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CR 02665

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DIANE KAREN ROGERS

Rulings on the admissibility of statements made by the accused to persons in authority.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on May 29, 30 and 31, 1995

Reasons filed: June 8, 1995

Counsel for the Crown: L. Rose

Counsel for the Accused: J. U. Bayly, Q.C.

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REASONS FOR JUDGMENT

INTRODUCTION

1 The accused is charged with fraud and theft of monies belonging to the Government of the Northwest Territories. She is the former administrator of the Territorial Court, an employee of the government's Department of Justice, and it is alleged that she used that position to misappropriate funds submitted to her safekeeping.

2 At the commencement of her trial, Crown counsel sought, in a *voir dire*, rulings as to the admissibility of three items: (1) a statement given by the accused to Corporal Zeniuk of the Royal Canadian Mounted Police on August 18, 1993; (2) a statement given by the accused to Mr. Bob Shahi, an auditor employed by the territorial government, on October 4, 1993; and, (3) a written memorandum, from the accused to the Secretary of the government's Financial Management Board, dated November 1, 1993. All three items can be generally classified as being exculpatory.

So as not to delay the start of the trial before the jury, I delivered my decisions orally and undertook to provide written reasons later. These are those reasons.

FACTS

3 On August 18, 1993, at approximately 8:30 a.m., the accused arrived for work at the Court House in Yellowknife. Inside the building she was accosted by Corporal (then Constable) Zeniuk and one other police officer. The accused and Zeniuk knew each other on a first name basis since the officer had been the court liaison officer in 1991 and 1992. Zeniuk informed the accused that he was investigating allegations of missing money and that she was a suspect. He then advised her of her right to silence and right to counsel, including the availability of legal aid. He told her she was not under arrest but that he wanted her to accompany him to the detachment to give a statement. She agreed to do so.

4 Prior to leaving with the officers, however, the accused noticed her immediate superior, Mr. Martin Harvey, the director of court services, motion to her. She joined him and they went to his office. There, Harvey told the accused that she was suspended for 30 days, with pay, while an investigation was conducted into allegations of money missing from the Territorial Court office. He said that theft was suspected and that she was implicated. He told her he knew nothing else. He gave her a letter formally notifying her of the suspension. The accused left Harvey's office and returned to meet the police officers who had been waiting for her. Outside, they guided her into the back seat of a police cruiser and drove her to the detachment (even though it is within short walking distance of the Court House).

5 While all this came as a surprise to the accused, it had in fact been well coordinated.

6 The police investigation started on or about August 12, 1993, when Zeniuk received information and documents from one of the employees in the Territorial Court office. He then conveyed this information to the territorial government and subsequently had meetings with members of the government's audit bureau on August 13 and 16, 1993. Zeniuk obtained a search warrant for the accused's office. On the evening of August 17, a coordinated search was undertaken by the police and audit bureau. The police officers searched the accused's office while the auditors searched the general Territorial Court office. As of August 18, therefore, according to Zeniuk, the accused was the "prime suspect" in what was suspected theft.

7 On the evening of August 17 as well, Harvey was contacted by the then Deputy Minister in the territorial Department of Justice. He was informed about the investigation; he was told that the police and audit bureau were conducting a search; he was instructed to meet with the accused the next morning and deliver the suspension letter; and, he was informed that the police would be at the Court House the next morning as well to intercept the accused.

8 At this point it is helpful to set out the organizational scheme for the various entities involved in this case. The accused was a manager within the territorial Department of Justice. That department is not responsible for criminal prosecutions (a function still performed in the Northwest Territories by the federal government's

Department of Justice). The territorial government, however, does have some authority over policing in the Territories by virtue of federal-territorial agreements respecting Royal Canadian Mounted Police services. Personnel matters in the territorial government come under the authority of the Financial Management Board, the chairman of which is a cabinet minister. The Secretary of that Board, however, is also the Comptroller-General for the Territories and as such has authority over the audit bureau. The audit bureau, which is established by a policy directive to be the internal auditors for the government, is given authority to access documents and, by virtue of the directive, is entitled to receive assistance from other government staff. It is normal procedure for auditors to work in cooperation with the police in the investigation of alleged criminal acts of a financial nature within the government.

9 Back at the R.C.M.P. detachment on the morning of August 18, the accused was shown into an interview room. Zeniuk showed her a list of lawyers and told her she could use a telephone that was there to contact one if she wished to do so. He then left her alone for 15 minutes. According to the accused, she then telephoned a local lawyer, Mr. Austin Marshall. She told him that she thought she would be charged with fraud and theft (the possible offences mentioned by Zeniuk earlier when he told her about the investigation). Marshall apparently was not available to attend at the detachment but told her that if she did not want to say anything to the police she did not have to and that if she was charged she would likely be released right away (something which may have been superfluous in any event since the accused, beside being a court administrator, was also a Justice of the Peace). The accused testified that she felt she was under arrest at

that point. When asked at the *voir dire* about her training as a Justice of the Peace, the accused said she received no training on the rights of suspects under police questioning.

10 Zeniuk did not know that the accused had spoken to a lawyer and she did not tell him. He turned on a tape recorder and commenced a question and answer session that lasted a little over one hour. At the start he went through the standard cautions once again and had the accused sign a form acknowledging her understanding of them. Zeniuk said it was a continuous interview but the accused said that he placed the recorder on pause on one or two occasions. I prefer the officer's evidence on this point but, as will be seen, the contradiction is not of any consequence. The accused left the detachment after the interview without being charged. Zeniuk had no further contact with the accused. Formal criminal charges were not brought until February of 1994.

11 The accused had no contact with anyone representing her employer until sometime in early October of 1993. Her suspension, originally for 30 days, had been extended. Between August and October the investigation continued. Meetings were held between members of the audit bureau and the police to coordinate efforts and to share information. Mr. Bob Shahi, a senior auditor, prepared a draft preliminary report in September. This was discussed first with members of the Department of Justice, including the Deputy Minister, at a meeting on September 20, and with senior representatives of the territorial labour relations office on September 27. A copy of this draft report was also given to Mr. Harvey. Subsequent to these meetings, which not only reviewed the draft report but also considered the question of the accused's continued employment, Shahi was directed to have a meeting with the accused to give her a chance to respond to the findings. This

was prompted by concerns over procedural fairness should the government decide to fire the accused.

12 A meeting was arranged for October 4, 1993. Prior to this, Shahi had prepared a list of questions to put to the accused at the meeting. Copies of these questions were given ahead of time to Harvey and to Corporal Zeniuk. Harvey contacted the accused and told her about the meeting. She expressed a desire to have him there but, as it turned out, Harvey was out of town on October 4 and so Colin Gordon, the personnel manager for the Department of Justice, went in his place. Gordon took no part in the meeting other than to take notes. The accused was unaware that a preliminary report, expressing opinions as to her culpability, had been prepared and circulated or that the questions to be asked by Shahi had been already reviewed by her immediate supervisor and the police.

13 The meeting of October 4, 1993, was attended by Shahi, Gordon and the accused. It too was tape recorded. There were no cautions given and no representations made by Shahi. After the meeting, Shahi gave the tapes to Zeniuk. As it turned out, the tapes were such poor quality that they were sent for enhancement to the R.C.M.P. laboratories. The police prepared a transcript. The original and enhanced tapes were eventually returned to Shahi. The accused was not told that the tape recording of the meeting would be given to the police.

14 After this meeting Shahi prepared a revised report. On October 8, 1993, the accused received a letter from the Secretary to the Financial Management informing her that the Deputy Minister of Justice had recommended her dismissal but that she could

present information for consideration before a final decision is made. The accused testified that she felt she had to respond in order to save her job. It was then that she retained Mr. Marshall to represent her on "labour/management" issues. The accused said that she had no idea that criminal charges were contemplated. Marshall corresponded with her employers and on October 22 Harvey forwarded to the accused a copy of the interim audit report. Obviously this was done so as to enable the accused to respond to the invitation to make a submission. Harvey also invited the accused to a further meeting scheduled for October 25 but the accused did not attend. On November 1, 1993, Marshall forwarded to the Financial Management Board a six page memorandum signed by the accused. Eventually the accused was dismissed but there was no evidence presented as to when that occurred.

GENERAL PRINCIPLES

15 The traditional rule for the admissibility of statements by an accused was stated by the Supreme Court of Canada in Boudreau v. The King (1949), 94 C.C.C. 1, when the court held that the fundamental question relating to the admissibility of any statement made to a person in authority is whether the statement was made voluntarily. This rule applies to all statements whether inculpatory or exculpatory: R. v. Piché, [1970] 4 C.C.C. 27 (S.C.C.).

16 With the advent of the Charter of Rights and Freedoms, and in particular the recognition that an accused's right to remain silent is a principle of fundamental justice, the question of admissibility turns on the freedom of the accused to choose to speak. For any statement by an accused to persons in authority to be ruled admissible, it must be

the result of a conscious, considered decision, freely made by the accused, knowing that he or she had the choice to speak to the authorities or not to speak. I have to be convinced beyond a reasonable doubt that this is the case. As stated by McLachlin J. in R. v. Hebert (1990), 57 C.C.C. (3d) 1 (S.C.C.), at page 43:

> The essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose - the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to them on the other. This right of choice comprehends the notion that the suspect has been accorded the right to consult counsel and thus to be informed of the alternatives and their consequences, and that the actions of the authorities have not unfairly frustrated his or her decision on the question of whether to make a statement to the authorities.

17 The traditional test has not been abandoned, it has merely been subsumed in the broader constitutional protections afforded an accused person. The common law criteria of voluntariness are now interconnected with the constitutionally mandated criteria set out in the Charter. I believe this is the point made by Sopinka J. when he recently wrote in R. v. Whittle, [1994] 2 S.C.R. 914, at page 931:

> A decision in this case requires a consideration of elements of the confession rule, the right to silence and the right to counsel. While the confession rule and the right to silence originate in the common law, as principles of fundamental justice they have acquired constitutional status under s. 7 of the *Charter*. The right to counsel is a specific right expressly recognized in s. 10(b) of the *Charter*. Although each is a distinct right they are interrelated and operate together to provide not only a standard of reliability with respect to evidence obtained from persons suspected of crime who are detained but fairness in the investigatory process. Although the confession rule in its traditional formulation had as its *raison d'être* the reliability of the confession, a strong undercurrent developed which also supported the rule in part on fairness in the criminal process. See *Hebert, supra, per* McLachlin J., at p. 171. A common element of all three rules is that the suspect has the right to make a choice.

> The preoccupation of the common law and *Charter* cases in preserving for the suspect the right to choose has been in relation to state action. Did the action of police authorities deprive the suspect of making an effective choice by reason of coercion, trickery or misinformation or the lack of information?

18 As a necessary condition to making an effective choice, the choice must be an "informed" one. An informed choice in this context, whether to exercise a right to consult counsel or to speak to the authorities, must be based on sufficient information so that the accused has an appreciation of his or her jeopardy and the consequences of the decision: R. v. Smith, [1991] 1 S.C.R. 714.

THE AUGUST 18, 1993, STATEMENT

19 The issue raised by the accused's statement to the police is whether her right to counsel was violated.

20 As previously noted, when the accused accompanied the police officers to the detachment, she thought she was under arrest and about to be charged even though Zeniuk told her she was not under arrest. She had been cautioned at the Court House. She talked briefly with a lawyer over the telephone at the detachment. After that she was cautioned again and when asked if she wished to contact a lawyer she initially said "no".

21 The recording of the statement was played for me and I was also provided with a transcript. The questioning by Zeniuk started off with some general personal questions

and then he asked about her job description. Then the following exchange took place (as recorded in the transcript prepared by the police):

ZENIUK Could you just uhm explain to me what your job description is here?
ROGERS Uhm is this part of my statement?

ZENIUK Yeah it is.
ROGERS Cause I don't want to make a statement yet.

ZENIUK So your saying simply that you don't want to answer that question?
ROGERS Well I just don't want to make a statement yet until I go and see a lawyer.

ZENIUK Is there anything further that you want to say to me today?
ROGERS No.

ZENIUK Do you wish to voluntarily offer any explanation as to what ahh is taking place?
ROGERS What do you mean.

ZENIUK Well we have an investigation were conducting, it's at the court house and just to give you a little bit more detail essentially the allegations stems around funds that are collected at the till, money is taken everyday and the court house, and the allegation is that ahh, that you've taken some of the money that rightfully belongs to the Government of the Northwest Territories that should have been gone to their Revenue and Trust accounts, however, it's essentially been taken by you instead. That's the basis of the investigation. Do you wish to make any comments about it at this time?
ROGERS No.

ZENIUK Is there any, do you have any questions for me?
ROGERS No.

ZENIUK Is there anything that you wish to say ahh here today or at this time?
ROGERS No, I'm still trying to compose myself like.

ZENIUK Do you want me to give you some more time to compose yourself and we can talk again later this morning?
ROGERS Well I just, I don't want to make a statement until I see a lawyer.

ZENIUK Okay would it suffice then if we were to ahh stop talking for today, you can go and seek advise from a lawyer and we can meet another time?
ROGERS Sure.

ZENIUK And discuss this further then?
ROGERS Yah.

ZENIUK Just so that your not ahh kept in the dark I mean your going to be going to a lawyer and your gonna, uhm the lawyers gonna want to know what's going on. Do you have any questions of me, that I can answer for you so that your not kept in the dark as to what the allegations are?
ROGERS No I think you told me.

ZENIUK Yeah, like I all I just like I want to be fair to you.
ROGERS No, I realize that.

ZENIUK And I appreciate the fact that your under a lot of stress and this isn't a usual situation for you and ah I'm sitting here from my perspective because I have a job to do, this isn't necessarily easy for me either. I think you can respect the fact that I have a job to do. Uhm ultimately we want to get to the bottom of whatever the improprieties might be, whatever inconsistencies there might be, and I'm not going to tell you that you have to give a statement or that you don't have to give a statement but if there's any explanation, at all, that you can offer it could clear up some matters that that were unsure of at this point. An again, you have every right to speak to a lawyer before you speak to me and given your job description I'm sure your fully aware of that.
ROGERS Like I haven't done anything so I mean this is what, I don't know what to tell ya like as far as my job description uhm.

ZENIUK I'll tell you what I was going to do, rather than me just walk in here cold and ask you a bunch of very direct questions, I had hoped to maybe learn a little bit about your background and uhm I mean you in the same process can ask me questions as we go along. I I really don't in spite of the fact that I worked for you for a period of time I really don't know very much about you, and that was the purpose of me asking what you did before you arrived here, how long you've been with the courts office and questions such as that.
ROGERS Okay. I'll answer those, I'll answer those.

22 The questioning then continued at length, moving from "background" points to more substantive questions regarding the allegations against the accused. At no point later on did the accused repeat her desire to speak to a lawyer nor did she ask that the questioning stop. The accused testified that she was not "perceptive" enough to stop the conversation as it progressed to more substantive matters because of her distraught emotional condition at the time.

23 Defence counsel submitted that, when the accused said that she did not want to give a statement until she talked to a lawyer, there was a positive obligation on the part of the officer to cease further questioning and to give her an opportunity to do so. By saying to her that all he wanted to do was ask "background" questions, he in effect did an "end run" on her reservations and undermined her decision to not talk.

24 Crown counsel submitted that there was no violation of the accused's right to counsel because she was not under arrest or detention and, in any event, by continuing the conversation she effectively waived her right to consult counsel. The accused is not unsophisticated as to legal procedures and, if she wanted to exercise her right to consult counsel, she was not diligent in doing so.

25 The point about arrest or detention is significant because the right to retain and instruct counsel, as protected by section 10(b) of the Charter of Rights, is extended to persons "on arrest or detention". But, as I will argue, the right to counsel did not arise for the first time upon enactment of the Charter. It predates it and has long been part of the traditional test of voluntariness. The difference is that the right has now been expanded by a broad interpretation of section 10(b) with various identifiable components.

26 In R. v. Prosper (1995), 92 C.C.C. (3d) 353, Chief Justice Lamer, writing on behalf of a majority of the Supreme Court of Canada, summarized the obligations of the police with respect to the right protected by s. 10(b) of the Charter (at page 375):

> As this court has stated on a number of occasions, s. 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person: see *Bartle, supra,* at pp. 12-3 [*ante,* p. 302]; *R. v. Manninen* (1987), 34 C.C.C. (3d) 385 at pp. 391-2, 41 D.L.R. (4th) 301 at pp. 307-8, [1987] 1 S.C.R. 1233 (S.C.C.); *R. v. Evans* (1991), 63 C.C.C. (3d) 289 at pp. 304-5, [1991] 1 S.C.R. 869, 4 C.R. (4th) 144 (S.C.C.); *Brydges, supra,* at pp. 340-1. Once a detainee has indicated a desire to exercise his or her right to counsel, the state is required to provide him or her with a reasonable opportunity in which to do so. In addition, state agents must refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel. As the majority indicated in *R. v. Ross* (1989), 46 C.C.C. (3d) 129 at p. 136, [1989] 1 S.C.R. 3, 67 C.R. (3d) 209 (S.C.C.) once a detainee asserts his or her right to counsel, the police cannot in any way compel him or her to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right. In other words, the police are obliged to "hold off" from attempting to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel.

27 The obligation on the police to "hold off" has been recently reaffirmed by the Supreme Court of Canada in Burlingham v. The Queen (May 18, 1995) per Iacobucci J. (at page 12): "Section 10(b) requires, barring urgent circumstances, that the police refrain from attempting to elicit incriminatory evidence once a detainee has asserted his or her right to counsel".

28 In my opinion, the obligation to "hold off" on questioning so as to give an accused a reasonable opportunity to consult counsel applies outside of the strict context of section 10(b) of the Charter. One need only look at some pre-Charter cases.

29 Admittedly Canadian courts in the pre-Charter era did not formulate a strict exclusionary rule for violations of an accused's right to counsel. Courts did, however, rely on a residual discretion to exclude a statement and even set aside a conviction when the right to counsel was violated: see, for example, R. v. Ballegeer (1968), 1 D.L.R. (3d) 74

(Man. C.A.). The question of whether the right included an obligation on the police to hold off on questioning was addressed by the Ontario Court of Appeal in the pre-Charter case of R. v. Howard & Trudel (1983), 3 C.C.C. (3d) 399, at page 414:

> On January 25, 1980, Trudel was arrested and taken to the O.P.P. office in London. After being cautioned, he was asked several questions as to his status and residence by Corporal McCurdy. He then stated: "I am not answering any questions until I call my lawyer. I want him here." He called his lawyer in the presence of the police. Three minutes later the interview resumed and continued for 24 minutes, although the police officer had been advised that his lawyer was coming. He questioned Trudel in an authoritarian manner. After 13 questions, to which Trudel did not reply, the questioning continued as follows:
>
> Q. Have you ever been outside of the City of London?
>
> A. Put me back in the lock-up. I am not saying any more.
>
> Q. Did you kill Greg McCart?
>
> A. I would be a fool to answer that.
>
> Q. Look me in the eye and tell me did you kill McCart?
>
> A. No.
>
> After a *voir dire*, the trial judge was satisfied beyond a reasonable doubt that the statement was free and voluntary and admitted it. He stated:
>
> > Clearly there was no fear of prejudice, there was no hope of any advantage held out by the officer. There was no oppression. The questions in themselves were not oppressive, they were not intimidating questions and there was nothing done by the officer that would threaten to destroy the free will of the accused and I am satisfied it is admissible for whatever value it may be. The question of weight is an entirely different matter.
>
> After Trudel made it clear that he wanted his lawyer to be present and had called him, Corporal McCurdy should not have continued his examination which made a mockery of Trudel's right to counsel and his right to remain silent. The probative value of the evidence was slight as compared to its potential prejudice to Trudel. In those circumstances the trial judge would properly have exercised his discretion if he had excluded it. I think in all the circumstances he should have excluded the evidence because of its tenuous probative value and its potential prejudice.

30 Even if the accused in the present case was not detained, I find that, by continuing the questioning, the officer, in the words of the judgment quoted above, "made a mockery" of the accused's right to counsel and right to silence. Therefore it cannot be said that the statement is truly voluntary. There was no emergency situation here, indeed the officer told the accused she was not under arrest, so there was no need to continue the questioning when the accused stated clearly and repeatedly that she did not want to make a statement at that time.

31 I agree with Crown counsel that there was no oppression in the questioning and that the entire context must be examined. The statement was not, in the traditional sense, induced by promises or coerced by threats. But, it was obtained by simply over-riding the accused's wish to consult with counsel by carrying on the conversation on the representation that it was just to get personal "background" information and then by moving on to substantive matters. In many ways it seems to me that the accused had a false sense of security as to Zeniuk's representation because of their past association.

32 Furthermore, if one examines this issue in the broader context of the right to silence, one can only conclude that the accused's wish to not speak should have been respected even if she was not detained. Recent cases suggest that the right to silence exists during police interrogation prior to detention. In Hebert (at page 15), Sopinka J. wrote that the right to silence arises "when the coercive power of the state is brought to bear against the individual — either formally (by arrest or charge) or informally (by detention or accusation) — on the basis that it is at this point that an adversary relationship comes to exist between the state and the individual." In the more recent

case of R. v. S. (R. J.) (1995), 36 C.R. (4th) 1 (S.C.C.), L'Heureux-Dubé J. commented (at pages 112 - 113) that the right to silence is triggered when an "adversarial relationship" arises between the state and the individual, a relationship that can exist even in circumstances where the individual has not yet been charged. Hence I conclude that the accused's right to silence, as well as her right to counsel, were effectively violated by the officer's continued questioning.

33 Having said all this, even if I am mistaken, I am also of the view that there was a violation of the accused's right to counsel under the Charter because, notwithstanding what the officer thought, she was indeed under "detention" at the time she was making the statement.

34 Corporal Zeniuk testified that the accused was free to leave at any time. Yet, when she expressed a wish to come back some other time, he did not stop; he carried on with his questioning.

35 The accused said that she felt she was under arrest and unable to leave. This subjective feeling, of course, is not determinative of the issue but then neither is the officer's view of the situation. As noted in R. v. Therens (1985), 18 C.C.C. (3d) 481 (S.C.C.), at page 505: "Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."

36 The question is whether a person, first a suspect and only later an accused, is "detained" when he or she is first questioned by the police. A very helpful guide on this point is provided by the Ontario Court of Appeal in R. v. Moran (1988), 36 C.C.C. (3d) 225, at pages 258 - 259:

> In determining whether a person, who subsequently becomes an accused, was detained at the time he was interviewed by the police, it is important to bear in mind that a police officer when endeavouring to discover whether or by whom an offence has been committed, is entitled to question any person, whether suspected or not, from whom he thinks useful information can be obtained. Although a police officer is entitled to question any person in order to obtain information with respect to suspected offence, as a general rule, he has no power to compel the person questioned to answer. Moreover, he has no power to detain a person for questioning and if the person questioned declines to answer, the police officer must allow him to proceed on his way unless he arrests him on reasonable and probable grounds: see *R. v. Esposito* (1985), 24 C.C.C. (3d 88 at p. 94, 53 O.R. (2d) 356, 49 C.R. (3d) 193 (Ont. C.A.); leave to appeal to the Supreme Court of Canada refused February 24, 1986, O.R. *loc. cit.*, 65 N.R. 244*n*.
>
> I venture to suggest that in determining whether a person who subsequently is an accused was detained at the time he or she was questioned at a police station by the police, the following factors are relevant. I do not mean to imply, however, that they are an exhaustive list of the relevant factors nor that any one factor or combination of factors or their absence is necessarily determinative in a particular case. These factors are as follows:
>
> 1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather that at his or her home;
>
> 2. whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;
>
> 3. whether the accused left at the conclusion of the interview or whether he or she was arrested;
>
> 4. the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime

or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;

5. whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;

6. the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;

7. the subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she *reasonably* believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.

37 In the present case, the accused was told that she was a suspect in alleged thefts from her employer. Corporal Zeniuk considered her the primary suspect. The accused was not asked for her preference as to where the interview should be conducted but instead was asked to accompany the officers to the detachment. The accused was not told she could come at some time convenient to herself. The officers waited for her at the Court House and then escorted her in a police cruiser to the station. The police were not conducting a general inquiry but had formed certain suspicions by this time and had targetted the accused specifically. Zeniuk acknowledged that even in questioning the accused about her background he was trying to obtain information that he could compare to information already in his possession. A search had already been conducted of the accused's office and documents had been seized. During the course of the questioning, the accused was confronted by specific accusations and asked for explanations, not

general comments. The accused admittedly was not arrested at the end of the interview although, as admitted by Zeniuk, he did make the observation to the accused that in his experience cooperation is usually considered by the courts to be a mitigating factor.

38 I find it also significant that when the accused was intercepted by Zeniuk on her way to her office, and while he was telling her about the allegations, her superior, Mr. Harvey, who knew that the police would be there, interjected and took her to his office where he gave her the letter of suspension. When she left Harvey's office she rejoined the waiting police officers who escorted her to the detachment. She was not allowed to go to her office. Her freedom of movement was thus effectively curtailed albeit with her passive acquiescence. It should not be surprising therefore for her to have thought that she was about to be charged.

39 Considering the totality of these circumstances, I conclude that the accused was "detained" at the time of her questioning. Hence the obligations outlined in Prosper are triggered. By continuing as he did the officer failed in the implementational duty to refrain from further questioning once the accused expressed a desire to consult counsel.

40 All this is not to say that there may not be situations of permissible police persuasion, even after a suspect expresses a desire to remain silent. But here, where Zeniuk was unaware that the accused had in fact contacted counsel, he should have exercised greater caution. And Zeniuk recognized the need for caution since, even though the accused was not under arrest, he gave her the standard police warnings on two occasions, once at the Court House and again at the detachment.

41 Did the accused show a lack of diligence in exercising her right? In my view she was not given an opportunity to do so at the time she requested it. Hence there is no lack of diligence on her part.

42 Did the accused waive her right? She talked with counsel briefly and, at the start of her interview, she said "no" when asked if she wished to contact a lawyer. She understood her rights at that time. But, an accused has a right to change his or her mind as the interview progresses. That is what happened here. Furthermore, it cannot be said that she implicitly waived her right by continuing the conversation. Numerous cases have said that the standard for proof of waiver is high especially in circumstances where the alleged waiver has been implicit. There is no such proof here. In all of the circumstances I do not find waiver in this case.

43 The case here is similar to the situation in R. v. Keyookta, [1993] N.W.T.R. 380 (S.C.). In that case the accused, while being questioned quite properly by the police, indicated that he did not want to answer any more questions. The police continued their questioning. My colleague Justice Richard said (at page 396):

> Although the accused stated clearly that he did not want to answer any further questions, the two police officers continued with their interrogation. In doing so, as state authorities, they were failing to respect his right to remain silent and his freedom to choose whether to answer or not. In doing so they breached his constitutional rights under s. 7, and in a flagrant way given his expressed decision not to answer further questions. He was entitled to change his mind at any point in the interview. He made an informed choice and they ignored it. In these circumstances the criminal justice system would be brought into disrepute if the state authorities are then permitted to use any subsequent answers in that interview as evidence against him at his trial.

44 Needless to say I agree with Richard J. when he says that the use of a statement under these circumstances would bring the criminal justice system into disrepute. I fail to see how any evidence created by the accused, in a situation where a fundamental right has been violated, could ever be admitted although I recognize that the possibility cannot be ruled out. This is not such a case.

45 The fact that the statement appears on its face to be largely exculpatory does not change my opinion. Crown counsel did not indicate whether he would seek to introduce this statement as part of his case in chief or hold it simply for possible cross-examination purposes should the accused testify. Even with an exculpatory statement there is significant possible prejudice to the accused in the latter case since cross-examination on inconsistencies could seriously undermine her credibility as a witness. Consciousness of guilt could be argued if there are proven false statements. In my opinion, noting the comments of Lamer C.J.C. in R. v. Ross, [1989] 1 S.C.R. 3 (at page 16), the fairness of the trial would be affected by the use of any evidence that could not have been obtained but for the participation of the accused, participation resulting from or influenced by a violation of the accused's constitutional rights. This applies even if the statement is not explicitly incriminating.

46 For the foregoing reasons, I ruled that the August 18, 1993, statement to Corporal Zeniuk is inadmissible.

THE OCTOBER 4, 1993, STATEMENT

47 The October 4, 1993, interview with the auditor was also recorded and transcribed. The recording is very poor quality .with numerous, although brief, unintelligible parts. The transcript also displays some defects. The fact that there may defects, and that parts may be unintelligible, is not ordinarily a matter of admissibility, but one of weight: Colpitts v. R. (1966), 1 C.C.C. 146 (S.C.C.).

48 This interview was organized and conducted by the auditor, Mr. Shahi. The accused, when asked to attend the meeting, was still on suspension with pay and therefore still an employee. She had heard nothing about the investigation, by either the police or the audit bureau, since her interview with Corporal Zeniuk on August 18. She testified that she attended the interview because, as a continuing employee, she felt she had an obligation to do so, to try to help clear up any questions, so as not to jeopardize her ongoing employment status. The accused testified that she did not know that Shahi was an internal auditor; she thought he was an outside auditor from the federal Auditor-General's office. She felt that Harvey had given her a "direction" to go to the meeting. Colin Gordon testified that, within the government, an invitation to attend a meeting with an auditor can more fairly be characterized as a "direction" and failure to attend could affect one's employment status.

49 Based on the evidence presented to me, there is no doubt that the audit bureau and the police were working in close cooperation and sharing information. There is nothing wrong with that, indeed it is to be expected. It is standard procedure. But the question is to what extent did the accused realize that when she went to the October 4th

meeting. Could what she said there jeopardize her position, not just with respect to her employment, but with respect to any pending criminal charges?

50 This raises the question of whether the auditor could be considered a "person in authority" at that time and in those circumstances. If he was, then any statement must meet the voluntariness standard, in all its connotations, as noted above. If he was not, then the statement need not go through the voluntariness test and is admissible.

51 The analysis traditionally used to determine if one is a person in authority was described as a subjective one. As stated in R. v. A.B. (1986), 26 C.C.C. (3d) 17 (Ont. C.A.), at page 27:

> The question as to whether the statement was made to a person in authority will be viewed subjectively, that is to say, from the point of view of the accused person who made the statement. The proper test is that given in Kaufman, *Admissibility of Confessions in Criminal Matters*, 3rd ed. (1979), p. 81, to the effect that did the accused truly believe, at the time he made the declaration, that the person he dealt with had some degree of power over him?

52 As a general rule a person in authority was described as someone engaged in the arrest, detention, examination (as in "interrogation"), or prosecution of the accused.

53 This subjective general rule, however, has been replaced by a dual objective/subjective test: R. v. Broyles (1992), 1 W.W.R. 289 (S.C.C.). Objectively, is the person empowered to arrest, detain, examine, or influence the prosecution of the accused? And, subjectively, did the accused perceive the person to have these powers?

54 The auditor was clearly an agent of their mutual employer, the Government of the Northwest Territories. The Honourable René J. Marin, in Admissibility of Statements (8th ed., 1992), at page 22, writes: "English cases leave.no doubt that masters were, at all times, considered persons in authority with respect to their servants, particularly where the offence was one against the person or property under the master's care." He also cites similar examples from Canadian law on employer-employee relationships. But the auditor is not the "master", or employer, merely the agent.

55 Can it also be said that he is a "state agent"? In one sense the employer, being the government, is the "state". But something more is required: an active involvement in the possible prosecution of the accused.

56 Shahi and the police were cooperating in the investigation and sharing information. He participated in the coordinated search of the Territorial Court office on August 17. Senior management in the government instructed him to assist the police in addition to conducting his own audit review. He turned documents over to the police. He received documents from them. He told Zeniuk about the planned meeting of October 4 and he shared with Zeniuk his list of prepared questions. He prepared an initial draft report in September, which he shared with senior government managers, in which he formed conclusions that the accused was implicated in cash discrepancies. He targetted her as a suspect since he had already formed certain opinions. Shahi acknowledged that, at the meeting of October 4, he wanted to interrogate her about his findings to date and to seek admissions from her. After the meeting, he shared the contents of the meeting with the

police. He also went on to prepare a further report in which he recommended to his superiors that further investigation be done by the police.

57 On any reasonable objective view of this evidence, Shahi was a person in authority. He had, and used, the power to investigate, interrogate, and implicate, and he was involved in the prosecution by his active cooperation with the police. There is nothing wrong with this in and of itself. But, the result is that the first part, the objective part, of the Broyles test has been met.

58 Has the second part of the test, the subjective part, been met? The accused clearly perceived that Shahi had the power to investigate the alleged misappropriation and she also perceived him as having a role to play vis-à-vis her employment status since his investigation will either absolve her or implicate her. But she testified that she was not aware of the auditor's extensive involvement with the police and Shahi mentioned nothing about it. If she had known the full extent of the cooperation between the police and auditors then unquestionably the subjective part of the Broyles test would be satisfied. But, even with the limited information she did have about the auditor's role — and I note that in the August 18 conversation at the police detachment Corporal Zeniuk told the accused twice that he was working in conjunction with the audit bureau — she clearly perceived Shahi to have power to investigate the allegations. Harvey told her that an investigation would be carried out. Hence she would have considered Shahi as being in a position to influence the investigation and prosecution. Furthermore, she felt she had a compulsion to speak to him, to be cooperative, so as not to jeopardize her on-going

employment status. For these reasons I am satisfied that, on a subjective basis as well, Shahi was, at that time and in those circumstances, a person in authority.

59 Having decided that the auditor was a person in authority, was the accused's decision to speak a voluntary one — that is to say, was her decision to speak to Shahi a free exercise of an informed choice? In my opinion it was not.

60 Crown counsel argued, correctly, that there was no detention, oppression, or intimidation to Shahi's questioning. But nevertheless the accused was not given sufficient information to make a reasoned decision. She was not told of the extensive cooperative effort of the auditors and the police. She was not told that Shahi had prepared a preliminary report in draft in which he had already formed opinions about her culpability. She was not told that Shahi had already prepared and circulated a set of questions to put to her. She was not told that the results of her conversation would be shared with the police. The result of all this is that she had no appreciation of the potential jeopardy she faced when she decided to speak to Shahi. And I use the term "decided" advisedly because, in the employment context, she really had no choice but to meet with the auditor. As pointed out by defence counsel, the accused's employment problems and the criminal investigation overlap since the reason she was suspended was because of the theft allegations. The sense of compulsion, and the lack of complete information as to the true state of affairs, undermined the accused's ability to make a considered decision to speak or not to speak to the auditor.

61 The accused did not request to have legal counsel present at the meeting. She did not think she needed one. Her evidence on the *voir dire* was that, even though she spoke to Mr. Marshall briefly from the police detachment on August 18, she had not consulted him further (because she had no further contact from the police or her employer) prior to October 4. She retained Marshall to assist her on her employment situation only after receiving the letter of October 8, 1993, from the Secretary to the Financial Management Board advising her that a recommendation had been made that she be dismissed.

62 The accused's superior, Mr. Harvey, did not tell her she may wish to have legal counsel at the meeting when he told her about it. The auditor, Mr. Shahi, did not ask her if she wanted legal counsel present. I am sure that the thought never crossed the minds of either Shahi or any other senior manager in the government. Yet, as Shahi testified, it was after he circulated his preliminary draft audit report in late September that he was given direction by others in the government that he should meet with the accused prior to any decision to terminate her employment because they were concerned about "procedural fairness". One would think that an elementary component of "fairness" in this context would be the right to be represented by counsel. There was no evidence as to what the government's response would have been if she asked to have counsel present. But the point is that she lacked the necessary information so as to make a reasoned decision to speak to Shahi or not, to request the presence of counsel, or whether to go to the meeting at all.

63 Crown counsel submitted that there was no representation of confidentiality by either Harvey or Shahi and therefore the accused could have no expectation of same.

This argument ignores the context in which the meeting was held. The allegations of theft led to both a police investigation and an internal audit review. The police and auditors shared information. Both the accused's employment and her liberty were in jeopardy. The minimum one could expect is that the accused would be told that any information obtained from her by the auditor would be shared with the police. This was not done. Therefore I conclude that the lack of the information necessary to enable the accused to make a reasoned decision, information as to the nature and extent of her jeopardy so that she can appreciate the consequences flowing from her decision, undermined her right to silence and vitiated any sense of true voluntariness.

64 Accordingly I ruled that the October 4, 1993, statement to Mr. Shahi is inadmissible.

THE MEMORANDUM DATED NOVEMBER 1, 1993

65 As noted previously, on October 8, 1993, the accused received a letter from the Secretary to the Financial Management Board. In it the accused was informed that the Deputy Minister of Justice had recommended her dismissal and certain allegations were set out against her, allegations based on the investigation conducted by the audit bureau. The letter concluded:

> In order to ensure that you are treated fairly, I am writing to you to give you the opportunity to present information on your behalf. If you choose to make a submission it should be delivered to my office by 5:00 p.m. on the fifth working day following the date of this letter.
>
> Any information which you choose to provide will be included in a package that will be given to the Chairman of the Financial Management Board. It is the Chairman who has the authority to dismiss public service employees.

66 The accused testified that it was after receipt of this letter that she retained Mr. Marshall to represent her with respect to her employment situation. As a result of a request from Marshall, a copy of the draft interim audit report was forwarded to him by Harvey. Eventually, under cover of a letter dated November 1, 1993, Marshall forwarded to the Board Secretary a six-page memorandum signed by the accused. In it she attempts to provide a comprehensive response to the draft audit report. This memorandum was also eventually turned over to the R.C.M.P. for use in their investigation.

67 Crown counsel submitted that the memorandum is "real" evidence and therefore admissible. He offered no authority to support this submission.

68 Defence counsel submitted that the memorandum is a "statement" made by the accused and subject to a voluntariness test. Furthermore, he submitted that (a) it was made under duress in that it was in response to a threat of dismissal; and, (b) it was made as a result of an inducement in the form of an invitation to make a submission that would be considered by the person empowered to make a decision as to her employment.

69 In my opinion the memorandum is a statement of the accused. It had no independent existence prior to or outside of the investigation. Hence it is not "real" evidence as we have come to know that term.

70 In many ways the same reasoning applies to this statement as to the statement of October 4 to the auditor. There is, however, one significant difference. By November 1 the accused has had the benefit of legal advice. Presumably her counsel reviewed and

advised her on the memorandum since it was sent under his covering letter. More importantly, the accused presumably received advice as to the risks inherent in submitting the memorandum. There was no evidence before me as to what advice she did receive but I expect that her legal advisor would have canvassed with her the possibility of the memorandum being used in any continuing investigation, including the investigation into criminal charges. I note that the accused did not appear at the meeting scheduled for October 25 which Harvey also asked her to attend. Marshall must also have been aware of the police involvement because he received a call, albeit a brief one, from the accused when she was at the police detachment on August 18.

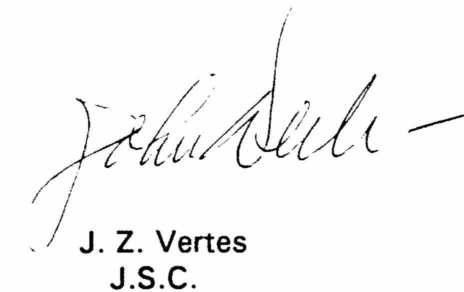
71 With respect to this memorandum, the intervention of counsel, in the absence of evidence to the contrary, raises a presumption that the accused was thoroughly advised as to the consequences of making a statement. In R. v. Silvini (1992), 68 C.C.C. (3d) 251 (Ont. C.A.), it was said (at page 264) that "an accused bears the burden of overcoming a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." That case was one dealing with the question of effective assistance of counsel at trial, but I see no reason why a similar presumption should not apply to the investigation phase of a prosecution. Counsel should be strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. In this case there was no evidence running contrary to the inference that the accused was fully advised by a competent lawyer. This is not a reversal of the burden of proof but merely an evidentiary burden that rests on an accused in these circumstances. I note that the same inference was recently applied by the British Columbia Court of Appeal in R. v. Williams, [1995] B.C.J. No. 741.

72 For these reasons I ruled that the November 1, 1993, memorandum is admissible.

CONCLUSION

73 These are my reasons for the rulings I delivered orally at the conclusion of the *voir dire*: the oral statements of August 18, 1993, to Corporal Zeniuk, and of October 4, 1993, to auditor Bob Shahi, are inadmissible at the trial of the accused; the written memorandum of November 1, 1993, is admissible.

74 An order will issue prohibiting the publication or broadcast of these rulings and the reasons for them prior to the conclusion of the current proceedings in this court against the accused.



J. Z. Vertes
J.S.C.

Heard at Yellowknife, Northwest Territories
on May 29, 30 and 31, 1995

Reasons filed: June 8, 1995

Counsel for the Crown: L. Rose

Counsel for the Accused: J. U. Bayly, Q.C.

CR 02665

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

and

DIANE KAREN ROGERS

Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes