IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: R. v. L.H., 2005 NSPC 36

Date: 20050825

Docket: 1457671

Registry: Halifax

Between:

Her Majesty the Queen

v.

L.H.

Publication restriction: Sections 110 and 111 of the Youth Criminal Justice Act

Judge: The Honourable Judge Pamela S. Williams

Heard: July 13th and 15th 2005 at Halifax, Nova Scotia

Written Decision: August 25, 2005

Counsel: Gary Holt, for the Crown
Shauna Hoyte and Brendan Lindsay (law student),
for the Young Person

By the Court:

INTRODUCTION AND ISSUES

[1] A voir dire was held to determine the admissibility of a videotaped statement given to police by L.H. on August 8th, 2004 in relation to a charge of dangerous driving causing bodily harm.

[2] The burden is on the Crown to prove beyond a reasonable doubt that the statement was voluntary and that the requirements of s. 146 of the ***Youth Criminal Justice Act*** (hereinafter referred to as the ***YCJA***) were met as they relate to the taking of statements given by young persons to persons in authority.

[3] Should the Crown fail to prove the statement was voluntary, that ends the inquiry and the statement must be ruled inadmissible. Should the Crown prove the statement was given voluntarily the Court must then determine if all s. 146 requirements were met. If they were, the statement is admissible against L.H. If all the requirements were not met then the statement is inadmissible.

[4] For the reasons that follow this Court concludes that the statement was given voluntarily but that the section 146 requirements were not met. The statement of L.H. is therefore inadmissible.

VOLUNTARINESS OF STATEMENT UNDER THE COMMON LAW AS CODIFIED BY S. 146(1) OF THE YCJA

The Law:

[5] The Supreme Court of Canada, in ***R v. Oickle [2000] 2 S.C.R. 3*** stated that the "confessions rule" has twin goals - protecting the rights of the accused without unduly limiting society's need to investigate and solve crime. Justice Iacobucci stressed that a contextual analysis must be undertaken to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness. Relevant factors to consider are:

1. Were there any inducements by way of threats or promises?
2. Were there any oppressive conditions or circumstances?
3. Did the accused have an operating mind?
4. Was there any police trickery?

The first three factors relate specifically to the issue of voluntariness while the fourth factor, though perhaps not affecting voluntariness, relates to maintaining the integrity of the criminal justice system. If the conduct is so shocking and appalling to the community then the confession should be excluded.

Application of the Law to the Facts:

[6] There is nothing in the videotaped statement to suggest that L.H. was induced by either threats or promises to make a statement. Although it is possible that L.H. may have been confused by Cst. Carlisle's response to L.H.'s comment about not wanting to answer all the questions being asked of him, it can not be characterized as an inducement. Cst. Carlisle was simply stating that the questions he was then asking to which he wanted a response were the questions on the statement

form, "Do you understand?" and they pertained to L.H.'s rights. Cst. Carlisle's comment that those questions had nothing to do with the incident itself was not intended as an inducement and there is no evidence that L.H. took it as an inducement to give a statement to the police about the incident.

[7] There was no evidence of oppression. After his arrest and detention L.H. had the opportunity to sleep over the course of the following twelve hours, i.e., for about an hour at the Cole Harbour Detachment of the RCMP in the early morning and thereafter at the Halifax Regional Police station in Dartmouth. At about noon he was given a blanket upon request and was given a meal at 2:45 pm. On the drive over from the Dartmouth station to Halifax police headquarters Cst. Boon asked L.H. if he was hungry or thirsty. L.H. requested a drink and was provided with a pop. Questioning of L. H. by officers Carlisle and Boon, as evidenced on videotape, was neither aggressive nor intimidating. Nor was L.H. subject to prolonged questioning.

[8] As noted by the Defence, a fairly minimal level of awareness is required for the "operating mind doctrine". There was nothing in the evidence of L.H.'s mother to suggest that any learning disability he has would place him below a minimal level of awareness as envisioned by ***Oickle***, supra. The effects of any alcohol consumption by L.H. more than twelve hours earlier would have surely worn off and would not have impaired his general level of awareness.

[9] There was no evidence of police trickery during the interview of the young person by the police.

[10] Given the above, the Court is satisfied beyond a reasonable doubt that the statement given by L.H. is voluntary. The inquiry now moves on to an analysis of whether the statutory requirements set out in s. 146(2) and 146(4) of the ***YCJA*** have been met.

STATUTORY REQUIREMENTS OF S. 146(2) AND 146(4) OF THE *YCJA*

The Law:

[11] The ***YCJA*** contains enhanced procedural protections to ensure that young persons are treated fairly and that they understand their rights. The rationale for this can be understood by reference to comments made by Sopinka J. in ***R. v. I.(L.R.) and T.(E.) [1993] 4 S.C.R. 504*** in relation to s. 56 of the ***Young Offenders Act (YOA)***. At p. 23, Justice Sopinka stated that Parliament recognized that young persons generally have a lesser understanding of their legal rights than do adults and are less likely to assert and exercise fully those rights when confronted with an authority figure - thus the need for procedural protections as set out first in s. 56 of the ***YOA*** and more recently in s. 146 of the ***YCJA***.

[12] In part these procedural protections specify that no oral or written statement given to a police officer is admissible as against a young person unless the statement was voluntary and unless the police officer first clearly explained the young person's rights to the young person in such a way that those rights were clearly understood by the young person: s. 146(2)(b).

[13] Before a statement is given a young person must also be given a reasonable opportunity to consult with counsel and , a parent or adult relative or appropriate adult. A young person can waive those rights but the waiver must be recorded on videotape or be in writing: s. 146(4). This also presupposes that the young person clearly understands what it means to waive his/her rights and what are the ramifications of such a decision.

[14] I agree with the comments of Semenuk J. of the Alberta Provincial Court in the decision of ***R. v. A.J.V. [2004] A.J. No. 811*** when he stated at par. 41 that a clear explanation of rights must be given to the young person and that the principles enunciated in the case law under the ***Young Offenders Act*** are instructive.

[15] I agree also with the principle (as set out by Felstiner J. in ***R. v. C.G. et al. [1986] O.J. No. 1698*** as it related to proceedings under the ***YOA***) that persons in authority must learn something about the educational level of the young person, his/her language and vocabulary skills, faculties of understanding and emotional state in order to determine how best to explain the rights and be sure that the young person understands what is being said.

[16] The court must determine, after hearing evidence on the voir dire, whether the person in authority i.e., the police officer, had a reasonable basis for forming an opinion as to the age and understanding of the young person. The officer will have to say how that opinion was formed and will have to satisfy the court that he/she clearly explained the rights to the young person and that the young person not only could have understood his/her rights and options were but that he/she did in

fact understand those rights/options as a result of careful explanation. In my view, those same principles apply to a voir dire held on the admissibility of a statement made by a young person to a person in authority under the ***YCJA***.

[17] I too agree with the principles as set out in ***R. v. O.K.[2004] B.C.J. No. 1458*** wherein McKinnon Youth Ct. J. stated at par. 96 that s. 146 of the ***YCJA*** requires a police officer, who attempts to obtain a statement from a youth, to ensure that the youth is fully apprised of all the rights under that section before asking the youth if he/she is willing to waive any or all of those rights. Not only must the waiver be clear and unequivocal, but his or her understanding must also be full and complete. Otherwise the waiver is rendered meaningless.

[18] ***R. v. B.S.M. [1995] M.J. No. 85***, a case decided under the ***YOA*** stands for the following:

1. The simple reading of an appropriate waiver to the young person will not generally constitute a clear explanation of the youth's rights or of the consequences of signing a waiver.
2. The mere reading of a waiver form accompanied by the repeated question "do you understand?" would normally fall short of satisfying the statutory requirements.
3. The explanation must be understandable by the young person.
4. It is not sufficient for police officers to wait for the young person to ask questions.

I agree with and adopt those principles.

[19] In ***R. v. C.G.H. [1996] M.J. No. 628*** the statement was ruled inadmissible because the Crown had not satisfied the Court that the young person was able to truly understand the various matters that were briefly canvassed by the police officer. There was no evidence that the young person was tested to make sure he understood what various components of the waiver actually meant.

[20] Most recently Chisvin J. of the Ontario Court of Justice ruled in ***R. v. T.W. [2005] O.J. No. 2785*** that a statement given by a young person in relation to two robbery offences involving firearms was inadmissible because the Crown had not proven that the young person fully understood his rights and the effect of the waiver. At paragraph 36 of his decision Judge Chisvin concluded that for s. 146 to have been complied not only must the written waiver form clearly set out all the factors contained in s. 146 but in going over those requirements it is not sufficient to read them verbatim or skim over them with the youth. He went on to say:

> "Rather, the officer must take the time to ensure that the young person properly understands what his or her rights are. They must be given to the young person in a manner that the young person truly understands and can thus effectively recite back to the officer. If the young person cannot communicate back to the officer what the right is, then the officer should not and cannot be satisfied that the youth truly understands their rights. A conclusionary statement by a youth in response to a formal reading of a line on a form is not sufficient. Merely responding 'yes' to a 'do you understand' does not indicate that a young person clearly understands their rights in a manner that was intended by Parliament."

[21] Earlier a similar result occurred under the ***YOA*** in ***R. v. M.A.M. (1986) 32 C.C.C. (3d) 566 (BCCA).*** Although the police officer had read the young person the form setting out the choices as provided by s. 56(2) of the ***YOA*** the court found that there had been no clear explanation given to the young person. Lambert J. confirmed that, by virtue of the provisions of s. 56 of the ***YOA***, Parliament had paid special attention to the need for young persons to receive "protective advice" and called upon the police to provide it. At page 6 of the decision Lambert J. stated that there should

be a genuine endeavour by a person in authority to describe the function of a lawyer and the benefits a young person could receive by have a lawyer, parent or relative present. That endeavour he said should be designed to lead to an appreciation on the part of the young person of the consequences of the choices he/she makes. Though the young person in that case suffered from a learning disability, he concluded that the mere reading over of the statement waiver and then asking him to sign, without any explanation, would not be in compliance with section 56 of the ***YOA*** even if there was no learning disability.

[22] Officers can not take for granted that a young person fully understands what is being presented to him/her. Nor should officers be excused from those tasks even should they have knowledge of the youth having in the past been subject to the waiver process: ***R. v. H.W. [1996] M.J. No. 546.***

[23] Comments made by the Supreme Court of Canada in ***R. v. J.T.J. [1990] 2 S.C.R. 755 at p.26*** in relation to the procedural protections of s. 56 of the ***YOA*** are equally applicable to s. 146 of the ***YCJA***

> Section 56 itself exists to protect all young people, particularly the shy and the frightened, the nervous and the naive. Yet justice demands that the law be applied uniformly in all cases. The requirements of s. 56 must be complied with whether the authorities are dealing with the nervous and naive or the street smart and worldly wise. The statutory pre-conditions for the admission of a statement made by a young person cannot be bent or relaxed because the authorities are convinced, on the basis of what they believe to be cogent evidence, of the guilt of the suspect.....Principles of fairness require that the section be applied uniformly to all without regard to the characteristics of the particular young person.

[24] There needs to be reliable evidence presented on the voir dire which will allow the court to conclude beyond a reasonable doubt that the young person clearly understood his/her rights and clearly understood the consequences of waiving those rights.

Application of the Law to the Facts:

[25] The videotaped statement given by L.H. is approximately one and one-half hours long. Cst. Carlisle starts the interview although Cst. Boon takes over midway through the process. Cst. Carlisle reviews and completes the 7 page statement/waiver form with L.H. This takes approximately 10 to 11 minutes in total. It is important to review, in detail, not only what is said and done but also the context in which the exchanges occur.

[26] The first 2 minutes of the interview are spent gathering particulars from L.H. such as his name, address and date of birth along with his mother's name and address. There is some eye contact between the officer and L.H. when these questions are being asked and answered.

[27] Cst. Carlisle then tells L.H. what the police are investigating and why L.H. is being held. Cst. Carlisle tells L.H. that the matter could become more serious if the victim were to die. During this time (approximately 2 minutes) Cst. Carlisle makes strong eye contact with L.H., and is very animated with his voice and hand movements. This generates some communication. L.H. asks what that means and how it would work.

[28] Cst. Carlisle next reads the statement form to L.H. and asks whether L.H. understands. L.H. responds 'yes'. During this 4 minute period, Cst. Carlisle reads the form rather quickly and speaks in a monotone. He makes little, if any, eye contact. The only further explanation provided by Cst. Carlisle is with respect to what could happen if the victim dies.

[29] At one point L.H. interrupts Cst. Carlisle and says he is not going to answer all the questions that are being asked of him. Cst. Carlisle tells L.H. that the questions then being asked are only 'do you understand?' and that there is nothing on the form about the incident itself. "It about your rights. That's all this form is." says Cst. Carlisle.

[30] Cst. Carlisle then continues reading the rights and the waiver portion of the form. During this time the officer again is reading quickly. He has L.H. initial the appropriate spots confirming that he waives his rights and then gets L.H. to sign the form. This takes a further 3 minutes. During no

time does Cst. Carlisle ask L.H. to read the form back to him, or to explain it's contents in his own words, verbally or in writing.

[31] Cst. Boon does not revisit the s. 146 requirements at all.

[32] Cst. Carlisle testified that he had dealt with L.H. 'since he was 13 years old' and that 'he [L.H.] knows the procedure'. However the officer was unaware of whether L.H. could read or write. He did not know the young person's grade level in school or whether L.H. had focus or concentration problems. The officer stated that there was no doubt in his mind that L.H. understood his rights because he asked if L.H. understood and L.H said yes. The officer did not think that further inquiry or explanation was required because he believed that L.H. understood.

[33] L.H. did not testify on the voir dire. His mother, A.V. did. She stated by the end of Grade 1 her son had been diagnosed with a learning disability in the area of verbal, comprehension and writing skills. She testified that she had told Cst. Cuvelier, an officer she understood to have had some contact with her son earlier in the day, that L.H. has a learning disability and that she wanted to be notified when he was taken to Halifax. She described her son as a child who does not talk a lot and who does not have a wide vocabulary. In her view, L.H. would say he understood his rights even if he did not understand because he was too proud to say otherwise. According to his mother, L.H. likes to portray himself as cool and normal. She bases this on having been present during police interviews in the past when her son would look to her for an explanation of what was being said but would not ask for an explanation himself.

[34] At all times the Court must be mindful of the fact that the burden rests with the Crown to prove beyond a reasonable doubt that L.H. fully understood his rights and options that he ultimately waived before providing a statement to police.

[35] Though Cst. Carlisle may have been satisfied that L.H. fully understood his rights, this Court is not convinced beyond a reasonable doubt that was the case. Other than an affirmative reply to the questions 'do you understand?' there is no other evidence that in fact L.H. fully and clearly

understood his rights. Despite the fact that the questions and waivers on the form appear, to me, to be clearly and simply worded I have no way of knowing whether L.H. indeed understood their meaning and the ramifications of waiving his rights. He was not tested to determine if he truly understood. And L.H.'s comment, midway through the reading of the form, to the effect that he was not going to answer all of the questions being asked of him, leads me to wonder whether he really understood the importance of the questions being asked and the answers he was giving.

[36] The Court was left with the impression (after viewing and reviewing the videotape) that the officer considered the completion of the statement form but a necessary formality and precondition to the taking of a statement from the young person.

[37] This together with the evidence I heard about a learning disability leads me to have grave concerns as to whether or not L.H. fully and clearly understood his rights and options. Police can not discharge the onus placed on them by s. 146 of the ***YCJA*** by quickly reading the statement form (no matter how well it is drafted) and obtaining a 'yes' to the questions 'do you understand?'. To allow such a process would undermine Parliament's intention when it enacted s. 146 of the ***YCJA***.

[38] Better police practices are required in order to ensure that young persons, detained and questioned are clearly and completely aware of their rights and options and that when they waive these rights they know the full consequences of such a choice. At the very least the officer should ask the young person to explain, in his own words, what he understands each right to mean, and to explain the consequences of waiving those rights. The officer should also describe the role of a lawyer and the benefits a young person could receive from having a lawyer, parent or other adult present.

[39] For these reasons I find that the requirements set out in s. 146 have not been met and the statement is ruled inadmissible.