

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

KEVIN ST. GERMAINE

RULING ON VOIR DIRE

[1] Mr. St. Germaine is charged with sexual assault, contrary to s. 271 of the *Criminal Code*. His jury trial is set to commence on September 22, 2014. On July 14, 2014, a *voir dire* was held in relation to a statement made by Mr. St. Germaine to Constable Sturko of the Royal Canadian Mounted Police on October 8, 2012. The issue on the *voir dire* is voluntariness. Mr. St. Germaine has not brought any motion for relief under the *Canadian Charter of Rights and Freedoms*.

[2] The only witness on the *voir dire* was Constable Sturko. The videotaped interview she had with Mr. St. Germaine was also viewed.

[3] The defence concedes that Constable Sturko made no threats or promises to Mr. St. Germaine and offered him no inducements. The defence further concedes that there was no atmosphere of oppression and no police trickery involved in the obtaining of the statement. Having reviewed the evidence, I agree that these aspects of the voluntariness rule are not of concern.

[4] Mr. St. Germaine does not take the position that he did not have an operating mind as defined in *R. v. Whittle*, [1994] 2 S.C.R. 914, in which Sopinka J. explained that the operating mind requirement “does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment” (p.936).

[5] Mr. St. Germaine’s argument is that admission of the statement would lead to trial unfairness because he was not told that he would be charged with sexual assault and because the police caution given to him by Constable Sturko was lacking the necessary information.

Background

[6] On October 8, 2012, Constable Sturko began an investigation into an allegation of sexual assault reported by D.L. (“the complainant”). The complainant and a friend had come to the detachment and had spoken to Constable Sturko that evening. Constable Sturko determined that D.L. was alleging that Mr. St. Germaine had sexually assaulted her. The allegation, as described by Constable Sturko, involved a sexual encounter that began with D.L.’s consent, but led to certain sexual acts to which she did not consent or as to which she withdrew her consent. There was also an allegation that a sexual act took place while the complainant was asleep.

[7] After speaking to the complainant and her friend, at approximately 11:00 p.m., Constable Sturko contacted Mr. St. Germaine by telephone. She identified herself and told him that she had just spoken with the complainant about “an incident” that had occurred on the previous Friday. She told Mr. St. Germaine that she wasn’t sure if there was a misunderstanding, but she wanted to get his side of the story. Constable Sturko did not use the words “sexual assault” or tell Mr. St. Germaine that he might be charged.

[8] Constable Sturko gave Mr. St. Germaine the option of speaking to her at his home, at the detachment, or at a later date. He indicated that he did not want her to come to his home, but that he would come to the detachment right away. He expressed no concern about the lateness of the hour and no hesitation about coming to the detachment.

[9] Constable Sturko described Mr. St. Germaine on his arrival as seeming upset, introverted and nervous. He was friendly, but seemed concerned. She got the impression that he understood what was going on. He did not appear to her to be impaired by alcohol or drugs.

[10] Mr. St. Germaine was not placed under arrest. Constable Sturko told him that he could leave any time. The interview room was located in such a way that the door he had entered to get into it led directly to the outside entrance/exit of the detachment.

[11] I will refer to the substance of the interview further on. It lasted approximately 40 minutes. When it ended, Constable Sturko turned off the recording device. She testified that Mr. St. Germaine asked her what is going to happen. She replied that she would talk to her supervisor. She told Mr. St. Germaine that he could leave or he could wait until she was finished. He elected to wait.

[12] Constable Sturko was unable to find the supervisor. From her evidence, it appears that she had questions about sexual assault and intoxication as well as withdrawal of consent. She was not able to find answers to her questions, but ultimately decided that she had grounds to arrest Mr. St. Germaine. She returned to the foyer where Mr. St. Germaine was waiting and told him that he was under arrest and charged with sexual assault. She had him sign a promise to appear in court. She testified that he asked her if he should plead guilty, in response to which she told him he should speak with a lawyer. She also read him his *Charter* right to counsel. He then left the detachment.

Positions of the Parties

[13] The Crown concedes that Mr. St. Germaine was a suspect in the sexual assault investigation at the time of the interview. Crown counsel concedes that as a result, Mr. St. Germaine's right to silence was triggered and he should have been cautioned that what he said could be used in evidence. Crown counsel further concedes that a suspect who is cautioned must be able to understand the caution and the consequences or implications of giving up his right to silence. It is the Crown's submission that Constable Sturko fulfilled her obligations in this regard and there is no basis in the evidence for a finding that Mr. St. Germaine did not understand the caution.

[14] Defence counsel submits that the only issue is whether the informational component of the police caution was complied with. The submission is that it was, or should have been, clear to Constable Sturko that Mr. St. Germaine was going to be charged with sexual assault. Mr. St. Germaine should have been told that he was going to be charged so that he could exercise his right to silence in a meaningful way. He should also have been told that anything he said to Constable Sturko could be used as evidence against him. Without that, he would not understand what he is giving up by giving up his right to silence. The defence says that the caution that was given was not a proper one and that because the Crown has not proven that Mr. St. Germaine was aware of the implications of giving up his right to silence, the Court should have a reasonable doubt as to whether the statement was voluntary.

Analysis

[15] It is well settled that on a *voir dire* where the issue is voluntariness, the Crown must prove beyond a reasonable doubt that any statement made by the accused to a police officer was voluntary: *R. v. Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.).

[16] The notion of voluntariness includes the common law principle that an individual does not have to give information to the police or answer questions. In other words, the common law recognizes the individual's right to remain silent. This component of the voluntariness rule is reflected in the police caution that is usually given to a suspect: *R. v. Singh*, 2007 SCC 48.

[17] The purpose of the caution is to make the person cautioned aware of the full implications of speaking to the police, which is an element of trial fairness. Without that awareness, whether it comes from the police or counsel, any statement obtained may be found not to have been truly voluntary. The presence of a caution is a factor in determining the voluntariness of a statement made by a person under arrest or detention and has been for over half a century: *R. v. Singh*, also referring to *Boudreau v. The King*, [1949] S.C.R. 262. In many cases, it is an important factor.

[18] As Watt J. (as he then was) put it in *R. v. Worrall*, [2002] O.J. No. 2711 (Ont.S.C. Jus.) at paragraph 106, "Voluntariness implies an awareness about what is at stake in speaking to persons in authority, or declining to assist them."

[19] In argument, defence counsel referred to the usual police caution as having been put into effect by what were known as the Judges' Rules in England. He submitted that those Rules required that a caution include the statement that anything the suspect said to the police may be used as, or given in, evidence "against you".

[20] Although the Judges's Rules did at one time include that wording, a direction was in place as early as 1912 that it was desirable that the words "against you" be omitted from the usual caution and that it should simply end with the words "be given in evidence": per A.T. Lawrence J. during counsel's submissions in *R. v. Voisin* (1918), 13 Cr. App. R. 89 (C.C.A.); *R. v. F. (K.P.L.)*, 2010 NSCA 45.

[21] Although not stated in *R. v. Voisin*, it is reasonable to assume that the reason for the omission of the words "against you" is that they might discourage the suspect from making a statement that could help him in his defence.

[22] In Canada the Judges' Rules never were and are not law, however as explained in *Singh*, the police caution has long been a factor to take into account on the issue of voluntariness. And in *Singh*, Charron J., speaking for the majority, referred to the following as a common form of police caution given to a person who has been charged with an offence:

You are charged with Do you wish to say anything in answer to the charge? You are not obliged to say anything but whatever you do say may be given in evidence.

[23] Of the caution just quoted, Charron J. said that it, "in plain language, informs the suspect of his right to remain silent" [at paragraph 31].

[24] It is clear, therefore, that the words "against you" are not required to be part of the standard police caution. That said, I take the argument made by defence counsel to be that in this case Mr. St. Germaine was not told that he would be charged with sexual assault and that anything he said could be used in a prosecution for that offence. To assess that argument, it is necessary to quote at length part of the interview conducted by Constable Sturko, as set out in the transcript:

Cst. El STURKO: and um, I am investigating actually because of her complaint, I'm investigating a sexual assault, you need to know that,

Kevin St. GERMAINE: Hm mm.

Cst. El STURKO: that I'm doing an investigation, okay?

Kevin St. GERMAINE: Okay.

Cst. El STURKO: But you're not under arrest, okay, I'm gathering all the information, like I told you this isn't,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: a trick or anything, the door is unlocked and you are free to go,

Kevin St. GERMAINE: Okay.

Cst. El STURKO: okay, like so, Also you have the right to talk to a lawyer if you want and I can provide you on, right now, you can go talk to legal aid on the phone if you want or the lawyer of your choice if you want. Like I said, you're not under arrest right now and you're not charged right now.

Kevin St. GERMAINE: Um, I don't know how that all works, like will she be charging me or like, is it gonna be just based on,

Cst. El STURKO: Well, right now, I'm, like people don't really lay charges,

Kevin St. GERMAINE: Hm.

Cst. El STURKO: how it works is that, someone comes in with a complaint,

Kevin St. GERMAINE: Hm mm.

Cst. El STURKO: okay, and they talk to me about it. In the criminal code, there um are charges laid out, I don't,

Kevin St. GERMAINE: Okay

Cst. El STURKO: know if you've ever seen the criminal code, we can, I can get one and show you if you wanna see it,

Kevin St. GERMAINE: I don't think I really need to,

Cst. El STURKO: Okay, but I'll explain to you exactly how it works,

Kevin St. GERMAINE: Thank you.

Cst. El STURKO: is that um, the elements of every offence are laid out and the elements of the offence are like, what it really means like if, if a theft, that means that you moved something,

Kevin St. GERMAINE: Hm mm.

Cst. El STURKO: caused it to be moved, took, took it,

Kevin St. GERMAINE: Hm.

Cst. El STURKO: um, damaged it like that's a theft, right,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: so if I'm looking at a sexual assault, it has its own um elements, right like,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: intent, um, you know,

Kevin St. GERMAINE: Hm mm.

Cst. El STURKO: unwanted touching, you know like stuff like that,

Kevin St. GERMAINE: Yeah,

Cst. El STURKO: right so. In order for a charge to be like approved or, or laid,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: the elements of the offence have to be there, right, and,

Kevin St. GERMAINE: Yeah, okay.

Cst. El STURKO: so right now, are you charged or arrested, no,

Kevin St. GERMAINE: Okay.

Cst. El STURKO: because the elements of the offence,

Kevin St. GERMAINE: Okay.

Cst. El STURKO: you know, I haven't established them,

Kevin St. GERMAINE: Okay.

Cst. El STURKO: okay? So,

Kevin St. GERMAINE: Okay,

Cst. El STURKO: you do have rights though even just though you're not under arrest,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: every person is covered by the charter of rights and I wanna make sure that you understand your rights.

Kevin St. GERMAINE: I am pretty sure like I'm not trying to hide anything or,

Cst. El STURKO: No, and I,

Kevin St. GERMAINE: so I'm pretty open,

Cst. El STURKO: don't think you are, neither am I like,

Kevin St. GERMAINE: Yeah, so I think I'm pretty open, I'm just talking to you like,

Cst. El STURKO: Okay, well I want, I'm glad that you wanna talk to me and that's, that's your right,

Kevin St. GERMAINE: Hm.

Cst. El STURKO: to me, it's also your right not to talk to me,

Kevin St. GERMAINE: Yes, fair enough, yeah.

Cst. El STURKO: You know that, right?

Kevin St. GERMAINE: Yeah for sure.

Cst. El STURKO: So, I mean I'm sure you watch like "Law and Order" and police shows and,

Kevin St. GERMAINE: Oh I love it, yeah.

Cst. El STURKO: even though they're not Canadian, they still have,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: the same basic,

Kevin St. GERMAINE: Hm mm.

Cst. El STURKO: thing, right? You have the right not to talk to me,

Kevin St. GERMAINE: Hm.

Cst. El STURKO: You can talk to a lawyer if you want, you're free to leave this conversation at any time,

Kevin St. GERMAINE: Okay.

Cst. El STURKO: um, the other things is too that, this a police warning and I can read it to you if you want, it's just that ah, you have nothing to, police warning is you are detained, which you are not, we're talking in respect to sexual assault, ah, you don't have to say anything, you have nothing to hope from any promises, favor, or any fear from any threat whether

or not you say anything, anything you do say may be used as evidence, so we read to someone when they're arrested. What it means is that you don't have to talk to me, anything that you do say, I could tell a judge,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: it could be evidence,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: it is evidence, um, and I'm not threatening you or promising you anything in return,

Kevin St. GERMAINE: Yeah

Cst. El STURKO: for talking to me.

Kevin St. GERMAINE: Right.

Cst. El STURKO: It's just an opportunity for you,

Kevin St. GERMAINE: Yeah, okay.

Cst. El STURKO: But when I first gone into policing actually, my trainer said, "El, what do you think is the most important thing in an interview?" And I said, "aw, guilty, people are getting them", right and he's like, "no, you're r, you're wrong", and I was like, what, you know,

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: he basically was like, "the most important thing is not finding guilty people, the most important thing when you're doing an investigation and you're doing an interview is to find out what the truth is."

Kevin St. GERMAINE: Hm mm.

Cst. El STURKO: Right?

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: And that's what I'm trying to figure out,

Kevin St. GERMAINE: Fair enough.

Cst. El STURKO: is what happened.

Kevin St. GERMAINE: Yeah.

Cst. El STURKO: So you said that you're open to talking to me
and I'm, wanna listen,

Kevin St. GERMAINE: Hm mm.

Cst. El STURKO: and find out what happened so. What
exactly is going on?

[25] Crown counsel argued that there were a number of “alerts” that made, or should have made, Mr. St. Germaine aware that he was facing a charge of sexual assault. I agree that there were some indications in that regard, both in the circumstances and in the interview itself. These were, for example, the fact that Mr. St. Germaine was contacted by, and was being interviewed by, a police officer, the fact that there was an investigation, and specifically, as Constable Sturko told him, that because of D.L.’s complaint, she was investigating a sexual assault. I also note in that regard that during the interview, Mr. St. Germaine told Constable Sturko that the complainant had referred to him as a rapist on social media.

[26] At the same time, however, I find that Constable Sturko downplayed the seriousness of the situation Mr. Germaine was in. In her initial telephone call with Mr. St. Germaine, she referred to what the complainant had told her as “an incident”. She also referred to the possibility that it was a “misunderstanding”.

[27] At the beginning of the interview, Constable Sturko talked to Mr. St. Germaine about a number of things, for example, their common backgrounds as musicians. She acknowledged that she did this in order to put him at ease and get him to talk to her. On its own, there is nothing wrong with that. However, that tactic generally creates, and I find in this case did create, an atmosphere of a relaxed chat rather than a formal statement. As is evident from the video, Constable Sturko conducted the interview in a relaxed, non-aggressive and friendly manner, seeking to establish a rapport with Mr. St. Germaine.

[28] In her testimony, Constable Sturko was initially reluctant to admit that based on the information she had received from the complainant and the other witness, she had enough evidence to charge Mr. St. Germaine with sexual assault. In cross-examination, she conceded that she did in fact have enough evidence, although she did not think so at the time. I find from her evidence that at the time of the interview, she was looking at the allegations mainly from the perspective of a withdrawal of consent during what had begun as consensual sexual activity. Because she was unfamiliar with or not confident about what effect that fact scenario would have on a charge of sexual assault, she was looking for further information or evidence from Mr. St. Germaine and guidance from her supervising officer before laying a charge. Notwithstanding that, from an objective standpoint, she had, as she conceded in cross-examination, grounds to lay a charge based on what she had been told by the complainant and there cannot realistically have been any question that a charge would be laid no matter what Mr. St. Germaine might say had or had not happened. Such charges are regularly laid, and proceed to trial, even if the only evidence of a sexual assault comes from the complainant.

[29] From the excerpt of the interview quoted above, it is evident that Mr. St. Germaine expressed unfamiliarity with the charging process. After being told by Constable Sturko that he was not under arrest and not charged, he asked whether the complainant would be charging him and stated that he did not know how that works. He appears to have been going on to ask whether being charged would be based on something else (“... will she be charging me or like, is it gonna be just based on ...”). However, before he continued with that question, Constable Sturko told him “Apeople don’t really lay charges”; she told him that instead, someone comes in with a complaint and talks to her.

[30] Instead of explaining that she, Constable Sturko, or her supervisor, would decide whether a charge is laid, the constable went into an explanation of the elements of offences, beginning with the offence of theft. She then went on to the offence of sexual assault, referring to “intent” and “unwanted touching”. She then told Mr. St. Germaine that he was not charged or arrested and that a charge could not be approved or laid because she had not established the elements of the offence. In light of her explanation of the elements of the offence, this can only have left Mr. St. Germaine with the impression that what the complainant had told the constable did not amount to a sexual assault and was not enough evidence to charge him, which was not in fact correct.

[31] Although I accept that at the time in question, Constable Sturko had some concerns about the charge of sexual assault in a consent/withdrawal of consent situation, and that she may have felt unprepared to lay a charge at that time, she did lay a charge very quickly after speaking to Mr. St. Germaine and without getting the guidance she was seeking. In any event, Constable Sturko's view of whether she had grounds to lay a charge is not determinative; the Crown, as I have pointed out, concedes that Mr. St. Germaine was a suspect. However, Constable Sturko gave no explanation as to why she did not come right out and tell Mr. St. Germaine that he might be charged or that she would make a decision as to whether he would be charged.

[32] In my view, what Constable Sturko did say can only have left the impression that she did not have enough evidence to charge Mr. St. Germaine. What is important is that in her comments to him about not having established the elements of the offence, she did not tell him that that did not mean that he would not be charged or that she was in the process of deciding whether he would be charged.

[33] After repeating that Mr. St. Germaine had the right not to talk to her, Constable Sturko then gave him the police warning as set out in the excerpt above. The warning, as given and in the context of what had already been said, is confusing. The words "police warning is you are detained, which you are not" makes it sound as though the warning applies only when an individual is detained and since Mr. St. Germaine was not detained, it did not apply. Similarly, "so we read to someone when they're arrested" leaves the impression that because she had told Mr. St. Germaine that he was not under arrest, it did not apply to him. The words, "we're talking in respect to sexual assault" do not clarify whether Mr. St. Germaine was going to be charged with sexual assault, particularly when Constable Sturko had already told him she had not established the elements of that offence. Nor, in my view, does the phrase "anything you do say, I could tell a judge" make the situation any more clear because it does not specify that she is talking about testifying in a trial in which Mr. St. Germaine is being prosecuted.

[34] Although Constable Sturko went on to tell Mr. St. Germaine that anything he said could be evidence, she detracted from that by also saying, "it's just an opportunity for you". She then told Mr. St. Germaine an anecdote about learning that the most important thing is not finding guilty people, it is finding out what the truth is, and she went on to say that she was trying to figure out what happened.

Again, all of what she said sounds as though she is distinguishing between a situation where a person is arrested or detained, or the police are trying to establish guilt, on the one hand, and simply trying to figure out what happened on the other hand, for example, to see if there has been a misunderstanding, as she said to Mr. St. Germaine on the telephone.

[35] Although Mr. St. Germaine simply replied “yeah” and “okay” to almost everything Constable Sturko said, I am not satisfied that those responses indicate a real awareness on his part of what was at stake in giving up his right to silence, because I am not satisfied that what was said was likely to signal to him that he was virtually certain to be charged with sexual assault and that anything he said could be used as evidence at a trial. Constable Sturko did say things that might have signalled that a charge might result, however in my view they were rendered ambiguous or detracted from by the talk of a possible misunderstanding, of the constable not having established the elements of the offence of sexual assault and of just trying to find out what happened.

[36] This is not a finding that Constable Sturko tried to trick Mr. St. Germaine. However what she told him was, in my view, confusing.

[37] I also find from the evidence that Mr. St. Germaine appears to have been very willing to cooperate with Constable Sturko, no doubt at least in part because of the relaxed and friendly atmosphere she created. However, that reinforces my finding that the interview had the atmosphere of a friendly chat to clear up a possible misunderstanding, rather than an interview in circumstances where it was virtually certain that Mr. St. Germaine would be charged. It is significant, in my view, that the only question Mr. St. Germaine asked about the status of the matter, i.e. whether the complainant would be charging him or something else would happen, was not directly and clearly answered. There is a risk, when a police interview is conducted in too friendly and casual a manner, and important matters like the police caution are not properly explained, that the seriousness of the situation and what is at stake will be significantly downplayed. I find that is what happened here.

[38] Mr. St. Germaine did not testify on the *voir dire* and there is no evidence as to his subjective belief at the time of the interview. However, I find the problems referred to above sufficiently serious that they do cause me to doubt whether he understood what was at stake in speaking to Constable Sturko. I have no doubt that he understood that he did not have to speak to her, but I do have a doubt as to

whether he understood what was at stake and that everything he said could be used in a prosecution against him for sexual assault. In all the circumstances, I have a reasonable doubt as to whether his statement was voluntary and accordingly I rule that what he said to Constable Sturko is not admissible in evidence.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
30th day of July 2014

Counsel for the Crown: A. Piché and M. Feldthusen
Counsel for the Accused: P. Harte

**IN THE SUPREME COURT OF THE
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BETWEEN:

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- and -

KEVIN ST. GERMAINE

RULING ON *VOIR DIRE* OF
THE HONOURABLE JUSTICE V.A. SCHULER
