

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

HASSEN ABDUL KERIM MOHAMED

RULING ON VOIR DIRE

[1] Hassen Abdul Kerim Mohamed faces four charges: possession of property obtained by crime, contrary to section 354(1) of the *Criminal Code*; possession of fentanyl for the purpose of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act (CDSA)*; possession of cocaine for the purpose of trafficking, contrary to section 5(2) of the *CDSA*; and possession of marijuana in an amount not exceeding three kilograms for the purpose of trafficking, contrary to section 5(2) of the *CDSA*.

[2] A *voir dire* was held in relation to a statement made by Mr. Mohamed to Constable Douglas Melville of the Royal Canadian Mounted Police on April 15, 2015. I ruled the statement admissible and indicated that full reasons would be provided at a later date. These are the reasons for the decision on the *voir dire*.

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

[4] The Crown called Sgt. Richard Brown and Cst. Douglas Melville, the officers who were involved in the arrest of Mr. Mohamed and in the taking of the statement from Mr. Mohamed. The videotaped statement of the accused was also viewed. The videotaped statement, transcript of the statement and the prisoner report were made exhibits on the *voir dire*.

[5] The defence argues that the accused's request for medication and the denial by the police raises issues regarding subtle inducements and oppression. The defence says that voluntariness has not been established beyond a reasonable doubt because of the concerns that should exist about subtle inducements and an atmosphere of oppression.

[6] In reviewing the statement and the circumstances surrounding the taking of the statement, I am satisfied beyond a reasonable doubt that the statement was voluntarily made and that the requests for medication and subsequent denial did not have the effect of overcoming Mr. Mohamed's free will. He was not, in my view, deprived of his choice to speak with the officer or not.

## BACKGROUND FACTS

[7] On April 15, 2015, the RCMP executed a search warrant at a residence in Yellowknife, Northwest Territories. Two persons were arrested at the residence during the execution of the search warrant: the accused Hassen Abdul Karim Mohamed and another person. Mr. Mohamed was located in the residence in the upstairs bathroom. During the execution of the search warrant, the RCMP found and seized cash and controlled substances, along with other items.

[8] The Emergency Response Team (ERT) was used to enter the residence. Sgt. Richard Brown was a member of the ERT who assisted in clearing the second floor of the residence. Sgt. Brown followed Cst. LeBlanc up the stairs and observed Cst. LeBlanc tell the accused that he was under arrest and to put his hands up. Sgt. Brown observed the accused with his hands up standing in the doorway of the upstairs bathroom. Cst. LeBlanc continued on to clear the second floor and Sgt. Brown remained with the accused.

[9] Sgt. Brown told the accused "It's police. Police. Stop" and told him to get down. The accused got down on the floor. Sgt. Brown also told him that he was under arrest, that he would have the right to speak to a lawyer and that anything he said could be used in court. The accused responded okay. The accused also told Sgt. Brown that he didn't know what was going on, he was new to the country and his name was Hassen. Sgt. Brown advised the accused that an investigator would come and advise him of his rights.

[10] Cst. Hume placed the accused in handcuffs. Cst. Hume also pointed out to Sgt. Brown a clear baggie of white rocks which appeared to be crack cocaine on the floor between the accused's legs. Sgt. Brown remained with the accused until Cst. Melville arrived and took over custody of him.

[11] Cst. Melville entered the residence after the ERT had secured the residence and was directed to the upstairs bathroom. He observed the accused lying on the floor in the bathroom. Cst. Melville arrested the accused for possession for the purpose of trafficking and provided him with his *Charter* rights and caution. The accused indicated that he understood his rights and that he wished to speak to a lawyer. Cst. Melville then took the accused downstairs and put him in the back of a marked police vehicle and arranged for his transport to the detachment.

[12] Cst. Melville went to the detachment at approximately 8:30 p.m. and booked the accused into custody. He then gave the accused access to legal counsel. Mr. Mohamed spoke to a legal aid lawyer for 8 minutes.

[13] As part of the booking in process, Cst. Melville completed a C-13 Prisoner Report which records information about the accused such as his name, address, reason for arrest, etc. The Prisoner Report also includes observations about the accused's mental and physical condition as well as any medications the accused might require. Cst. Melville described the accused's condition as placid and alert.

[14] Cst. Melville was advised by the accused that he took sleeping pills. Cst. Melville contacted an officer at the scene who located medication for Mr. Mohamed and the medication was brought to the detachment. Mr. Mohamed did not request any medication at that time. Cst. Melville testified that he did not recall Mr. Mohamed advising of any other medical condition at that time.

[15] Cst. Melville took a statement from the accused at 11:38 p.m. on April 15, 2015 in the interview room at the Yellowknife detachment. The statement was audiotaped and videotaped and concluded at 12:40 a.m.

[16] Cst. Melville reminded Mr. Mohamed that he had been arrested for possession for the purpose of trafficking and that he had been given his rights to counsel. Mr. Mohamed confirmed this and said that he had spoken to counsel. Cst. Melville reminded Mr. Mohamed of his right to silence which he indicated that he understood. Cst. Melville then provided Mr. Mohamed with the secondary caution which he indicated that he understood.

[17] Cst. Melville testified that Mr. Mohamed did not appear to be in pain or discomfort and did not tell him that he was in pain or experiencing discomfort. He did not observe any visible symptoms of physical or mental illness.

[18] During the statement, Mr. Mohamed appeared alert and was responsive to questions. He asked for his medication or a cigarette several times during the

interview. Cst. Melville declined to provide either. Mr. Mohamed engaged in conversation with Cst. Melville during the statement, answering some questions but refusing to answer other questions, sometimes claiming that he did not remember.

## POSITION OF THE PARTIES

[19] The Crown's position is that the voluntariness of Mr. Mohamed's statement has been proven beyond a reasonable doubt. There is no issue that the accused had an operating mind and there is no question of police trickery. The Crown argues that the accused understood his right to silence, he asserted and exercised the right by not answering some of the questions put to him by the police. During the statement, the accused did not appear intimidated by the officer and they discussed matters as equals. There were times during the statement that Mr. Mohamed spoke in an assertive tone of voice.

[20] The Crown argues that the main issue to be considered is one of oppression; were the circumstances such that they objectively had the effect of overcoming the accused's choice to speak to the police. The accused requested his medication during the statement. The accused had told the officer that he took sleeping pills. The accused told the officer he needed his medication initially but nothing more about why it was required. Later on, he used the medication to avoid answering questions and then to accuse the officer of withholding his medication. The Crown says there was no indication that the accused was in pain or discomfort and he did not express that he was in any pain or discomfort. In the circumstances, the officer was not obliged to investigate the accused's condition or his prescription dosage.

[21] The Crown argues that ultimately this issue does not change the result, that Mr. Mohamed was not deprived of his choice to speak to the police. The Crown submits that the accused knew that he had the right to choose to speak to the police and the circumstances did not have the effect of overcoming his ability to choose to speak to the officer or not.

[22] The defence's position is that the court should be concerned about the subtle veiled inducements which impact on the accused's free will and the prospect that an atmosphere of oppression can produce false confessions.

[23] The defence argues that the accused repeatedly requested medication but was denied it by the officer. The officer did not inquire into the accused's need for medication. The failure of the officer to inquire about the accused's condition or

the necessity of the medication should leave a doubt regarding the voluntariness of the statement.

[24] The defence also argues that the officer's promise to provide medication once the statement was over was a subtle inducement. An inducement in combination with other factors such as the officer continuing to question the accused when the accused is in control of the state results in a situation where the free will of the accused to provide a statement is overborne. The accused referred to his medical conditions (gout, depression and anxiety) in the statement which compounds concerns about the accused's mental health in being able to exercise his free choice to speak with the officer.

[25] The defence argues that the denial of medication is also an aspect of oppression. The accused expressed a present need for his medication which was denied by the officer. The impact of the denial of medication can lead to inhumane and oppressive conditions.

[26] The defence argues that the accused's request for medication and the denial by the police raises issues regarding subtle inducements and an atmosphere of oppression. The defence argues that, as a result, there should be a reasonable doubt about the voluntariness of the accused's statement.

## LEGAL FRAMEWORK

[27] Both the Crown and defence agree on the general principles that are applicable in this case. They agree that the Supreme Court of Canada cases of *R. v Oickle*, [2000] 2 S.C.R. 3 and *R. v Singh*, 2007 SCC 48 set out the legal principles that are applicable when considering the voluntariness of a statement made by an accused person to a police officer.

[28] 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 is voluntary. A statement will not be admissible if it is made under circumstances that raise a reasonable doubt about voluntariness. *Oickle, supra*.

[29] The concept of voluntariness also includes a consideration of an accused's right to remain silent when being questioned by the police. The common law recognizes that a person does not have to answer questions and has the right to remain silent. However, this does not mean that the police cannot speak to an accused person in furtherance of their role in investigating crimes. *R. v Singh, supra* at para. 28.

[30] The focus of the inquiry is an objective examination of the conduct of the police and its effect on the accused's ability to exercise free will taking into account individual characteristics of the accused. *Singh, supra* at para. 36.

[31] Assessing the voluntariness of a statement is a contextual exercise which 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*.

[32] In considering inducements, the law allows the police to offer inducements. As noted in *Oickle, supra* at para. 57:

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 wishes 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.

#### APPLICATION TO THIS CASE

[33] Considering the evidence on this application and, in particular, the statement of Mr. Mohamed, I am satisfied beyond a reasonable doubt that his statement was voluntary. While there may have been an inducement, Mr. Mohamed's will was not overborne. Similarly, there was not an atmosphere of oppression which was sufficient to overcome Mr. Mohamed's choice to speak to the police. In the end, Mr. Mohamed answered some questions put to him by Cst. Melville and he made the choice not to answer other questions.

[34] When he was booked in, Mr. Mohamed initially told Cst. Melville that he took sleeping pills when Cst. Melville asked about medication. He also advised Cst. Melville where his medication could be found. There is no evidence that he told Cst. Melville about any other medication or medical conditions or that he requested any medication at that time.

[35] Observing the videotaped statement, Mr. Mohamed appears alert, does not appear to be in pain or discomfort and there are no obvious indicia of any physical or mental issues.

[36] At the outset of the statement, Mr. Mohamed requested medication. He said that he had gout and needed his medication:

Mohamed: Just I need my medication. Like I have a – gout problem –

Melville: Yes.

Mohamed: - if you know –

Melville: Yes, I have your medication, okay. It's – it's with your property in the cells.

Mohamed: Okay.

Melville: I – the – the – I don't know what medications you, you have and all that and I don't know how they will affect you, but I can't speak to you if you've been taking anything, okay.

Mohamed: Yes.

Melville: So I'd like – that's why I'm trying to get this done quickly, so that I can get you in there, you can take your medication and you can go to bed and relax, okay.

[37] Cst. Melville testified that he did not provide the accused with medication because he was going to interview the accused and he did not know how the accused would react to the medication. Cst. Melville also felt it was not proper to give him medication until the conclusion of the interview. Cst. Melville wasn't sure if Mr. Mohamed wanted to take sleeping pills or another medication but he was concerned that if the accused took the sleeping pills, it would impair his ability to understand and comprehend what was going on in the interview.

[38] Immediately after this, Cst. Melville asked the accused if he wanted something to drink and the accused requested a smoke. Cst. Melville responded that he would see "what we can do about the smoke" but that was something that would have to be dealt with later.

[39] At this point in the interview, Cst. Melville was clear that he was not going to provide Mr. Mohamed with medication or a cigarette until the statement was over. Indicating to an accused person that the issues of medication and a cigarette will be dealt with following the statement might be viewed as an inducement; however if it was an inducement, then it was not a strong enough one to raise a reasonable doubt about whether the accused's will was overborne. As the statement continued, Mr. Mohamed chose what information he provided to the

officer. He answered some questions and claimed to not remember some information.

[40] Cst. Melville proceeded to interview the accused. Mr. Mohamed answered some of the questions but also claimed that he did not remember things like what he had done that day or where he had gone. Cst. Melville continued to ask the accused about his activities, pressing him for details. Mr. Mohamed then made another request for a cigarette:

Mohamed: I don't know, sorry. I have memories problem. Can I smoke one cigarette then we keep going?

Melville: Not right now, no. We're going to finish this first.

Mohamed: Hmm-m.

Melville: Because if I – if I take you for a cigarette now, it's called what's – it's called an inducement.

Mohamed: Oh, sorry, sorry, sorry, sorry.

Melville: Because then it's like I'm all right, you answer my questions, I'll give you a smoke.

Mohamed: No, no, no, no, no.

Melville: And I can't do that, okay, so we're going to finish here –

Mohamed: I have nothing to –

Melville: - and then we'll worry about that.

[41] Cst. Melville was clear with the accused that he could not provide a cigarette as it could be construed as an inducement. From the videotape and the transcript, it appears that the accused understood this and was apologetic. Later on in the interview, Mr. Mohamed claimed that he did not understand.

[42] Cst. Melville continued with the interview of the accused and continued to question him about his activities and the discovery of drugs in the bathroom where he was arrested. The accused denied knowledge of the drugs and when the officer continued to ask about the drugs, the accused responded by saying he needed his medication and then a cigarette. Cst. Melville continued to question the accused who then responded by saying that the officer had promised him a cigarette. Cst. Melville responded:



I didn't promise you a cigarette at all actually. I said to you when we finish here, we'll look and see if there's any cigarettes there, because you don't have any. When you were arrested, you didn't have any cigarettes on you.

[43] As the interview continued, the conversation between Cst. Melville and the accused became much more confrontational. Near the end, Mr. Mohamed accused Cst. Melville of abusing him and said that Cst. Melville had promised him a smoke and promised him his medication in exchange for the statement. The claims of Mr. Mohamed, at that point, are contrary to what is portrayed in the statement. Mr. Mohamed later said that he misunderstood the situation. However, earlier in the statement, he appeared to understand and agree that Cst. Melville had not promised him a cigarette or medication in exchange for the statement.

[44] It is not clear what medication Mr. Mohamed wanted to take as Cst. Melville was only aware of the sleeping pills which were requested and located in the residence. While Mr. Mohamed makes reference to gout, anxiety and depression during the interview, it is not clear what medication he required for these conditions and where the medication might be located. Mr. Mohamed did not advise the officer of this information. There is no evidence that would suggest that, at the time of the interview, Mr. Mohamed's medical condition was such that any denial of his medication would have an effect on his choice to provide a statement to the police.

[45] After the initial request for medication and a cigarette, the accused's requests for both appear to occur at times where Cst. Melville is asking him tough questions that it seems he does not want to answer. While the accused may have wanted a cigarette and his medication, the requests also appear to have been attempts by the accused to avoid questions and/or end the interview.

[46] I am not satisfied that the effect of not providing the accused with medication or a cigarette was to deprive the accused of his choice to speak with the officer. The accused clearly chose to answer some questions and not others during the interview. In the circumstances, I cannot conclude that the accused's will was overborne.

[47] I have also considered the issue of oppressive conditions and whether the conditions as a whole raise the specter of oppression and raise a reasonable doubt about the voluntariness of the accused's statement.

[48] The statement was not a long one, it was taken starting at 11:38 p.m. and continued for about an hour. The accused had been in custody since approximately 8:00 p.m. and lodged in cells. I have not heard any evidence about any oppressive

conditions that he might have been subjected to while in custody. There is no evidence that he was denied sleep, food or water. The accused was fully clothed and there is no indication that he was cold or denied a blanket while in cells. The accused did not complain about the conditions in which he was held and he was offered a drink at the outset of the interview.

[49] As well, I adopt my comments above about the accused not being provided medication or a cigarette. In the circumstances, I am not satisfied that the accused was subjected to oppressive conditions.

[50] In considering the circumstances of the statement provided by Mr. Mohamed, I am satisfied beyond a reasonable doubt that the statement was taken in circumstances whether there were no inducements or oppressive circumstances and that the accused was not deprived of the choice to speak to the officer and his will was not overborne.

[51] For these reasons, I concluded that Mr. Mohamed's statement is voluntary.

S.H. Smallwood  
J.S.C.

Dated at Yellowknife, NT, this  
20<sup>th</sup> day of December, 2018

Counsel for the Crown:  
Counsel for the Accused:

Duane Praught  
Jennifer Cunningham

S-1-CR-2015-000113

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