Citation: *R.* v. *W.J.A., et al.*, 2010 YKTC 118 Date: 20101217
Docket: 09-00567
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

W.J.A. & P.J.A.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 and 486.5 of the *Criminal Code.*

Appearances:
Robert Beck — Counsel for the Crown
Malcolm Campbell — Counsel for W.J.A.
Gordon Coffin — Counsel for P.J.A

RULING ON VOIR DIRE

[1] P.A. and W.A. have been jointly charged with the offences of sexual assault and unlawful confinement. Each defendant has also separately been charged as a party to the offence of sexual assault committed by the other defendant. W.A. has been further charged with the offences of assault, uttering a threat to cause bodily harm, and robbery.

[2] A voir dire was held during the trial to determine whether a statement made by each of the defendants while in the custody of the RCMP was voluntary. There were no *Charter* issues raised with respect to the statements.

[3] The only evidence on the voir dire was the testimony of Cst. Aubin. I was not provided with copies of the transcripts or any audio/video recording of the statements. When I enquired about this, I was advised that this was by the agreement of all counsel. Therefore the only information I received regarding specifics of what was said during the interviews came through the testimony of Cst. Aubin when portions of the transcripts of the interviews were put to him in cross-examination.

[4] While counsel may have perfectly valid reasons for proceeding in this way, it limited the amount of information available to me in assessing the voluntariness of the statements that were provided.

[5] At the conclusion of the voir dire, I ruled that the statements were voluntary. These are the reasons for my ruling.

Issues

[6] With respect to the statement of P.A., defense counsel argues that his statement was involuntary because he was offered an inducement and was provided with inaccurate and misleading information by Cst. Aubin as to the potential consequences of the charges against him.

[7] With respect to the statement of W.A., defense counsel argues that his statement was involuntary because he was unsure of his legal rights, being barely able to recollect having spoken to a lawyer, given that he was intoxicated at the time he was provided access to counsel.

[8] There were no issues raised and none existed on the evidence I heard with respect to either accused being deprived of necessities such as food, sleep or clothing or any suggestion that either of them did not have an operating mind.

Principles

[9] In order for a statement to be voluntary, it must have been freely and voluntarily made in the sense that it was not obtained by fear of prejudice or hope of advantage held out or exercised by a person in authority. A voluntariness analysis requires a contextual approach that considers a number of factors, including, but not limited to, the presence or absence of threats or promises, oppression, an operating mind and police trickery.

[10] The onus is on the Crown to prove beyond a reasonable doubt that a statement was voluntarily made.

Right to Silence

[11] The law is clear that there is no obligation on a police officer to refrain from questioning an adult detainee after there has been an assertion of the right to silence, or to take a detainee back to his cell when requested to do so. There is also no right of an accused to have counsel present when an interview is being conducted. That said, any interview conducted after the assertion of the right to silence runs the risk of crossing the line and making any subsequent statement involuntary. Each case turns on its own facts and a voluntariness assessment must take into account the circumstances of the interview, the particular characteristics of the detainee, and in particular any aspects of

the detainee's character which make him or her more susceptible or vulnerable to the continuation of the police questioning.

Legal Consequences

[12] Police officers should avoid delving into the potential legal consequences that a detainee faces, whether procedural or substantive. In particular, police officers should not discuss with a detainee what advice his or her legal counsel may have provided, or will perhaps provide in future, or deride the legal advice that has been or could potentially be given. They should also not mislead a detainee as to what opportunities the detainee may have during the legal process to tell their side of the story. Implicit within such misleading commentary is the threat of a negative legal consequence if the detainee does not provide a statement immediately.

Threat or Inducement

[13] An inducement, whether in the form of a threat or promise, involves the *quid pro quo* benefit in exchange for the statement being made. Not all *quid pro quo* held out by a person in authority will render a statement involuntary. Legal inducements, where the police officer taking the statement purports to have authority to offer a benefit, such as lenient treatment in the form of a reduced charge or sentence, are improper. The impact of the threat or inducement on the voluntariness of the subsequent statement requires an overall contextual analysis. (***R.*** v. ***Spencer***, 2007 SCC 11 at paras. 13 – 15; ***R.*** v. ***Oickle*** 2000 SCC 38 at paras. 48, 49).

Police trickery

[14] Only improper police trickery which would shock the community is subject to condemnation by the court.

Analysis

Background

[15] The complaint of a sexual assault was received by Cst. Aubin in Ross River at approximately 7:00 a.m. on October 23, 2009. P.A and W.A. were identified as being the offenders. At approximately 8:01 a.m., W.A was arrested in his residence. He appeared to be intoxicated with slurred speech and a strong odour of liquor on his breath. He was provided his *Charter* rights and police caution immediately afterwards in the police cruiser. At approximately 8:13 a.m., P.A. was arrested at his residence and provided his *Charter* rights and police caution.

[16] Both P.A. and W.A. were transported to the RCMP Detachment. En route to the Detachment, W.A. stated that he "…couldn't get charged with raping his wife". This was all evidence heard at trial prior to entering into the *voir dire*.

Statement of P.A.

[17] P.A. was interviewed by Cst. Aubin at approximately 5:29 p.m. on October 23, 2009. The interview lasted less than half an hour. At the beginning, P.A. stated he had not yet spoken to counsel. He was then taken to a private room where he spoke with legal aid duty counsel. He was brought back into the interview room, and when asked if he was satisfied with his call to duty counsel, he responded "Yes".

[18] During the course of the interview, P.A. told Cst. Aubin several times, perhaps as many as 7 – 12, that he did not want to speak with him. Cst. Aubin told P.A. that he could listen to Cst. Aubin talk.

[19] When P.A. asked Cst. Aubin if it was okay because his lawyer was not there, he was told that it was not his right to have a lawyer present.

[20] P.A. also asked Cst. Aubin to take him back to his cell, and Cst. Aubin replied that he wouldn't. Cst. Aubin testified that he did not do so because this was his opportunity to ask P.A. questions.

[21] Cst. Aubin told P.A. that "things were not looking good for him". Cst. Aubin denied in his testimony that this meant he was telling P.A. that he could make things better for P.A., and that he only meant that the charges were serious.

[22] When P.A. told Cst. Aubin that he would hear his side of the story in Court, Cst. Aubin replied that P.A.'s lawyer would not let him testify. Cst. Aubin told P.A. this was his only opportunity to tell his side of the story. Cst. Aubin testified that he meant that this was P.A.'s only opportunity to tell <u>him</u> P.A.'s side of the story. When questioned further, Cst. Aubin agreed that if P.A. had contacted him at a future date to talk with him, he would have interviewed him again.

[23] Cst. Aubin told P.A. that he had already spoken with W.A. and implied that W.A. had told him things. In fact, the interview with W.A. occurred after the interview with

P.A. Cst. Aubin talked with P.A. about one person usually taking the rap because the other person pins the offense on him. Cst. Aubin agreed when testifying that it could have been implied to P.A. that if P.A. didn't tell him what happened now, he could be the one that took the rap for the whole thing. Cst. Aubin, however, denied intending to imply this.

[24] Cst. Aubin also discussed the issue of consent with P.A. and stated that if the sex was consensual then "we don't need to go any further". Cst. Aubin denied, however, that he meant that P.A. wouldn't be charged, only that they would not have to go any further in the discussion at that point in time.

Conclusion regarding P.A.

Right to Silence

[25] The repeated statements by P.A. that he did not wish to speak to Cst. Aubin, the denial of his query as to whether his counsel should be present, and the refusal to return P.A. to his cell upon request, raise the issue of whether P.A. was subjected to an oppressive atmosphere which violated his right to silence. Nothing in the evidence before me, however, indicates that P.A. was subjected to an oppressive atmosphere which significantly impacted upon his choice to speak or not. P.A. was entitled to say he did not wish to speak and that he wanted to be returned to his cell. Cst. Aubin was also entitled to attempt to obtain a statement despite these repeated requests by P.A. I find that Cst. Aubin acted within the limitations established by law in this regard. This nonetheless remains a factor when considering the entirety of the interview in determining voluntariness.

Legal Consequences

[26] Cst. Aubin went further than he should have in this case when he told P.A. that the police statement was his only opportunity to provide the police a statement and would be his only opportunity to tell his side of the story, including at trial. Even if I accept his testimony that he meant it was P.A.'s only opportunity to tell him (Cst. Aubin) P.A.'s side of the story, this nonetheless disregards what P.A. would or could think Cst. Aubin meant. P.A. cannot be expected to have interpreted the plain words spoken to him to arrive at Cst. Aubin's purported subjective meaning, or to know his legal rights or potential legal consequences.

[27] Further, Cst. Aubin should not have told P.A. what his lawyer would or would not let him do with respect to testifying at trial. This is simply an area which Cst. Aubin, and for that matter, any police officer in questioning a detainee, should not enter into. When it comes to the detainee's involvement with legal counsel, the role of the interviewing police officer is limited to ensuring that the detainee has had a reasonable opportunity to contact counsel and obtain legal advice, if the detainee so desires. That is the extent of it.

[28] Also, I find it somewhat problematic for Cst. Aubin to state in testimony that he only meant that the interview would not go any further at that point in time if P.A. told him the sex was consensual. Common sense indicates, from an objective point of view, that Cst. Aubin was at a minimum implying that P.A. would be free to walk out the door if he told him the sex was consensual. This clearly is an inducement and not an accurate description of the immediate legal consequence (ie. P.A. would not cease to

be detained). Whether this comment actually had the effect of inducing P.A is, of course, not known.

[29] I find that Cst. Aubin's actions in this regard went beyond what is acceptable. This said, I must consider these actions along with all the other evidence in order to determine whether a reasonable doubt has been raised as to the voluntariness of P.A.'s statement.

Inducement

[30] As noted above, there was an inducement offered in this case. Firstly, the implied "threat" of having only one chance to talk could have caused P.A. to feel that he had to provide a statement immediately, or he would never get the opportunity.

[31] Secondly, there was the at least implied promise to end the interview and police investigation if P.A. told Cst. Aubin the sex was consensual.

[32] I have found that these inducements offered by Cst. Aubin were improper. However, I don't know what the actual effect of these inducements was on P.A. Whether the offering of these inducements raises a reasonable doubt that P.A.'s will was overborne such that he provided a statement must be assessed after considering all the other circumstances of the interview.

Trickery

[33] Cst. Aubin engaged in police trickery when he told P.A. that W.A. had already provided a statement, including information which Cst. Aubin implied could result in P.A. taking the fall for the alleged offence. Such trickery, however, is allowable and I am satisfied that Cst. Aubin was acting properly within the limitations prescribed by law in this regard.

[34] In this case, I find that Cst. Aubin's actions did not cross the line and that an oppressive atmosphere was not created. P.A.'s right to silence was not violated.

[35] It is important to keep in mind that, as a general rule, there must be a connection between the impugned police conduct and the decision by a detainee to provide a statement in order for the statement to be ruled involuntary and excluded. Such a connection can be established from an objective viewing of all the circumstances which can include, but does not require, testimony from the accused as to the effect of the police conduct. An exception to this general rule would be an occasion when the police conduct is so egregious that as a matter of principle the statement must be excluded. This is not such a case.

[36] I find, on a consideration of all the circumstances, that I am satisfied that the statement of P.A. was voluntary, despite the improper actions of Cst. Aubin at points within the interview. There is nothing to indicate that P.A., due for example to age, mental health or illness, was particularly susceptible to being misled by Cst. Aubin's

actions. I simply do not, when I view the circumstances objectively, see an actual connection between the impugned actions and the statement being provided.

Statement of W.A.

[37] The interview with W.A. took place at approximately 6:02 p.m on October 23, 2009. According to Cst. Aubin's testimony, he appeared to be sober with no indicia of impairment. Cst. Aubin started by asking W.A. if he was satisfied with his call to his lawyer. Cst. Aubin disputed in cross-examination that W.A. told him at that time that he was not satisfied with his call to legal counsel.

[38] Cst. Aubin told W.A. that he was going to ask him some questions. W.A. responded by saying "no" and that he was going to talk to his lawyer. Cst. Aubin told W.A. that he already had talked to his lawyer. W.A. responded by saying that he thought, or was pretty sure, that he had spoken to counsel. W.A. said he was pretty drunk. W.A. subsequently repeated to Cst. Aubin that he thought he had spoken to counsel but that he was "pretty gassed" at the time.

[39] Cst. Aubin testified that he had been informed by another police officer that W.A. had contacted counsel shortly after he had been arrested and brought to the Detachment. Cst. Aubin testified that W.A. had not been provided a further opportunity to speak with counsel prior to the interview. When asked in cross-examination if he could have provided this opportunity, Cst. Aubin stated that he read "stuff" to W.A. before the interview started. What the content of this "stuff" was is unknown to me.

[40] Cst. Aubin testified that W.A. told him he that he didn't want to tell his side of the story, and that counsel had told him not to say anything.

[41] Cst. Aubin stated in cross-examination that his impression was that W.A. in fact recalled speaking to a lawyer, as evidenced by W.A. remembering that the lawyer told him not to say anything. He further testified that W.A.'s statements that he was going to talk to a lawyer were not requests to be provided access to counsel at that time, only a reference to a future wish to speak with counsel and perhaps tell his counsel his side of the story.

[42] Cst. Aubin denied that he was trying to suggest to W.A. that he would not have a further opportunity to speak with counsel.

[43] When questioned by defense counsel about his reasons for telling W.A. that he had spoken to P.A. already and stating that "you would hate to have a brother pin it on another brother", Cst. Aubin denied that this was a reference by him to P.A. pinning the blame for the alleged offence on W.A.

Conclusion regarding W.A.

[44] The real issue here is whether W.A.'s statement was voluntary given his level of intoxication at the only time he was able to speak with counsel prior to being interviewed, in consideration with W.A.'s subsequent references to wanting to speak to counsel.

[45] There is nothing in the evidence that raises any substantive concern regarding the generally relevant considerations made when assessing the voluntariness of a statement, such as the offering of inducements or existence of an oppressive atmosphere.

[46] While the extent to which a detainee has had meaningful access to legal counsel is a factor that may be considered in assessing voluntariness, on the facts of this case I find that any concerns that may exist simply do not cause me to have any sense that W.A.'s will was overborne such that he involuntarily provided a statement to Cst. Aubin. It appears clear that, intoxicated as he may have been, W.A. recalled speaking to counsel well enough to remember that he had been told not to say anything. There is nothing before me to indicate that, in the circumstances, W.A. was particularly vulnerable or susceptible to Cst. Aubin's questioning in a manner that raises doubts about any statement being voluntary.

[47] I do not have a s. 10(b) *Charter* application or argument before me, so nothing I have stated in this decision is directed towards an assessment as to whether W.A.'s s. 10(b) *Charter* rights were violated.

Conclusion

[48] The statements provided by P.A. and W.A. were voluntary and, as such, are admissible at trial.

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T.C.J.