Citation: *R.* v. *Brazeau*, 2016 YKTC 54 Date: 20161021
Docket: 15-00385
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

SHANE DONALD BRAZEAU

Appearances:
Ludovic Gouaillier Counsel for the Crown
Amy Steele Counsel for the Defence

RULING ON APPLICATION

Introduction

[1] It is alleged that Shane Brazeau stole personal items of two women, at the women's place of work. The only non-circumstantial evidence which ties Mr. Brazeau to the theft is his utterance in the presence of the victims and a police officer admitting to the theft.

[2] A co-worker of the victims saw Mr. Brazeau the day after the theft. He had reason to believe that either Mr. Brazeau was involved in the theft or had relevant information about the theft. Mr. Brazeau agreed to go to the police station to talk with police.

[3] Once a police officer was available, she met with Mr. Brazeau on the front steps of the police detachment to discuss the matter. Others were present, including the two victims of theft. The police officer advised Mr. Brazeau that he need not say anything and that anything he said could be used against him in court. The officer proceeded to ask him what he knew about the theft. Mr. Brazeau was unwilling to respond. One of the victims admonished Mr. Brazeau for what she believed he had done. The officer again asked him to provide details as to what he knew. He declined. The same victim continued to lecture Mr. Brazeau, as well as to request that he return the items. She indicated that she would not 'press charges' if he located the stolen items and returned them.

[4] The officer then interjected by again asking Mr. Brazeau if he had stolen the items. At this point, Mr. Brazeau admitted that he had committed the theft and that he would recover and return the stolen items. The police officer then advised him that he had until the next day to recover and return the items to police. If he did not do so, he could be charged with theft.

[5] On this *voir dire*, the defence applies to exclude Mr. Brazeau's utterance, on the basis that it was not voluntary.

Position of the parties

[6] The Crown argues that there is no evidence that the police officer was making a promise to Mr. Brazeau. One of the victims of the theft, who was not a person in authority, appealed to his conscience and he chose to make an admission of guilt.

There is no evidence that Mr. Brazeau felt more compelled to confess due to the officer's presence. In all the circumstances, the statement is voluntary.

[7] The Defence submits that even though the promise was not made directly by the police, the circumstances are such that a reasonable person would believe that the promise was one made jointly by the victim and the police. The police officer did not interject to say that the decision to lay charges was the officer's decision and not that of the victim.

Analysis

[8] This is an unusual matter because of the manner in which events unfolded, culminating in Mr. Brazeau's admission. When Cst. Jury spoke to Mr. Brazeau in the presence of others, she was not the lead investigator. Mr. Brazeau had attended the attachment voluntarily. Cst. Jury had quickly come up to speed on the theft allegations before the unexpected meeting. She candidly admitted on the stand that if the stolen goods had been recovered, charges would likely not have been laid.

[9] As a result, she did not take notes of her interactions with Mr. Brazeau until more than one month later, when she was aware that theft charges were being laid. The notes generally described these interactions with Mr. Brazeau as she recalled them at that time. Cst. Jury was not in a position to recall word for word the exchanges she had with Mr. Brazeau.

[10] Due to these circumstances and the passage of time, there are discrepancies in the evidence of witnesses about a number of items, including, for example, who, in fact,

was present at the time of this meeting in front of the police station. It is also clear that witnesses do not remember the exact wording of the questions to and answers from Mr. Brazeau at the time of the admission.

[11] In order for a statement to a person in authority to be admissible, it must have been made voluntarily and to have been the product of an operating mind. A statement is voluntary if it is made without "fear of prejudice or hope of advantage". (see *R. v. Hodgson* [1998] 2 S.C.R. 449 at para. 15, referring to *Ibrahim v. The King* [1914] A.C. 599 (P.C.))

[12] Courts are to contextually apply the voluntariness rule and to not employ "hard and fast rules." (see *R. v. Oickle* 2000 SCC 38, at para. 47) All relevant factors are to be considered in coming to a decision on voluntariness of a statement.

[13] The ultimate focus is that of voluntariness, the determination of which cannot be made without keeping in mind the nature of the alleged inducement. As stated in *R. v. Spencer* 2007 SCC 11:

> …Furthermore, what occupies "centre stage" is not the *quid pro quo*, but voluntariness - it is the overarching subject of the inquiry, and this should not be lost in the analysis. As discussed above, while a *quid pro quo* may establish the existence of a threat or promise, it is the strength of the alleged inducement that must be considered in the overall contextual inquiry into voluntariness. para. 19 (Emphasis added)

[14] A person in authority normally refers to anyone involved in the detention, arrest, examination or prosecution of the accused. (*R. v. A.B.* (1986), 26 C.C.C. (3d) 17 (Ont. C.A.) at p. 26) Cst. Jury was clearly a person in authority who was involved in the questioning of Mr. Brazeau.

[15] Whether Ms. Gonzago, who made the inducement, should also be considered a person in authority is a more difficult question. There is no specific, confined category of individuals considered to be persons in authority. Making such a determination requires a

> …consideration of the accused's belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime… (*Hodgson*, para. 36)

[16] Mr. Brazeau did not testify on the *voir dire*, so there is no direct evidence as to what he reasonably believed at the time. As such, I am unable to conclude what Mr. Brazeau subjectively believed with respect to Ms. Gonzago's status at the time of Ms. Gonzago's offer.

[17] In any event, based on the fact that Cst. Jury was a person in authority, the Crown bears the burden of proving the statement of Mr. Brazeau was made voluntarily.

[18] The question to be determined then is whether the offer made by Ms. Gongazo in the presence of Cst. Jury, to not proceed with criminal charges if the stolen items were returned, and the subsequent questioning by Cst. Jury to Mr. Brazeau, renders his verbal statement involuntary.

[19] The Crown submits that there is no evidence Cst. Jury was intending to make a promise to Mr. Brazeau prior to Ms. Gonzago's inducement to him, and there is no evidence that he felt compelled to make a statement because of Cst. Jury. The Crown, in referring to *R. v. Van Den Meerssche* (1989), 53 C.C.C. (3d) 449 (B.C.C.A.), submits that as Mr. Brazeau did not testify in the *voir dire*, the Court cannot speculate that he felt compelled to make the statement due to the officer's presence.

[20] However, in the *Van Den Meerssche* decision, the Court did not find in the circumstances of that case that police had made a promise of advantage to the appellant.

[21] In the case at bar, it should be noted that on two occasions Mr. Brazeau refused to answer questions about the theft which Cst. Jury had put to him. It was only after Ms. Gonzago's offer and Cst. Jury's third attempt to obtain an admission, that Mr. Brazeau made his statement.

[22] Unfortunately, although perhaps understandably in the circumstances, Cst. Jury did not advise Mr. Brazeau, that it is not Ms. Gonzago who decides whether charges are laid, it is the police.

[23] An accused in such a situation may well believe that continued questioning by the police after the making of such an offer, reveals that the police are complicit in the offer. Indeed, Cst. Jury's evidence was that she would have been quite content to have the matter resolved by way of the return of the stolen items. She agreed implicitly with the proposal put forward by Ms. Gonzago, and as such did nothing to temper or extinguish the inducement.

[24] Therefore, considering all of the circumstances, I cannot find beyond a reasonable doubt that the statement was voluntary.

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CHISHOLM T.C.J.