.

[2] Following her arrest on November 21, 2023, Ms. Nakamura was interviewed by police and gave a statement. The trial commenced with a *voir dire* in relation to that statement.

[3] The Crown seeks a ruling that the statement made by Ms. Nakamura to police was voluntary and therefore admissible as evidence at trial. Voluntariness is disputed by Ms. Nakamura. There is also an application by Ms. Nakamura to exclude evidence of her statement pursuant to s. 24(2) of the *Charter* on the grounds that Ms. Nakamura's s. 8 and 10(b) *Charter* rights were breached. Mr. Jacques, who is co-accused with Ms. Nakamura, did not make arguments on the *voir dire*.

[4] The Crown bears the burden of proving voluntariness beyond a reasonable doubt. Ms. Nakamura bears the burden of establishing the *Charter* breaches on a balance of probabilities. The Crown called two police witnesses on the *voir dire*. The defence did not call any evidence.

[5] The arguments in this case centred primarily on Ms. Nakamura's language comprehension as her first language is Japanese, not English.

Voluntariness

[6] A confession to a person in authority is presumptively inadmissible, unless the Crown proves beyond a reasonable doubt that the confession was voluntary. Where the Crown wishes to rely on the statement of an accused person as evidence in the trial proper, the onus is on the Crown to establish beyond a reasonable doubt that the statement is voluntary.

[7] Ms. Nakamura's statement is not, strictly speaking, a confession. The Crown's purpose in seeking a ruling on voluntariness is to be able to use the statement to cross-examine Ms. Nakamura should she choose to testify.

[8] The law in relation to voluntariness is set out by the Supreme Court of Canada in *R. v. Oickle,* 2000 SCC 38. The factors listed below were identified by the Court as circumstances that can vitiate the voluntariness of a statement:

1. Threats or promises: meaning, was the statement a result of fear of prejudice or hope of leniency?
2. Oppression: were the conditions in which the statement was taken so abhorrent that a concern is raised that a confession may be induced by stress?
3. Operating mind: did the accused recognise that anything she said may be used in evidence?
4. Police trickery: acknowledging that the police may resort to trickery to gain a confession, the issue is whether the police employed a form of trickery that would "shock the community" requiring exclusion to maintain the integrity of the justice system.

[9] In considering the issue of voluntariness, I have the benefit of being able to hear and review both the audio recording of Ms. Nakamura's arrest and processing and the audio/video recording of her statement which were made exhibits on the *voir dire*. While I have considered the arguments advanced by Ms. Nakamura's counsel, from my review of these recordings, I find no evidence of any threats or promises made by police to Ms. Nakamura. I reach the same conclusion with respect to police trickery. I find no evidence that the police relied on any form of trickery that would "shock the community".

[10] With respect to oppression, Ms. Nakamura's counsel argues that the RCMP's warrantless entry into Ms. Nakamura's home to arrest her supports a finding that the conditions were oppressive and the resulting statement stress induced. Typically, when assessing oppression, courts consider whether a suspect was deprived of food, clothing, water, sleep, or medical attention; was denied access to counsel; was confronted with fabricated evidence; or was questioned aggressively for a prolonged period of time. In *Oickle*, at para. 58, the Supreme Court of Canada said the following about the concept of oppression:

> ... Oppression clearly has the potential to produce false confessions. If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternatively, oppressive circumstances could overbear the suspect's will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession.

[11] Having considered the evidence on this application, I am unable to find that the conditions in which Ms. Nakamura's statement was taken were oppressive. Even during the arrest at her residence, the way the RCMP engaged with Ms. Nakamura was calm, friendly and non-threatening. As well, during the interview, the RCMP clearly considered Ms. Nakamura's well-being, ensuring she was offered water, tissues, and bathroom breaks as needed.

[12] Lastly, turning to the operating mind aspect of voluntariness, defence counsel argues that Ms. Nakamura's English language comprehension gives rise to this concern. In *Oickle,* at para. 63, the Supreme Court of Canada set out that the operating mind principle "does not imply a higher degree of awareness than knowledge of what

the accused is saying and that he is saying it to police officers who can use it to his detriment". As noted in *R. v. Whittle*, [1994] 2 S.C.R. 914, and relied on by this Court in *R. v. R.S.S.*, 2020 YKTC 5, at para. 5, the Supreme Court of Canada likened the operating mind test to that of fitness to stand trial, a standard requiring only limited cognitive capacity and no demonstrated analytical ability.

[13] Further, language comprehension is only exceptionally a voluntariness issue. It comes into play when an accused's comprehension is so deficient it is impossible for him or her to understand what the police said (*R. v. Arjun*, 2013 BCSC 2076, at para. 59; *R. v. Ejigu,* 2012 BCSC 1673, at para. 27; *R. v. Liew*, 2012 ONSC 1826, at para. 98). While English is clearly not Ms. Nakamura's first language, I do not find that it was impossible for her to understand what the police said to her.

[14] Having considered all the circumstances surrounding the taking of the statement, I am satisfied that the Crown has established that Ms. Nakamura's statement was voluntary. However, that is not the end of the matter. I must consider the *Charter* application.

***Charter* Application**

[15] Ms. Nakamura applies for an order excluding the statement she made to police on the basis that her s. 10(b) *Charter* rights to counsel were violated. The onus is on Ms. Nakamura to establish, on a balance of probabilities, that her rights were breached. However, there are still evidentiary expectations on the Crown when a *Charter* breach is alleged. Section 10(b) of the *Charter* places both informational and implementational obligations on the police. As this Court held in *R. v. Schiffner*, 2020 YKTC 29, at para.

29, there is a burden on Crown to demonstrate that these obligations have been appropriately discharged. In this case, the concerns arise in relation to Ms. Nakamura's linguistic barriers.

[16] The case of *R. v. Ukumu*, 2019 ONSC 3731, relied on by this Court in *R.S.S.*, provides an extensive overview of the law as it applies to the issues before me. I quote from *Ukumu* extensively below.

> 31 The law governing such issues is well-established and developed, at least insofar as alleged breaches of s.10(b) of the Charter based on linguistic difficulties are concerned.
>
> 32 General considerations and principles in that regard include the following:
>
> a. The right to counsel guaranteed by s.10(b) of the Charter encompasses a right to be informed of the right and its components in a comprehensible and meaningful way, and the right to exercise that right in a meaningful and comprehensible fashion. In particular, it is not sufficient for a police officer, upon the detention or arrest of a person, to merely recite the rights guaranteed by section 10 of the Charter. As s.10(b) of the Charter stipulates, the detainee or accused must be "informed". Individuals who are detained or arrested are in a vulnerable position, and the rights conferred by s.10(b) of the Charter are one of the central protections to allow such individuals the ability to understand their situation and make informed decisions in relation to that situation. A detainee or accused therefore must understand what is being said to him or her, and understand what the options are, in order that he or she may make a choice in the exercise or waiver of the rights guaranteed by the Charter. Similarly, meaningful exercise of the right to counsel requires an ability to fully understand the advice and instructions of counsel, in order to make a fully informed choice to follow or disregard such advice and instructions.
>
> b. The police are not required to go to extreme means in order to respect the rights of a detainee or accused

under section 10 of the Charter. Generally, in relation to language comprehension, if there are no circumstances that subjectively or objectively suggest an issue regarding comprehension of English, it is fair to infer that an individual understands his or her legal rights as read to him or her in English, and will understand legal advice provided to him or her in English.

c. However, "special circumstances" may exist in relation to linguistic comprehension of legal rights. In particular, there may be objective indicia that an individual's knowledge of English may be limited for various reasons, such that he or she may not have sufficient comprehension of the matter. Where such "special circumstances" exist, police officers dealing with a detainee or accused are obliged to act reasonably in the circumstances; i.e., by taking further reasonable steps to ascertain and ensure that the individual actually understands his or her legal rights, and is able to exercise those rights in a meaningful way.

d. The determination of whether such "special circumstances" exist is a question of fact and law. In particular, even where a court accepts that a detainee or accused person understood his or her constitutional rights as explained in the English language, the factual findings may still raise "special circumstances" which require the police to take additional steps to ensure that the accused understands the content of the right to counsel, and makes a meaningful exercise of that right.

e. The test for special circumstances is an objective rather than subjective one. In particular, the subjective belief of police officers that an accused fully understood his or her legal rights, (even where a court accepts police testimony in that regard), or was "playing games" by pretending to understand less than he or she actually did, accordingly is not determinative of whether or not such "special circumstances" exist. Again, issues relating to linguistic comprehension of Charter rights involve a question of law, and accordingly are not decided by assessments of credibility alone. It is a reversible error of law to conclude that there are no special circumstances on the basis of a police officer's subjective belief about the ability of a detainee or accused to understand his or her legal rights.

> f. Such "special circumstances" may exist where there is objective evidence that English is not the first language of a detainee or accused, and there is sufficient objective evidence of some lack of understanding of the right to counsel or other information provided to the detainee or accused by police at the time of the detention or arrest.
>
> ...

[17] The question before me is whether, objectively, "special circumstances" existed such that the RCMP dealing with Ms. Nakamura were required to take further reasonable steps to ascertain and ensure that she understood her legal rights and was able to exercise those rights in a meaningful way. The case law is clear that the officers' subjective belief that Ms. Nakamura understood is not determinative.

[18] *Ukumu* provides a lengthy list of factors that may be considered in determining if "special circumstances" exist. However, at para. 34, the Court said that where two or three indicators of possible comprehension difficulties are found, without further steps being taken by the police to ensure that *Charter* rights are fully understood and capable of being meaningfully exercised by an accused, this will suffice to warrant a finding that the *Charter* rights of the individual have been breached.

[19] As such, I must first determine whether "special circumstances" arose in this case. Then, I must consider if the police took reasonable steps to ascertain that Ms. Nakamura understood her constitutional rights and was able to meaningfully exercise those rights.

Special Circumstances

[20] Prior to her arrest, RCMP knew that Ms. Nakamura was from Japan, was a Permanent Resident of Canada, that English was not her first language, and that she did not have a Canadian criminal record. Upon speaking with Ms. Nakamura, as the audio and video recordings make clear, it would have been evident to RCMP that her English was heavily accented, that she did not speak fluently, and that she made frequent grammatical errors.

[21] Following her arrest, Ms. Nakamura spoke with duty counsel. Immediately after that call, and prior to her police interview, duty counsel advised the RCMP that Ms. Nakamura required an interpreter. Duty counsel spoke to and informed both Cst. MacKinnon and Cst. Brady that Ms. Nakamura had language issues.

[22] There are numerous examples during Ms. Nakamura's arrest and subsequent the police interview that, objectively, establish that Ms. Nakamura's English comprehension is limited. As noted in *R. v. Nguyen*, 2020 ONSC 7783, at para. 46:

> ...
>
> Evidence of a working knowledge of day-to-day English usage will not necessarily extinguish the concern for meaningful comprehension. Police will proceed at the peril of a successful prosecution where there are indicia of a language comprehension problem and an interpreter is neither offered nor made available.

[23] An incomplete sampling of the exchanges demonstrating comprehension issues is set out below.

[24] A review of the audio recording of Ms. Nakamura's arrest demonstrates that, while she can be heard speaking English, her English is accented and grammatically incorrect. Defence counsel pointed out that, when Ms. Nakamura is heard on the audio recording telling her step-daughter that she had to go with RCMP to the detachment, she says "don't have choice" or "no have choice".

[25] During her interview with Cst. MacKinnon, Ms. Nakamura is asked if she understand what she spoke about with duty counsel. Her response is "mm I think so?".

[26] When questioned if she was threatened by the officers, Ms. Nakamura says:

> I don't think so?

[27] When asked if there was something that made her uncomfortable with the officers, she responds:

> I'm very sad that they came to my house that was a little bit but I understand that's their job.

[28] When asked if she understands that she is facing an allegation of sexual assault that is not proven in court, she simply parrots back:

> Not proven in court.

[29] When asked:

> What does sexual assault mean to you?
>
> Um means sexually mm [pause] the behaviour where that uh harassed uh

[30] When asked if there are any other words she knows for sexual assault, she says "mmm" and is seen shaking her head on the video, then says "no".

[31] Cst. MacKinnon then attempts to explain sexual assault from the dictionary as follows:

> So sexual assault is any type of sexual activity or sexual contact where consent was not given, okay?

[32] Ms. Nakamura says back:

> Consent of not given.

[33] Cst. MacKinnon corrects her, saying:

> When it's not given.

[34] Cst. MacKinnon goes on to provide a description of sexual activity without consent. Ms. Nakamura asks:

> What is consent?

[35] Ms. Nakamura returns to the meaning of the word "consent" again later, asking:

> And then uh that what about the word again consent?

[36] When asked to explain why she thinks she is at the detachment, Ms. Nakamura says:

> Uh the complaint uh sent a letter to you about the incident and uh she request it I think?

[37] Based on the factors known to RCMP at the time of her arrest, coupled with the information provided by duty counsel that Ms. Nakamura required an interpreter, and the linguistic barrier demonstrated during her arrest and subsequent police interview, I find that "special circumstances" arose. The objective facts are:

- Ms. Nakamura is from Japan;
- English is not her first language;
- She has a strong accent;
- She frequently communicated in broken and grammatically incorrect English;
- At times her responses to questions were not responsive to what was being asked of her;
- She had difficulty explaining key concepts, such as consent and sexual assault;
- Cst. MacKinnon had to repeat things and offer simple explanations at times; and
- Duty counsel alerted the RCMP to Ms. Nakamura's need of an interpreter.

[38] Given these factors, I find that the RCMP had an obligation to take further reasonable steps to ensure that Ms. Nakamura was able to meaningfully understand and exercise her rights.

[39] Before moving on, it must be noted that the Crown disputed that Ms. Nakamura's s. 10(b) rights were breached. In my view, the Crown failed to address the objective test for determining if special circumstances exist. The Crown instead chose to focus on the officers' subjective view of Ms. Nakamura's language comprehension. When pressed on this point, the Crown drew the Court's attention to a single statement in Ms. Nakamura's lengthy statement:

> did you have a sexual relationship with [K.K.]?
>
> Uh the lawyer told me not to speak here today. ...

[40] While this response demonstrates that Ms. Nakamura had some understanding of the advice she received, given all the circumstances, it is not sufficient to persuade me that Ms. Nakamura meaningfully understood the legal advice she received. It has long been understood that the informational component of the s. 10(*b*) right requires detainees to be "advised of [their] rights … in a meaningful and comprehensible manner" (*R. v. Vanstaceghem*, 1987 CanLII 6795 (ON CA) p. 147). I return to the fact that, immediately after speaking with Ms. Nakamura, duty counsel followed up with the RCMP – speaking directly with both Cst. MacKinnon and Cst. Brady – and alerting them to his concern that Ms. Nakamura had difficulty understanding English. The most reasonable inference to make from this exchange with duty counsel is that he was concerned that Ms. Nakamura did not understand the legal advice provided. It is very

troubling that the officers' ignored duty counsel's concern – particularly as he had been the one to provide her with legal advice - and failed to even ask Ms. Nakamura if she wished to have an interpreter made available.

Reasonable Steps

[41] Cst. MacKinnon and Cst. Brady both testified that they believed Ms. Nakamura understood what was said to her. However, as the case law makes clear, the officers' subjective belief is not determinative.

[42] There is no evidence that either Cst. MacKinnon or Cst. Brady took reasonable steps to ensure Ms. Nakamura meaningfully understood her rights and was able to exercise them. The police are expected to "err on the side of caution" to make sure that the person fully understands her rights and is able to exercise those rights in a meaningful way (*Ukumu*, para. 49, *R. v. Bassi*, 2015 ONCJ 340, para. 7; *Nguyen*, paras. 24 to 28).

[43] As explained in *Bassi*, at paras. 9, 11 and 12:

> 9 … [The] situation of an individual who is detained by police and attempting to understand their legal rights is not an everyday situation. A suspect who may be able to manage day to day in English, may nonetheless not be comfortable in English when dealing with the complexities of understanding his legal rights in a situation where he is detained and under arrest...
>
> ...
>
> 11 Where a court finds that special circumstances are present, officers must take reasonable steps to ascertain that the detainee has understood his constitutional rights. In the context of the implementational aspect of the right, officers must facilitate contact with counsel in a manner that addresses the detainee's language issues. At the informational stage, this could be done by giving right to counsel through an officer who speaks the

> detainee's language, or through an interpreter, or in some cases, depending on the detainee's level of English, through more careful explanation of the right to counsel by the arresting officer. At the implementational stage, common measures used to facilitate right to counsel where there are language issues are duty counsel who speaks the detainee's language, or simultaneous interpretation [citations omitted]. Where special circumstances have been found to exist, the failure of police to even ask if the detainee would like to use an interpreter to translate his rights or speak to counsel has been found to violate s. 10(b)... [citations omitted]
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> 12 The case law is also clear that a detainee does not bear an onus to ask for counsel or duty counsel in a language other than English, since detainees may not be aware that they have this right. Where special circumstances are triggered, the police have a duty to advise the detainee that they can consult counsel in another language, and to facilitate the detainee doing so (for example by accessing duty counsel in another language, or by using an interpretation service such as Cantalk). [citations omitted]

[44] With respect to Ms. Nakamura, her arrest was planned. The RCMP were aware that Ms. Nakamura was not a native English speaker. However, the evidence establishes that there was no discussion during the planning for her arrest about possible language issues or a plan to offer an interpreter.

[45] At no point during her arrest and the following interview was Ms. Nakamura offered an interpreter. This was despite Cst. MacKinnon knowing that there was a 24-hour interpreter service available. Ms. Nakamura was never asked if she wished to speak to Japanese speaking duty counsel. The importance of speaking to counsel in one's native language to ensure meaningful comprehension is addressed at length in *Nguyen*, paras 40 – 45. This failure to take reasonable steps to ensure Ms. Nakamura understood her rights and was able to meaningfully exercise them is particularly troubling given that duty counsel raised the concern about language issues to both officers immediately after speaking to Ms. Nakamura. Simply put, the officers

disregarded the information provided by duty counsel. Instead, Cst. MacKinnon took it upon herself to determine Ms. Nakamura's comprehension. She testified that, even after hearing duty counsel's concerns, she went into the interview to determine Ms. Nakamura's understanding and that she felt Ms. Nakamura understood her. In my view, the officers disregarded the objective evidence of Ms. Nakamura's language barrier, choosing instead to proceed based on their subjective understanding of her comprehension, and failing to take further reasonable steps as required. Unfortunately, neither officer appeared to understand the state of the law in this area, despite it being well-established for many years.

[46] I am satisfied, on a balance of probabilities, that special circumstances existed which required additional steps to be taken to ensure Ms. Nakamura's understanding of and ability to meaningfully exercise her rights to counsel. I find that reasonable steps should have included offering Ms. Nakamura the services of a Japanese-speaking interpreter or Japanese-speaking duty counsel. The failure to do so resulted in a breach of her s. 10(b) *Charter* rights to counsel.

Remedy

[47] The remedy sought by Ms. Nakamura is the exclusion of the statement. The test for exclusion under s. 24(2) of the *Charter* is set out in *R. v. Grant,* 2009 SCC 32, and involves the consideration of three factors.

[48] The first consideration is the seriousness of the *Charter*-infringing conduct. As noted by this Court in *R.S.S.*, the law in relation to language issues and rights to counsel is well-established and, further, as noted in *Bassi*, has been for many years.

Despite this, neither Cst. MacKinnon nor Cst. Brady appeared to understand the law and their obligations to "err on the side of caution" and take reasonable steps to ensure Ms. Nakamura was able to meaningfully understand and exercise her rights. Neither officer appears to have considered the objective evidence of Ms. Nakamura's limited English language skills, choosing instead to determine for themselves her ability to understand. This approach flies in the face of the well-established law in this area. I am particularly troubled by the officers' approach in this case given the communication received from duty counsel. Duty counsel explicitly alerted the officers to his concern that Ms. Nakamura did not understand English and required an interpreter. The officers' complete disregard for the objective evidence of Ms. Nakamura's English comprehension issues weighs heavily in favour of exclusion.

[49] The second consideration is the impact of the breach on the *Charter*-protected rights of the accused. This factor also favours exclusion. As noted in *R.S.S.*, at para. 46, meaningful comprehension and exercise of the right to counsel is a critical protection for vulnerable persons under arrest, a vulnerability that is heightened when the arrest and interview are not conducted in the accused's first language. Ms. Nakamura's vulnerability was further heightened by the fact that she had no criminal record and lacked prior experience with police. Her language comprehension issues and her inexperience with police increased her vulnerability and placed her at a significant disadvantage in dealing with police.

[50] The third consideration is society's interests in a trial on its merits. The charge Ms. Nakamura faces are serious. However, in this case, Ms. Nakamura's statement is not a confession, and its exclusion would not end the prosecution's case. It is not

evidence crucial to the prosecution. The Crown simply seeks to rely on it for the purposes of cross-examination. In other words, exclusion of the statement will have a very limited effect on 9society's interests in a trial on its merits. This factor is neutral.

[51] Having weighed the three factors, I am satisfied that the statement obtained from Ms. Nakamura in violation of her s. 10(b) *Charter* rights should be excluded.

[52] Having decided the defence application on the basis the s. 10(b) *Charter* breach, I decline to consider the s. 8 *Charter* argument.

CAIRNS T.C.J.