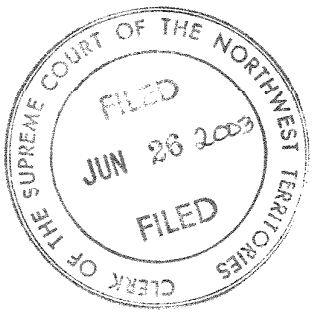
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

PAVEL BRUHA



Transcript of the Ruling on the Voir Dire respecting admissibility of statements by The Honourable Justice J. Z. Vertes, sitting in Hay River, in the Northwest Territories, delivered orally on the 24th day of June, A.D., 2003.

APPEARANCES:

Ms. L. Colton:	Counsel for the Crown/
Mr. A. Bernard:	Counsel for the Crown
Mr. H. Latimer:	Counsel for the Defence/
Mr. S. Shabala:	Counsel for the Defence

THE COURT: The Crown seeks a ruling as to the admissibility of four statements made by the accused while he was in custody after his arrest. Three statements were made to police officers in the form of formal interviews. Commendably, all of these statements were video- and audio-taped and subsequently transcribed. The fourth statement was, in essence, a conversation between the accused and an undercover police officer posing as an inmate placed in the same jail cell as the accused.

Defence counsel filed a motion challenging the admissibility of these statements on Charter grounds, specifically violations of the accused's right to counsel and right to remain silent. The issue, however, is really one of voluntariness. And on that point the Crown bears the burden of proof.

The general rule is that a statement will not be admissible if it was made in circumstances that raise a reasonable doubt as to voluntariness. And, as noted in Oickle, (2000) 147 C.C.C. (3d) 321 (S.C.C.), the application of the rule is by necessity contextual and requires a consideration of all of the circumstances. Some of those circumstances are the existence of threats or promises, an atmosphere of oppression, whether the accused had an operating mind, and the existence of police trickery. The focus of the inquiry is into the question of voluntariness, broadly

conceived as described in cases such as Whittle, [1994] 2 S.C.R. 914, and Hebert, [1990] 2 S.C.R. 151, that is to say, the result of an accused, with an operating mind sufficient to understand what he is doing and saying, and being informed about the right to choose between speaking or not speaking, and not having been unfairly frustrated in that choice by the authorities, deciding to speak nevertheless.

The accused is facing trial on a charge of manslaughter in the death of Yves Label on January 16, 2002, in Hay River. At the time of the statements, however, he was charged with second-degree murder.

The accused was arrested on January 18, 2002, at 10:45 a.m., by RCMP Constables Irani and Dollard. At the time of arrest, Constable Irani read to him, from a card that he carries, the standard statement regarding the right to counsel, the availability of legal aid assistance, and the warning that he does not have to say anything. The accused was asked, at the scene of the arrest, if he understood and he said he did. The accused was then taken to the RCMP detachment where he was lodged in a cell. At approximately 11 a.m., Constable Irani again advised him of his right to counsel. The accused responded that he understood, he wanted to talk to the police, and he did not want to talk to a lawyer.

At 3:20 p.m., on January 18, Corporal Yorke, who

had come from Yellowknife to assist with the investigation, took the accused from his cell and into a private room from which the accused spoke to a local lawyer, Mr. Dave MacDonald, for about 10 minutes by telephone. Approximately 20 minutes later, Corporal Yorke took the accused to an interview room where the first recorded interview took place.

The first interview lasted from 3:47 p.m. to 4:15 p.m. Corporal Yorke asked if the accused had talked to a lawyer; the accused said he had just contacted one; Corporal Yorke then gave a "secondary" warning to the accused as follows:

> If you have spoken to any police officer or any other person in authority with respect to this matter who has offered to you any hope of advantage or suggested any fear of prejudice should you speak or refuse to speak with me at this time, it is my duty to warn you that no such offer or suggestion can be of any effect and must not influence you or make you feel compelled to say anything to me for any reason, but anything you do say may be used in evidence.

The accused stated that he understood.

During this interview the accused said a number of times that his lawyer told him not to say anything but he kept on talking. The officer said to him, at one point, that he would feel better by talking about what happened and getting it off his chest. At another point, the accused became emotional and cried.

The interview stopped, however, by the accused simply getting up and walking out of the interview room.

Later that same day, January 18, Corporal Yorke again took the accused from his cell to the interview room. This recorded interview lasted from 10:08 p.m. until 11:57 p.m. Again the officer read to the accused the "secondary" warning quoted above. The accused, at this time, said that he wanted to tell the police what happened. He spoke eagerly and my impression, from watching parts of the videotape, is that the accused was trying to convince the officer of what he was saying. He said he "has nothing to hide." Again, at times, the officer appealed to the value of telling the truth.

The following day, January 19, the accused was spoken to at 9 a.m. by Constable Irani who asked if he had spoken to a lawyer. The accused confirmed that he had spoken to Mr. MacDonald and that the advice he had received was not to speak with the police. The accused told Constable Irani that if he wanted to speak to his lawyer he would tell the guard.

Various actions were taken on January 19th after this encounter. At 9:30 a.m. the accused was given access to a telephone to contact another lawyer. He said he left a message. At 10 a.m. he was taken to the local court house and appeared before a Justice of the Peace who remanded him in custody to a future date

for an appearance in Territorial Court. Mr. MacDonald was present to assist the accused. The accused met with a legal aid worker at 2:45 p.m. At 5:20 p.m. and again at 5:44 p.m., the accused spoke by telephone with two lawyers in Yellowknife. At around 9 p.m. Corporal Yorke asked the accused if he would do a crime scene re-enactment but the accused refused saying his lawyer told him not to say anything more.

On January 20th, the accused was visited at the detachment by a local church minister and later by his wife. On both occasions he met with his visitor in a private room. Throughout all of this, while the accused was being held in the detachment cells, he was provided with regular meals and refreshment and taken out to a secure outside area if he wanted to smoke a cigarette.

On January 21st, the accused was interviewed by Constable Robertson. This recorded interview started at 11:35 a.m. and lasted until 2:12 p.m. Constable Robertson gave the "secondary" warning to the accused. The accused repeatedly said that he did not want to say anything. However, while it is evident that the accused was agitated, he kept talking and in many instances would hardly let the officer interject. He clearly wanted to express his agitation over what he said are lies told by others. At one point he got up and moved toward the door but the officer blocked his

way. The accused sat down and resumed talking. Throughout the interview the accused, even though saying that his lawyer told him not to say anything, kept talking. He did not at any point in the interview ask to speak to his lawyer.

Subsequently, on January 22nd, the accused was taken to Yellowknife. There he was lodged in the RCMP detachment cells. An undercover police officer was placed in the cell with him. During the course of the day the accused made various statements to the officer. I am satisfied that none of these were elicited through interrogation by the officer (even though the only evidence as to what was said came from the officer). During the submissions on the voir dire, defence counsel conceded that these statements are admissible and I agree.

It should be noted that the defence called no evidence on the voir dire. It is thus somewhat difficult to fully appreciate any argument about oppression or the accused's mental state during the interrogations. Counsel were content that I make my assessment based on the videotapes of those sessions. Since I have no evidence as to the accused's subjective perspective, I must confine myself to an objective assessment of the circumstances.

Also, it should be noted that all of the statements are essentially exculpatory. Further, the

Crown has stated that their intention is not to place any of these statements into evidence as part of their case-in-chief. The Crown simply wishes a ruling so as to have these prior statements available for cross-examination purposes should the accused testify.

The mere fact that a statement is exculpatory or inculpatory, or whether the Crown wishes to use the evidence or simply wishes to have it available should the need arise, make no difference to the application of the governing principles. It does seem to me, however, to be somewhat difficult to argue that the authorities created such an atmosphere of oppression that it broke the accused's will if the accused still does not confess to anything. The object of the exercise is to avoid the possibility of false confessions. Here there is no confession.

In my opinion, and as a general comment, the police treated the accused appropriately throughout the four or five days in question. The mere fact that he was held in the detachment cells is not by itself suggestive of oppression. There was no evidence that he was denied anything he wanted, at any time, nor that he was subject to any psychological pressure, other than the usual psychological pressure that comes from being detained.

The accused is an adult, 52 years old, and appeared from the videotapes to be intelligent,

assertive, and for the most part in control of his emotions. He speaks English with an accent and at times his grammar is deficient. But, he struck me as articulate and able to communicate clearly.

I find no violation of the accused's right to consult counsel. The law is clear that the police have three duties upon the detention of a person. First, the police must inform the detainee of his or her right to retain and instruct counsel without delay and of the availability of legal aid assistance. Second, if the detainee indicates a desire to exercise this right, the police must provide him or her with a reasonable opportunity to do so. Third, the police must refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity. All this was done in this case.

The real question is the extent of the police obligation to withhold further questioning once an accused indicates that his lawyer told him not to say anything.

The law at present does not impose an obligation to cease all questioning after a detainee has consulted counsel. The point was made in Hebert (at page 184):

> ...there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform

> the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.

Generally speaking, while an accused has the right to counsel and the right to remain silent in response to questioning by the state, he or she does not have an absolute right, after consulting counsel, to be free from police questioning. Conversely, the police are not bound to refrain from interviewing an accused nor bound to advise counsel they intend to do so. Simply put, if an accused has been advised that he may remain silent, and he chooses, instead of keeping his mouth shut, to answer questions then that is his right and his responsibility alone.

In my opinion, that was the situation here with respect to the first statement to Corporal Yorke. The accused had consulted counsel. He had been told to say nothing. Yet, during the interview, he answered questions. There is nothing to suggest that he was pressured in any way. The suggestions by Corporal Yorke that the accused would feel better by getting it off his chest fall far short of what the law recognizes as an inducement. An invitation to tell the truth is not an inducement: see S.L.S., (1999)

132 C.C.C. (3d) 146 (Alberta C.A.).

There have been several cases in this jurisdiction where statements have been ruled inadmissible in situations where the police have effectively run rough-shod over the accused's right to silence and continued interrogations in the face of repeated expressions by an accused that he did not want to answer any questions: See Keyookta, [1993] NWTJ No. 105 (S.C.); and Nitsiza, [2000] NWTJ No. 18. In those cases, however, there were circumstances that added to the gravity of the situation. Usually, the accused was a young person, in some cases intellectually and psychologically challenged, and the expressed desire of the accused person was either to not say anything or to not answer any further questions without talking to his lawyer. In those circumstances there is an obligation on the police to hold off further questioning.

A similar situation arose in the Quebec case of Otis, (2000) 151 C.C.C. (3d) 416 (Quebec C. A.), leave to appeal to the Supreme Court of Canada denied. There the accused repeatedly raised his right to remain silent and his right to counsel during interrogation. There was expert evidence called by the defence on the voir dire to the effect that the accused had limited cognition and a low I.Q. The Court ruled his statement inadmissible on the basis

that the repeated questioning, in the face of the accused's unambiguous request to remain silent and to consult his lawyer, provoked an emotional disintegration that effectively deprived the accused of his ability to choose whether to remain silent. The Court held that, although the police may interrogate a suspect and attempt to persuade him to break his silence, they cannot abuse that right by ignoring the will of the suspect and denying his right to make a choice. The analysis of the dynamics existing between the interrogator and the suspect must always be done, however, on a case-by-case basis.

In this case I find no evidence of any emotional disintegration, of any loss of the accused's ability to make a choice, nor of any police conduct that somehow could frustrate or undermine that choice. At no time did the accused ask to talk to his lawyer. At no time did he ask that the interview be stopped until he chose to stop it.

For these reasons I find the first statement to be voluntary and therefore admissible.

The second statement to Corporal Yorke is clearly admissible. It is indeed a statement that the accused wanted to make. Neither the circumstances nor the timing lead me to have any doubt as to its voluntariness.

The third statement, the interview by Constable

Robertson, is more problematic. Defence counsel described it as an oppressive situation. The term "oppression" is really just a way of describing the variety of circumstances which may put the voluntary nature of a statement in doubt. But the question is still the same: Is the accused psychologically capable of actively making a choice with respect to his right to remain silent? My conclusion, based on the evidence, is that he was so capable at all times.

The accused, during the third interview, was certainly far more vociferous than previously. He repeated that he was not going to say anything further. Yet he continued talking. There was no pressure from the officer. Certainly the officer encouraged him to keep talking. But, there was nothing to suggest that the accused was overwhelmed psychologically. Quite the contrary; he seemed more assertive than ever. His expressions as to him not saying anything further are more expressions of anger than invocations of his right to silence. And, I have no doubt that the accused was aware of his rights since by this time he had talked with at least three lawyers.

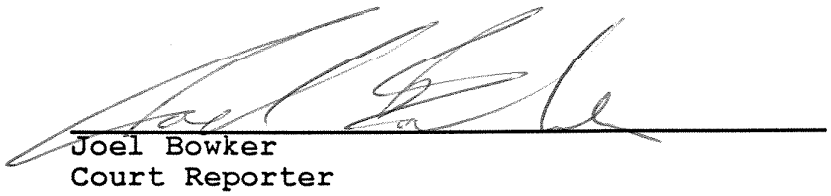
Defence counsel also referred to what he called "reprehensible" conduct by the officer. At various points Constable Robertson referred to the accused's lawyer by asking "Is your lawyer going to go to jail"

as a way of trying to persuade the accused to talk after the accused said his lawyer told him not to talk to the police. Certainly, the police are not permitted to "belittle" a detainee's lawyer or to do anything that has the effect of undermining the detainee's confidence in his lawyer: see Burlingham, [1995] 2 S.C.R. 206. In my opinion, that is not what happened here. Nothing said by the officer, when examined in context, could have that purpose or effect.

I will say one thing regarding this interview. On cross-examination, Constable Robertson was asked if he gave any thought to stopping the interview when, at the beginning, the accused said that he did not want to say anything. The officer answered "no." In my opinion, police officers should proceed cautiously in such situations and ask themselves if what the accused is saying is meant to be a desire to remain silent, a desire to rest on his rights, or if it is merely part of the ongoing dialogue that can be overcome by proper persuasive techniques. I conclude in this case that it is the latter. But it is extremely dangerous for an officer to simply ignore such expressions.

For all of these reasons, I rule all statements to be voluntary and admissible.

Certified to be a true and accurate transcript, pursuant to Rules 723 and 724 of the Supreme Court Rules



Joel Bowker
Court Reporter