

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. MacIntosh*, 2021 NSPC 46

Date: 20211122
Docket: 8483052
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Registry: Halifax

Between:

Her Majesty the Queen

v.

Cody MacIntosh

Restriction on Publication:

s. 486.4: Ban under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way

DECISION ON VOLUNTARINESS OF STATEMENT

Judge:	The Honourable Judge Elizabeth Buckle,
Heard:	July 7,8, August 30, September 15, 16, 2021, in Halifax, Nova Scotia
Decision	November 22, 2021
Charge:	271, 151, 163.1(2) of the <i>Criminal Code</i>
Counsel:	Alicia Kennedy, for the Crown Peter Planetta, for the Defence

By the Court:

Introduction

[1] Mr. MacIntosh was arrested on November 27, 2020 at approximately 3:00 a.m. Eleven and a half hours later he was questioned by police and gave a statement.

[2] This decision concerns whether the Crown has proven that statement was voluntary, meaning that when Mr. MacIntosh spoke to police it was an exercise of free will by a person who made an informed and meaningful choice to speak.

[3] The focus of the inquiry in this case is on whether Mr. MacIntosh was offered improper inducements and/or subjected to oppressive treatment. The ultimate issue is whether these factors, together or in combination, raise a reasonable doubt about whether his will was overborne.

Law

[4] Under the common law confessions rule, no statement made by an accused to a person in authority is admissible unless the Crown proves beyond a reasonable doubt that it was made voluntarily (see: *R. v. Oickle*, 2000 SCC 38; *R. v. Paterson*, 2017 SCC 15; and, *R. v. Spencer*, 2007 SCC 11, para. 11).

[5] Courts have recognized that the confessions rule is concerned with the reliability of confessions, trial fairness and protecting the accused's right to remain silent (*R. v. Hebert*, [1990] 2 S.C.R. 151, p. 173; *Oickle*, paras. 26 & 69; and, *Paterson*, paras. 14 – 16).

[6] Broadly defined, a voluntary statement involves an exercise of free will by a person who makes an informed and meaningful choice to speak.

[7] The factors traditionally considered are whether there were threats, promises, oppression, inappropriate police trickery and whether the confession was the product of an operating mind. However, in *Oickle*, the Supreme Court of Canada confirmed that the assessment of voluntariness is “contextual” and no “hard and fast rule” can “account for the variety of

circumstances that could vitiate the voluntariness of a confession” (*Oickle*, para. 47). A judge must consider all relevant factors and “strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession’s voluntariness...” (*Oickle*, para. 71).

[8] The ultimate question is whether a specific factor, alone or in combination with other factors, “are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne” (*Oickle*, at paras. 57 - 58).

[9] The specific factors engaged in this case have to be assessed in the broader context which includes Mr. MacIntosh’s particular circumstances.

[10] Based on my observations of him during his interactions with officers on the video and also during his testimony in court, I believe he suffers from mental health issues and has some cognitive limitations. These would not rise to the level of causing me to conclude that his statement was not the product of an ‘operating mind’. The ‘operating mind’ test requires that the accused possess only a limited degree of cognitive ability to understand what he is saying and that he is saying it to a person in authority who could use it against him. It does not require that the accused display analytical ability or be capable of making a good or wise choice or one that is in his or her interest (*Oickle*, paras. 63 - 64; and, *R. v. Whittle*, [1994] 2 SCR 914 para.45)

[11] I am satisfied that Mr. MacIntosh met that test.

[12] However, the court in *Oickle* (para. 63) said that the operating mind requirement is not a discrete inquiry but rather must be considered part of the context for the overall assessment. Cases suggest that diminished cognitive ability can be an important factor in determining whether any inducements or oppressive circumstances caused the person’s will to be overborne. In other words, inducements and/or oppressive circumstances may have an increased impact if the suspect also has a cognitive limitation even if that limitation would not in and of itself rise to the level of involuntariness due to lack of operating mind.

Oppression

[13] Oppressive circumstances and conditions have the ability to produce involuntary confessions. In *Oickle*, para. 58, the court said:

... 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. Alternately, 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.

[14] Then, later, at para. 60,

... Under inhumane conditions, one can hardly be surprised if a suspect confesses purely out of a desire to escape those conditions. Such a confession is not voluntary. ...

[15] The court in *Oickle*, para. 60, provided a non-exhaustive list of factors that might create an “atmosphere of oppression”, including: depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time.

Promises/Inducements

[16] The context as a whole must be considered to determine whether a purported promise raises a doubt on voluntariness. As noted in *Oickle*, a relatively minor inducement may be impermissible if the suspect is also deprived of sleep, heat and clothes for several hours during an interrogation. On the other hand, where the suspect is treated properly, it will take a stronger inducement to raise a doubt on voluntariness (*Oickle*, para.71). It is entirely dependent on the circumstances.

[17] When considering whether an inducement is improper, the “most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, (that is an offer in exchange for the statement), whether it comes in the form of a threat or a promise” (*Oickle*, para.57).

[18] It is important to note, however, that on its own the existence of a *quid pro quo* is not determinative. Rather, it is “the strength of the inducement, having regard to the particular individual and his or her circumstances that is to be considered in the overall contextual analysis into the voluntariness of the accused’s statement” (*Spencer*, para.15).

General

[19] The cases recognize of course that police detention is inherently oppressive and not all inducements are improper. The issue is whether these factors, given Mr. MacIntosh's state of mind and mental capacity, raise a reasonable doubt as to whether his will was overborne.

Application of Law to Facts

[20] On this application, I heard from the officers who arrested and transported Mr. MacIntosh, the officers who maintained custody of him once he was at the police station, the detectives who were responsible for interviewing him, and from Mr. MacIntosh. I also had the benefit of an audio-video recording showing Mr. MacIntosh and his interactions with police during the 11.5 hours he spent in an interview cubicle at the Halifax Regional Police (HRP) station (Ex. 1).

[21] Mr. MacIntosh was arrested by Cst. Andrew Beaton, Cst. Jeff MacLean, Cst. Antoine Vairn and Cst. Jared MacGregor at 3:00 a.m. on November 27, 2020. He was transported to the HRP station where he was placed in an interview cubicle at 4:20 a.m.. At that time, he was turned over to the custody of Cst. Andrew Parsons and Cst. Samantha Banfield. They were responsible for him until approximately 6:20 a.m. when his care was transferred to Cst. Renju John-Oorutharoyal and Cst. Hayden Martell. At approximately 2:10 p.m., D/Cst. Jeff Nicholson and D/Cst. Anthony McGrath took over and at 2:40 p.m., D/Cst. McGrath began interviewing him. The interview concluded at 4:00 p.m.

Oppression

[22] The Defence argues that the circumstances of Mr. MacIntosh's detention were oppressive and he was offered improper inducements, which together raise a reasonable doubt as to the voluntariness of the statement he eventually gave. The Defence submits that the treatment that created the oppressive atmosphere can be clearly seen in the video and the officers' various explanations for that treatment do not excuse or explain it. Specifically, the following: the interview cubicle he was held in for over 10 hours prior to being interviewed was not suitable for that purpose; when he was able to sleep by laying on the floor, he was woken regularly for 'safety checks'; he remained in handcuffs for nine hours following his arrest; he was not given any water until 11 hours after his arrest and no food until 11.5 hours

after his arrest; he was not provided with a blanket until two hours after his initial complaint of being cold; he was not provided with prescribed medication until 11 hours after his arrest, 8 hours after telling officers he suffered from anxiety and bi-polar disorder and two hours after requesting his medication. The Defence also argues that I should accept Mr. MacIntosh's testimony that when the detectives took him outside for a cigarette before interviewing him, it was suggested to him that things would go better for him and he would have a better result if he spoke to them. The detectives deny this.

[23] The Crown acknowledged that some aspects of Mr. MacIntosh's treatment were not perfect but submitted that what occurred did not rise to the level of oppressive circumstances. She argued that the standard for oppression is a relatively high one. She pointed out that Mr. MacIntosh was comfortable making requests of police and did not ask for food or water, that the video shows him sleeping so he was not deprived of sleep, that once he specifically requested his medication that request was accommodated, that reasonable explanations have been provided for some aspects of his treatment and that there is no evidence that his conditions would have been superior if he'd been placed in a cell in the booking area.

[24] In her submissions, the Crown said that the standard for oppression is not concerned with things such as whether the "thread count" on the sheets was high enough. I appreciate that she was using a turn of phrase to make a point. However, in my view the issues exposed in this case go way beyond a concern that the blanket he was eventually given did not have a sufficient thread count.

[25] I have concluded that Mr. MacIntosh's treatment while in police custody at the HRP station falls far below the standard we should expect from police and created an atmosphere of oppression.

[26] I will first summarize my reasons for reaching that conclusion and then address the question of whether, in the circumstances, that oppression played a role in Mr. MacIntosh's decision to speak to police.

[27] The four officers who were assigned to maintain custody of Mr. MacIntosh at the police station were all relatively junior. They did, however, have access to a supervising sergeant and to the detective in charge of the investigation. They described their assignment and how they perceived their

role. Cst. Banfield testified that she was asked to keep an eye on Mr. MacIntosh until the day shift took over. She described her job as to watch over Mr. MacIntosh, make sure he was okay, and check on him regularly. She and her partner, Cst. Parsons were generally stationed outside the door of the cubicle which was monitored by video. They could go to an adjacent room to check the monitors or Mr. MacIntosh could get their attention by calling out or knocking on the door.

[28] Cst. John-Oorutharoyal testified that he is also a registered nurse. He said that he and Cst. Martell watched Mr. MacIntosh on a monitor from a room about 10 – 12 feet from the cubicle.

[29] Cst. Martell described his role as to maintain continuity of Mr. MacIntosh, tend to his needs, and make sure no one spoke with him until the detectives came to interview him.

[30] The first area to address is the decision to place Mr. MacIntosh in an interview cubicle rather than in the ‘prisoner care facility’ (otherwise known as cells or booking). The cubicle is perfectly adequate for an interview. However, Mr. MacIntosh was held there for 10.5 hours before his interview began. In my view, many of the issues present in this case (lack of water, lack of food, failure to attend to a medical condition, disrupted sleep, and remaining in handcuffs for a prolonged period) could have been avoided if Mr. MacIntosh had been in a cell in booking where there are bunks and staff who know the policies concerning treatment of prisoners and have experience in prisoner care.

[31] There may be a very good reason why he was not put in a cell to wait for the detectives to be ready to interview him, but none was given in this hearing.

[32] Cst. Beaton testified that he was instructed to take Mr. MacIntosh upstairs for an interview rather than to the booking area but he did not know why. D/Cst. McGrath, who ultimately interviewed Mr. MacIntosh and was apparently in charge of the investigation, said that he didn’t know who gave the direction to put Mr. MacIntosh in the cubicle rather than in cells. Cst. John-Oorutharoyal testified that near the beginning of when he took custody of Mr. MacIntosh, his instructions were to keep him in the interview cubicle because the detectives would be coming to interview him in a couple of

hours. Mr. MacIntosh had already been in the room for about two hours at that point and the interview did not begin for another eight hours.

[33] I will next address the concern about general comfort and disrupted sleep. The interview cubicle has a metal chair and a bare tile or concrete floor. It does not have a bunk. All police witnesses confirmed that in the booking area, there would be bunks or metal beds. There was some dispute about whether the bunks had mattresses on them – one officer didn't know, one said no and one said yes. Mr. MacIntosh testified that in the cell area there would be a bunk with a mattress, a blanket and the light would be dimmer.

[34] The result of being in the cubicle was that for much of the 10 hours Mr. MacIntosh was there waiting to be interviewed, he lay on the concrete floor sleeping or attempting to sleep. Throughout that period, Mr. MacIntosh repeatedly asked for a mattress or to be moved to a place where there was a mattress. It is entirely understandable that a mattress could not be brought to him, but, as I said, I have no evidence about why he could not be taken to a cell.

[35] From the time that Cst. John-Oorutharoyal and Cst. Martell took over at approximately 6:20 a.m., Mr. MacIntosh was woken approximately every 15 – 30 minutes. They both testified that this was to ensure he was okay and both referenced HRP policy. However, it was clear that the four officers who had the care of Mr. MacIntosh that day had an imperfect and inconsistent understanding of what the policy required. Neither Cst. Parsons nor Cst. Banfield woke Mr. MacIntosh at all during the two hours they were monitoring him. Cst. John-Oorutharoyal said his practice was to actually wake prisoners every 15 minutes. Cst. Martell testified that if he could see on the monitor that the person was breathing and moving, he wouldn't need to wake him but otherwise he would. I believe, based on other cases, that Cst. Martell's interpretation of policy is probably most accurate. I understand the policy requires prisoners to be actually woken every 15 minutes only where there is a concern about impairment or injury. Absent such a concern, prisoners need to be checked every 15 minutes to ensure they are breathing and only roused if that can not be otherwise determined. I appreciate that Cst. John-Oorutharoyal felt that he could only be certain by actually waking Mr. MacIntosh. However, a policy, or interpretation of a policy, that requires every prisoner to be woken every 15 minutes could have significant impact

on the voluntariness of statements given the importance of sleep as an independent and contextual factor in the voluntariness assessment.

[36] Mr. MacIntosh first asked for a blanket at 4:54 a.m.. Cst. Banfield told him she didn't have anything for him right now, suggested he wait and in a bit she might be able to get more stuff or move him. He asked if he could be moved now and was told no. At 5:37 a.m., he knocked on the door and told Cst. Banfield he was "freezing" and "very cold". Cst. Banfield did not get Mr. MacIntosh a blanket and could not recall if she looked for one or made any inquiries to try to get one after his requests at 4:54 a.m. or 5:37 a.m.

[37] At approximately 6:19 a.m., Mr. MacIntosh again asked for a blanket or something to warm him up so he could sleep. Cst. Martell testified that after this request, he contacted his supervisor to request approval for a blanket and, at 6:29 a.m., he gave Mr. MacIntosh a blanket. He said once he got approval, it was not difficult to get a blanket – he just had to go downstairs to ask.

[38] It is clear from the video, that Mr. MacIntosh did sleep, but it was on a hard floor, in a cold room lit by bright fluorescent lights and was interrupted every 15 – 30 minutes, so could hardly be described as a deep or restful sleep.

[39] I'll next deal with the fact that Mr. MacIntosh remained in handcuffs for nine hours following his arrest. He was handcuffed when arrested at 3:00 a.m. which was entirely appropriate. Those cuffs remained on until Mr. MacIntosh was turned over to Cst. Banfield and Cst. Parsons at 4:20 a.m. At that point the arresting officer's handcuffs were replaced with those of Cst. Parsons which remained on until approximately 12:00, nine hours after Mr. MacIntosh's arrest.

[40] Concern about self harm or officer safety can certainly explain a prisoner being handcuffed. In cross-examination, Mr. MacIntosh acknowledged a criminal record which included crimes of violence including against law enforcement. However, he was arrested with minimal force, offered no resistance and was transported without incident. The evidence from all police was that he was cooperative throughout their dealings with him. That is corroborated by the video evidence. At the start of the video recording, Mr. MacIntosh had been in custody for approximately one hour and 20 minutes. For the 11.5 hours he is shown on the video, he remained

cooperative and polite, repeatedly saying “please” and “thank you”, only rarely became frustrated, and used no threatening words or gestures.

[41] Cst. Parsons was asked why Mr. MacIntosh had to be handcuffed, given that he was in a monitored, locked room inside a police station. He said he believed it was a matter of officer discretion and it was his standard procedure to leave handcuffs on the prisoner in that situation. He said that HRP policy required prisoners to remain in handcuffs until booking staff say they can be removed. Therefore, his practice was to leave them on when upstairs because there is no booking officer there to tell him to take them off.

[42] Cst. John-Oorutharoyal testified that Mr. MacIntosh was already in cuffs when he took custody of him. He said he did not have any instructions to remove the cuffs and would not normally remove them until he knew Mr. MacIntosh was not a threat to himself or others and was calm. He said the cuffs were in the front so would have been more comfortable and Mr. MacIntosh did not ask to have the cuffs removed. He did eventually remove the cuffs at approximately 12:10 p.m. after being satisfied it was safe. He removed them to allow Mr. MacIntosh to speak with counsel and then did not put them back on. At that point, he knew Mr. MacIntosh had been wearing handcuffs for at least six hours.

[43] Cst. Martell testified that it was HRP policy to leave suspects in handcuffs unless there was a reason to remove them. When asked whether that was policy even if the suspect was in a locked room, he said he didn’t know and agreed it was discretionary. He said it may not have occurred to him at the time that Mr. MacIntosh had been cuffed for that duration of time.

[44] Again, it is clear that if Mr. MacIntosh had been taken to booking, his handcuffs would have been removed. I accept that being cuffed in front would be more comfortable for him. However, being kept in handcuffs for 9 hours is excessive in these circumstances.

[45] I’ll next deal with Mr. MacIntosh’s medical condition. The video-recording shows that at 6:19 a.m., he told the officer that he had bad anxiety and was bi-polar. The officer told him the best thing for that would be sleep. At 9:43 a.m., he told officers he was starting to get stressed out. At 11:38 a.m., he told the officer who checked on him that he wasn’t feeling good. At 12:08 p.m., he told Cst. John-Oorutharoyal and Cst. Martell that he needed his medication. They confirmed where it was and what kind. Mr. MacIntosh

told them he needed it soon. Cst. John-Oorutharoyal went to Mr. MacIntosh's residence to get the medication which included prescriptions for ADHD, depression and bi-polar disorder. He then arranged for EHS to attend to administer them since police officers are not permitted to. At 2:05 p.m., Mr. MacIntosh was given his medication other than one which was not supposed to be taken until night. He told EHS that he had missed his previous night's dose but was informed they could only administer it as prescribed.

[46] Once Mr. MacIntosh specifically told police that he needed his medication, they responded reasonably, albeit not speedily. However, the officers' response to being told by Mr. MacIntosh that he had bad anxiety and bi-polar disorder, a serious illness that is normally treated with medication, is concerning. Rather than ask him whether he took medication for that, they told him that sleep was the best thing.

[47] I'll next address the fact that Mr. MacIntosh was not provided with any water until 11 hours after his arrest and no food until 11.5 hours after his arrest. As the Crown points out, he did not request water or food, appeared more interested in a cigarette than food and he seemed comfortable requesting other things. For example, he asked for a blanket, a mattress and to use the washroom.

[48] None of the four officers who were responsible for Mr. MacIntosh's care from 4:20 a.m. to 2:00 p.m. offered him food or water. Cst. Martell and Cst. John-Oorutharoyal were both aware that he had been in custody since before 6:20 a.m., when they took over and that there were power bars and bottles of water available for prisoners. Cst. Martell said it was his practice to ask prisoners if they wanted a power bar or water but could not recall if he asked Mr. MacIntosh. Cst. John-Oorutharoyal said that Mr. MacIntosh did not ask for food or water and it did not cross his mind.

[49] At 2:05 p.m. Mr. MacIntosh was given a bottle of water to take his pills.

[50] The subject of food was first raised at approximately 12:00 when D/Cst. McGrath met with Mr. MacIntosh to advise him of additional charges. He told Mr. MacIntosh he'd be back in a couple of hours to talk about everything and would bring food. After that, Mr. MacIntosh asked a couple of times when they would be back and at around 1:20 p.m., told the officer he was starving. A little after 2:00 p.m., he asked when he (D/Cst. McGrath)

would be back with the food and was told by Cst. John-Oorutharoyal that plans had changed and he would be going to get it and would be back in 15 – 20 minutes. Cst. John-Oorutharoyal testified that the detectives were going to get food but forgot, so they directed he and/or Cst. Martell to go to McDonalds. Cst. John-Oorutharoyal went to get the food and D/Cst. McGrath provided it to Mr. MacIntosh at 2:30 p.m..

[51] D/Cst. Nicholson testified that he assumed Mr. MacIntosh would have been given a power bar and water as that is standard. D/Cst. McGrath testified that when, at noon, he offered to bring food for Mr. MacIntosh he wasn't aware of whether he had been given anything to eat since his arrest. The delay, he said, in returning with his food was because he was preparing for the interview. He knew Mr. MacIntosh had been in custody for some time but did not ask whether he'd eaten. He initially said that it took time to arrange for the food but then acknowledged that there was a McDonalds about a three minute drive from the station.

[52] Failing to give a prisoner food or water for 11 hours, through two normal meal times, is very concerning. Someone in Mr. MacIntosh's position is completely in the control of the police and they have a duty to attend to him. It is hard to understand that the officers who were charged with Mr. MacIntosh's care did not think to offer him food or water. The detectives who were going to be interviewing him offered it, promised they would bring it and then apparently forgot to get it. At best, this is simply a thoughtless and unacceptable lack of attention for the well being of a person who is entirely in your control. At worst, it is a calculated inducement, designed to cause the prisoner to be more appreciative when the interviewing detective eventually shows up with food.

[53] I accept that Mr. MacIntosh did not ask for food until after noon. He testified that he requested something to eat during transport. Cst. MacLean and Cst. Beaton testified that they could not recall that or any interaction with Mr. MacIntosh during the transport. They transported him in the wagon with a plexi-glass divider between them. I accept that it would have been possible for Mr. MacIntosh to make the request and for the officers not to hear. However, I find that the request was probably not made. Mr. MacIntosh was transported a little after 3:00 a.m.. It would not be typical to be hungry at that hour and I believe that if Mr. MacIntosh had been hungry and requested food

during the transport, he would have persisted or raised that at some point during the recording.

[54] However, my concern about the lack of food and water is not significantly diminished by the fact that he did not tell the officers that he wanted food or water and initially seemed more interested in a cigarette than food. Mr. MacIntosh did not have complete success when he made other requests of police and it is not surprising that someone in Mr. MacIntosh's position who suffers from anxiety and has not taken his medication might need a cigarette. Further, after Mr. MacIntosh was told, around noon, that food would be brought he did make inquiries about when the food would be brought and said he was starving.

[55] The circumstances of the interview itself were not oppressive or otherwise concerning. It took slightly over one hour. There was only one officer in the room. He was not in uniform. He maintained a reasonable distance from Mr. MacIntosh throughout, remained seated, used a calm, quiet voice, and never stood or moved closer to Mr. MacIntosh. I would describe the officer's demeanour as patient and low key and the tone as conversational.

[56] Unfortunately, this is not the first time in recent years when I have seen a similar pattern at HRP – suspects being placed in interview cubicles for long periods of time before the start of an interview with very little attention to their wellbeing. The officers assigned to guard seem to see their duty as ensuring the prisoner is alive and doesn't escape or talk to anyone rather than "prisoner care". I don't know if this pattern is indicative of an issue with training, if the junior officers are simply afraid to do anything without specific direction or if the treatment is purposeful.

[57] Counsel have provided cases dealing with how the law on oppression has been applied in a variety of circumstances (*R. v. Hoilett*, (1999) 136 C.C.C. (3d) 449 (ONCA); *R. v. Fernandes*, 2016 ONCA 772; and, *R. v. Paternak*, 1995 ABCA 356). I have read these and many others. No two cases will be the same. Mr. MacIntosh was not naked as the suspect was in *Hoilett*, he was given access to counsel and his interview was not lengthy or aggressive. However, in other respects his treatment included most of the failures identified by the Supreme Court of Canada in *Oickle* (para. 60) as potentially contributing to an atmosphere of oppression. I have no difficulty in concluding that his treatment created an atmosphere of oppression.

Inducements

[58] The Defence also argued that Mr. MacIntosh was explicitly offered inducements.

[59] On arrest, Mr. MacIntosh was promptly cautioned, advised of his right to counsel, and spoke with counsel upon arriving at the police station. After he was arrested for the new charges, he was again cautioned and allowed to speak to counsel. Mr. MacIntosh testified that on two occasions when he was taken outside by the detectives for a smoke, D/Cst. McGrath told him that things would go better for him if he spoke. He said they made him feel it was in his best interest to give a statement since they might believe him and not proceed with charges. He recalled the officer saying something like “the truth will set you free”. Both D/Cst. McGrath and D/Cst. Nicholson who was present denied that this was said.

[60] I do not accept Mr. MacIntosh’s evidence on this point. His evidence about many aspects of the interview was unreliable. I accept that he believed and decided it was in his best interests to give a statement but not that the officer told him that.

[61] Therefore, I have included that Mr. MacIntosh was not explicitly offered any inducements.

Impact of the Oppressive Atmosphere

[62] My conclusion that Mr. MacIntosh was not treated properly and that his treatment created an oppressive atmosphere is not the end of the inquiry. I have to determine whether his ability to decide whether to give a statement was overborne by the circumstances of his detention

[63] Mr. MacIntosh testified that while in the room he felt overwhelmed. He had not taken his medication the night before or that morning, he had no food, nothing to drink, no mattress and when he did sleep he was woken. He said he couldn’t get a clear headspace.

[64] He testified that when he doesn’t take his medication, the consequences increase slowly, then rapidly - he starts to have depression, forgets things, gets overly frustrated and can’t stop himself.

[65] He testified that when it came time to speak with the interviewer, he wanted to get it all over and done with. He wanted to go to a cell and was prepared to say whatever he needed.

[66] He said his mental state was not good at the time. He suffers from PTSD as a result of an incident he witnessed while in prison.

[67] He testified that he thought that if he told the truth, it would be best for him, that the charges would go away.

[68] I accept much of that testimony. I have absolutely no doubt that Mr. MacIntosh was feeling tired, generally out of sorts, overwhelmed and anxious. It is also clear from the video that as time went on he was getting more anxious, more upset and more frustrated. I accept that this was in part due to the delay in receiving his medication.

[69] However, based on my review of the entire record, I am persuaded that Mr. MacIntosh wanted to tell his story to police essentially from the time of his arrest. He felt he had a defence and that if he could tell his side of what happened he would not be charged. The arresting officers testified that he wanted them to look at his phone from the outset. Cst. MacLean testified that he volunteered information about what had happened. While on video, waiting to be interviewed, he again asked if anyone had looked at his phone. When advised that there would be new charges, he immediately started to tell D/Cst. McGrath his side of things. Finally, during the interview with D/Cst. McGrath, Mr. MacIntosh provided information with very little prompting from the detective.

[70] Mr. MacIntosh testified that he felt obligated to speak to D/Cst. McGrath. However, he acknowledged that was essentially because he thought that if he told the truth, they would look into it and the charges would go away.

Conclusion

[71] The Crown bears the onus of proving the voluntariness of the statement beyond a reasonable doubt and I find that the onus has been met.

[72] This was a very difficult decision. Mr. MacIntosh's treatment was entirely unacceptable and created an atmosphere of oppression and subtle

inducement. I have no doubt that, given his mental health and possible cognitive limitations, the circumstances were entirely capable of causing a situation where an accused would speak solely to get out of the situation. In the absence of evidence that Mr. MacIntosh wanted to tell his side of the story from the beginning, I would have had no difficulty concluding this statement was not voluntary. However, I am satisfied beyond a reasonable doubt that Mr. MacIntosh's decision to talk to police was his own. His will was not overborne by the circumstances of his detention or any inducements, perceived or real, because his will or desire from the beginning was to tell his side of the story.

[73] Even when a statement is found to be voluntary, a court can find that the existence of these factors can call into question the reliability of some or all of the statement such that its weight is reduced (eg. *R. v. Hodgson* [1998] 2 S.C.R. 449, at paras. 19-20). When I consider the impact of Mr. MacIntosh's statement on the trial, the circumstances of his detention, his mental health and cognitive limitations will all form part of my assessment of that statement.

[74] The statement is admissible in the trial.

Elizabeth Buckle, JPC