

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CORY ROSS NITSIZA

RULING ON VOIR DIRE

INTRODUCTION

[1] Cory Ross Nitsiza is charged with having committed a sexual assault on A.N. on August 24, 2016 in Whatì, Northwest Territories, contrary to section 271 of the *Criminal Code*. His jury trial on this charge was held from February 26 to March 1st, 2018 in Yellowknife. On the first day of the trial, a *voir dire* was held in relation to a statement made by Mr. Nitsiza to Constable Jeff MacKay of the Royal Canadian Mounted Police on September 15, 2016.

[2] On February 27, 2018, I ruled that I was satisfied beyond a reasonable doubt that the statement given by Mr. Nitsiza to Cst. MacKay was voluntary. I advised counsel that full reasons would be provided either during the course of the trial or in writing at a later date. The jury was unable to reach a verdict and a mistrial was declared on March 1st, 2018. The matter has been rescheduled for trial on October 15, 2018. These are the written reasons for the decision on the *voir dire*.

[3] The issue on the *voir dire* was voluntariness. Mr. Nitsiza did not bring an application alleging that any of his rights under the *Canadian Charter of Rights and Freedoms* were infringed.

[4] The Crown called Cst. MacKay, the police officer who arrested Mr. Nitsiza as well as took the statement from him. The Defence called the accused to testify on the *voir dire*. The audio-recorded statement of the accused was entered into evidence as well as a transcript of the statement, an Agreed Statement of Facts, a handwritten diagram of the R.C.M.P. station, and the criminal record of Cory Ross Nitsiza.

OVERVIEW

[5] Cst. MacKay was the lead investigator in relation to a complaint of sexual assault allegedly committed by the accused on A.N. Following the taking of statements from A.N. and another witness, he formed the opinion that there were reasonable grounds to arrest the accused for sexual assault.

[6] On September 14, 2016, at approximately 3:35 p.m., Cst. MacKay and Cpl. Forman went to the accused's residence. They knocked on the door but there was no answer. Shortly after, they saw Mr. Nitsiza walking towards the house with his child. Cst. MacKay had a short conversation with Mr. Nitsiza and determined, at that point, that it was not practical to arrest him because the child had to be in the care of Mr. Nitsiza. In the officer's assessment, the child was young, not able to care for herself and not old enough to stay home without proper adult care. Cst. MacKay asked Mr. Nitsiza to come to the detachment as soon as possible.

[7] The next day, on September 15, 2016, when Mr. Nitsiza had not attended the R.C.M.P. detachment, Cst. MacKay and Cpl. Forman went to Cory Nitsiza's residence in Whatì. At approximately 10:58 a.m., Cst. MacKay arrested the accused who was standing on his front porch. Mr. Nitsiza was placed under arrest and escorted to the police vehicle. In the vehicle, Cst. MacKay advised Mr. Nitsiza that he was under arrest for sexual assault and sexual interference and advised of his right to counsel. Mr. Nitsiza indicated that he understood and that he wished to speak to a lawyer. Cst. MacKay then read the accused the police warning which he indicated that he understood. The accused was transported to the R.C.M.P. detachment.

[8] At approximately 11:06 a.m., the accused was placed in a cell. He was given an opportunity to speak to legal counsel at 11:10 a.m. The accused spoke to a lawyer for about three minutes and was then returned to the cell at approximately 11:15 a.m. At around 11:35 a.m. Cst. MacKay removed the accused from cells and took him to his desk in the detachment where he took a statement from him.

[9] Cst. MacKay took an audio-recorded statement from Mr. Nitsiza commencing at 11:35 a.m. that day. The statement was audio-recorded because the officer could not get the camcorder used to take statements to work that day. In setting up the interview, Cst. MacKay could not get the camcorder to record a new interview. He did not know why it would not work and there was no place in the small community of Whatì to have the camcorder checked or repaired. The only other tool available to use was a digital audio recorder.

[10] Cst. MacKay took the statement at his desk in the R.C.M.P. detachment in Whatì. There is no interview room at the detachment. Mr. Nitsiza sat on a chair beside Cst. MacKay's desk and Cst. MacKay sat at his desk during the interview, about three feet away.

[11] Cst. MacKay began the interview by confirming with Mr. Nitsiza what had occurred earlier: that Mr. Nitsiza had been arrested; advised of the reason for arrest; given his *Charter* rights and police caution; he said he understood those rights and wanted to speak to a lawyer; he spoke with a lawyer; and he understood the police caution. Mr. Nitsiza agreed that this is what occurred.

[12] Cst. MacKay proceeded to take a statement from Mr. Nitsiza that was approximately 22 minutes long, ending at 11:57 a.m. During the statement, Mr. Nitsiza sounded calm. He did not sound reluctant and was responsive to the questions being asked by the officer. As the interview progressed, the accused's version changed and evolved as he was confronted with information by Cst. MacKay.

[13] The accused testified on the *voir dire* and testified that he was worried about his daughter who was at school and who would take care of her. He testified that he asked Cst. MacKay if he would be released if he gave a statement and that the officer said that he would see what he could do. Mr. Nitsiza testified that he thought this meant he would be released if he gave a statement and testified that he gave the statement to the police because he thought he would be released from custody.

[14] In cross-examination, the accused was asked about his daughter and previous arrangements for her care when he was unable to care for her. The accused testified that the officer had told him that his mother would be picking up his daughter. He said that he was worried about his daughter but also acknowledged that his mother was able to care for her and had done so on other

occasions. The accused was also asked about using the phone in cells and denied, aside from the call to a lawyer, he had been allowed to use the telephone again. The Crown asked the accused if he had been allowed to use the telephone at 2:00 and at 3:30 and he denied using the telephone.

[15] In re-direct, the accused was asked if he remembered banging his head against the wall at the detachment at around 1:45 p.m. which he said he did. He was then asked if he remembered much after banging his head and he responded “no”. It was then put to the accused that he was not sure about the details after he had been banging his head on the cell wall. The accused responded “no”.

[16] The Crown and Defence subsequently agreed in an Agreed Statement of Facts which was orally entered into evidence that the accused was observed banging his head on the wall at 1:43 p.m. and at 2:00 p.m. and 3:32 p.m., the accused was allowed to use the phone.

[17] Cst. MacKay, in his testimony, didn't remember exactly what he told the accused but said he didn't recall the accused offering to give a statement and telling him that he would work on getting him released. He remembered that the accused was concerned about his daughter but did not remember the exact conversation. Cst. MacKay was asked several times about having a conversation with the accused where he agreed to work on getting the accused released if the accused gave a statement. He testified that he did not recall this occurring and when asked if it was possible that he had said something like that to the accused, Cst. MacKay replied, “I mean, anything's possible. I don't recall saying anything like that”.

POSITION OF THE PARTIES

[18] The Crown's position was that the statement was voluntary and that the evidence of the accused was not credible. He did not remember significant events such as being given the opportunity to make two telephone calls while in custody. The Crown argued that even if the accused thought he was going to be released, that was not based upon anything the officer had said to him. The Crown argued that, in all of the circumstances, the statement was voluntary.

[19] The Defence's position was that the accused gave the statement in exchange for what he believed would be his release from custody and that the evidence of the officer left open the possibility that this was what had occurred. The statement was

given by the accused believing that it would result in his release from custody and therefore, the statement was the result of a *quid pro quo* and was not voluntary.

[20] The Defence also points to an exchange at the beginning of the statement where the Defence claims that the officer did not review Mr. Nitsiza's rights with him and never confirmed that he understood his rights prior to taking the statement. The Defence submits that, in all of the circumstances, the statement was not voluntary.

ANALYSIS

[21] The Crown is required to prove beyond a reasonable doubt that any statement made by an accused person to a police officer or person in authority was voluntarily made: *R. v. Oickle*, [2000] 2 S.C.R. 3. A statement will not be admissible if it is made in circumstances which raise a reasonable doubt about the voluntariness of the statement.

[22] Assessing the voluntariness of a statement is a contextual exercise which is fact specific and involves the consideration of a number of factors including whether the statement is the result of threats or promises by the police officer; whether the statement was taken in oppressive circumstances; whether the accused had an operating mind; or whether the statement was taken as a result of police trickery. *Oickle, supra*.

[23] In considering the voluntariness of the statement, where the accused chooses to testify on the *voir dire*, I have to consider his evidence and even if I reject his testimony, I still must consider the evidence as a whole and decide whether it raises a reasonable doubt about the voluntariness of the statement. The onus is on the Crown to prove the voluntariness of the statement.

[24] In this case, there was no suggestion that Mr. Nitsiza was intoxicated or did not have an operating mind or that the statement was the result of threats or trickery on the part of the police. There was no evidence of oppressive circumstances.

[25] What was suggested was that the statement was the result of an inducement, from a *quid pro quo* agreed to or implied by the police. The Defence argued that the accused was concerned with whether he would be released from custody and

when he gave the statement, he believed that he would be released from custody if he did.

[26] In considering whether a statement has been subject to an improper inducement, the most important consideration is whether there has been a *quid pro quo* offer by the police. The Supreme Court of Canada stated in *Oickle*, at p. 37:

In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. On this point I found the following passage from *R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.), at p. 212, particularly apt:

Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.

[27] In this case, the accused claimed, in his evidence at the *voir dire*, that just prior to the interview, he asked Cst. MacKay if he were to give a statement, whether he would be released from custody. The accused testified that Cst. Mackay said he would see what he could do. The accused stated:

A Yeah. I remember he told me he wanted to make an interview. I said, yeah. So, when we were just about to make an interview, before the recording started, I told the officer, like, you know, I was worried about my kid. And like, you know,

what can I do to get out? Like, you know, can – if I give you a statement, like, you know, can I get out? I want – I want to see my daughter. So, he said, Yeah, I'll see how I can – see what I can do, he said. I'll work on something, he said, so....

Q When the officer said that to you, what were you thinking that meant?

A I was just thinking, oh, I'm going to get out.

Q So, after you made that comment to the officer and he responded, your understanding was if you gave a statement, what would happen to you?

A Going to get released.

Q And is that what you wanted?

A Yeah, because I was worried about my daughter.

[28] For several reasons, I have some difficulty accepting Mr. Nitsiza's evidence as an accurate account of what occurred between Cst. MacKay and himself prior to the statement and what his understanding and motivation were in giving the statement to the officer.

[29] It's understandable that a parent would be concerned about who was going to take care of their child while they were in custody. I have no doubt that one of Mr. Nitsiza's concerns while in police custody was his daughter but I have some difficulty accepting that this was his primary concern when he gave the statement. The accused testified that following the statement, he was upset because he did not know who was going to watch his daughter. He stated:

Q How did you feel about what might happen with your daughter?

A I don't know. I don't know. I remember I was sad, crying. So, I don't – no, I was just thinking, who's going to watch her, so until – because my mom watched her, so...

Q But, at the time, you didn't know what was going to happen with her, right?

A Yeah.

[30] This evidence is inconsistent with the accused's earlier evidence where he testified that when they arrived at the detachment, he had told the police his concerns about his daughter and he had told them to call his mother to pick up his daughter. Prior to giving the statement, he testified that the officer "told me that my mom was going to pick her up after school". So when the accused gave the

statement, he knew that his mother was able to pick up his daughter and it was not accurate when he said that he did not know what was going to happen to her.

[31] The accused also acknowledged, in cross-examination, that he had been in custody before. He testified that the mother of his child was working at a mine site and worked a two weeks in, two weeks out rotation. When he had been in jail before and the child's mother was at work, the accused testified that his mother or his daughter's other grandmother cared for the child during those times. In this situation, the accused must have had some expectation that a family member could care for his daughter while he was in custody.

[32] The accused had just got out of custody some time before being arrested for this matter. He was cross-examined about his criminal record and acknowledged the convictions on his criminal record. Mr. Nitsiza's criminal record shows that he was convicted on December 15, 2015 for several offences and received a sentence of imprisonment of 8 months and 90 days consecutive. It's not clear when he was released but he testified that he had just been released from jail. Having just been released from custody and knowing that the charges he faced were serious, it would not be surprising if the accused was concerned about whether he would be detained. It is apparent from his criminal record that he had been detained before and that he had frequently failed to comply with conditions of release. Despite this, when asked if he really expected to be released, the accused replied that he thought he would be released if he provided a statement.

[33] Another area of concern was the accused's denial of being permitted to use the telephone following the statement. Counsel agreed that Mr. Nitsiza had been permitted to use the telephone on two occasions following the statement. The accused, when asked about these phone calls, was adamant that he was not permitted to make any calls even when the specific times were put to him. In cross-examination, he was asked about this:

Q And I'm not referring to the time when you called the lawyer, but to a time later, you were allowed to use the phone?

A No. I – I only talked to a lawyer, that's pretty much it.

Q You only talked to a lawyer, that's it?

A Yeah, He – the officer was the one who called my mom to pick up my daughter.

Q You don't recall being allowed to use the phone?

A No, they wouldn't allow inmates to – or prisoners to use the phone there, just to call a lawyer. That was pretty much it.

Q I put it to you that you were allowed to use a phone. You were allowed to use a phone at 2:00, and you were allowed to use a phone again at 3:30; do you remember that?

Mr. Bran Your –

A No.

[Objection made by defence and overruled – omitted]

Q So, just to confirm, your evidence is that you were not allowed to use a phone?

A Yes.

[34] One possible explanation for this discrepancy which was raised in re-direct was that the accused had banged his head on the cell wall following the statement. The accused agreed with the suggestion put to him by Defence counsel that he was not sure about the details of what occurred after that including whether he had any phone calls. However, prior to this, in cross-examination, the accused had been quite clear about not making any telephone calls and there was no suggestion that his memory of events had been affected by anything. Whether this discrepancy results from banging his head on the wall, the stress of the situation, his concern about being detained or his concern about his daughter, or a combination of these factors, they may have impacted the accused's memory of what occurred. His evidence about the telephone calls is a significant discrepancy and it causes me some concern that the accused is not entirely accurate in his recollection of events.

[35] In reviewing the statement, there is nothing in it which refers to the accused's motivation in providing the statement and there is no reference to the accused being released or detained in the statement. There is also no discussion about the accused's daughter. These topics are not mentioned. Instead, the statement focuses on the accused's version of what occurred on the night in question with A.N.

[36] The evidence of Cst. MacKay was that he agreed that Mr. Nitsiza was concerned about his daughter but did not recall the specifics of the conversation. He testified in cross-examination on this point:

Q You said earlier, when he asked you about the plan, I said, most likely remand; does that ring a bell –

A Yeah.

Q - from earlier?

A Because, I think, at that point we knew the conditions that Cory was on.

Q So what I'm trying to get at is, that's not what you told Cory though, is it?

A I don't remember what exactly I would have told Cory. I do remember him being concerned about his daughter.

Q What I'm suggesting to you is when he offered to give his statement to you, you told him, I will work on getting you released?

A I don't recall that.

Q But you're not denying that, it's possible you said something like to him?

A I mean, anything's possible. I don't recall saying anything like that.

[37] Defence counsel suggested that the officer's evidence left open the possibility that he had offered release to the accused in exchange for providing a statement. Cst. MacKay acknowledged that he did not recall the specifics of his conversation with the accused but also testified that he did not recall agreeing to work on the accused's release if the accused provided a statement. While the officer's response of "anything's possible" may seem to open the door to this possibility, I don't view this as a realistic possibility. The answer of "anything is possible" is not an overwhelming endorsement of the possibility of the proposition being put to the witness. The officer also followed up on his answer by immediately restating that he did not recall saying anything like that.

[38] The circumstances of the situation also have to be considered. The officer testified that the plan for Mr. Nitsiza, which he had told to the lawyer that Mr. Nitsiza spoke to, was likely remand meaning that the police were likely going to seek to have Mr. Nitsiza detained on the charges. There's no indication that the police were seriously considering the release of the accused. Given the accused's criminal record and the number of breaches on his criminal record and considering the seriousness of the charges Mr. Nitsiza was facing, that was not an unreasonable position for the police to take.

[39] The motive of the accused in providing a statement to the police likely included the hope that if he provided a statement, he would be released from custody. The accused may have felt that providing a statement would result in his release from custody but, considering the evidence, it seems likely that this hope

was self-generated by the accused. It may have occurred to the accused, having expressed his concerns about his daughter to the officer, that if he provided a statement to the officer, that may result in his release from custody. While this may have been the dominant motive in the accused's mind for providing the statement, I cannot conclude that this was something promoted or agreed to by Cst. MacKay.

[40] Defence counsel also referred to the failure of the officer to review Mr. Nitsiza's rights and confirm that he understood them when taking the statement. I do not agree that the officer neglected to do so.

[41] Cst. MacKay testified that he placed Mr. Nitsiza under arrest, that he advised Mr. Nitsiza that he was under arrest for sexual assault and sexual interference and advised him of his right to counsel. Mr. Nitsiza indicated that he understood and that he wished to speak to a lawyer. Cst. MacKay then read the accused the police warning which he indicated that he understood. The accused was given an opportunity to speak to counsel and did so.

[42] Cst. MacKay began the interview by confirming with Mr. Nitsiza what had occurred earlier: that Mr. Nitsiza had been arrested; advised of the reason for arrest; given his *Charter* rights and police caution; he said he understood those rights and wanted to speak to a lawyer; he spoke with a lawyer; and he understood the police caution. Mr. Nitsiza agreed that this is what occurred.

[43] In his evidence, Mr. Nitsiza ultimately agreed that he understood his rights and there is no suggestion that he did not understand that he had a choice to speak to the officer or that what he said could be used in evidence against him.

[44] In the circumstances, I do not think there is any merit to the suggestion that the officer failed to review Mr. Nitsiza's rights or that Mr. Nitsiza did not understand his rights when providing the statement.

[45] In considering the circumstances of the statement provided by Mr. Nitsiza, I am satisfied beyond a reasonable doubt that the statement taken was voluntary and taken in circumstances where there was no *quid pro quo*, there was no promise that Mr. Nitsiza might be released if he gave a statement. For these reasons, I concluded that Mr. Nitsiza's statement was voluntary.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
19th day of April, 2018

Counsel for the Crown:
Counsel for the Accused:

Maren Zimmer
Jay Bran

S-1-CR-2017-000031

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