

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

K. (N.L.)

Restriction on Publication

Pursuant to s. 648 of the *Criminal Code*, the proceedings referred to in this Ruling are subject to a publication ban until such time as the jury has retired to consider its verdict.

RULING ON VOIR DIRE and CHARTER APPLICATION

[1] On November 5, 2018 I issued a Memorandum to Counsel indicating that statements made by the accused would be excluded. I indicated I would provide reasons for that decision by the end of the trial. The reasons are set out below.

FACTS

[2] On February 4, 2017, Cpl. Nicholas Brodeur and Cst. Michael Snow of the RCMP went to the accused's ("N.K.") cabin, located approximately ten kilometres from Aklavik, Northwest Territories. They went because they received a report from a complainant alleging N.K. had sexually assaulted her. The complainant advised the police that N.K. told her he was going to his cabin and would kill himself and that she knew N.K. had guns there.

[3] They arrived at approximately 6:55 a.m. The natural light was low and the location isolated. They were concerned that they could be entering a dangerous situation, given the information from the complainant. The closest backup was in Inuvik, some fifty kilometres away. Accordingly, they made a protective plan. Cpl. Brodeur dropped off Cst. Snow by the side of the cabin. Cst. Snow was concealed by bushes, but he had a good view and was equipped with a police-issued, long-range firearm. Cpl. Brodeur then drove to an area approximately five hundred feet from the cabin. He used the police vehicle for lighting and protection, pointing it in the direction of the cabin. He also had a high-powered light, referred to as “mag” light, trained towards the cabin. He had his police pistol drawn. He testified N.K. would not have been able to see the pistol.

[4] Cpl. Brodeur and Cst. Snow were in contact with each other throughout by radio.

[5] Cpl. Brodeur used the loud speaker system on the police vehicle to make contact with N.K.. This occurred between 6:55 and 6:57 a.m. He testified that he was on a first name basis with N.K. and that he had said something like “Hey, [N.K.]. It’s Nick. Like, what’s going on?” On cross-examination he said that he asked N.K. to come out of his cabin because they needed to talk to him. Cpl. Brodeur told N.K. to keep his hands visible. He did not mention the sexual assault allegation at that time, nor the intention to arrest N.K., because he was concerned it might aggravate N.K. Cpl. Brodeur wanted to ensure that N.K. came out of the cabin safely.

[6] Cst. Snow testified he heard Cpl. Brodeur command N.K. to come out of the cabin with his hands visible and N.K. complied.

[7] Cpl. Brodeur saw N.K. come out of the cabin. He said N.K. was carrying something, which he thought might be a rifle. He based this on the way N.K. was carrying the object. Cst. Snow testified in cross examination that N.K. did not appear to be carrying a firearm. He said it was his experience that people in the community who hunt and trap often keep their firearms on the side of their snowmobiles, however.

[8] Cpl. Brodeur eventually stopped using the loud speaker system because he felt it was aggravating to N.K. and he started yelling to N.K. instead. He said N.K. was responding.

[9] Cpl. Brodeur testified he heard N.K. use words to the effect that he wanted the police to shoot him. He responded by saying something like “I won’t shoot you. I just

want to talk to you”. Cpl. Brodeur testified that his intention was to get a conversation going and to de-escalate the situation.

[10] Cst. Snow relayed to Cpl. Brodeur that N.K. said he wanted the police to shoot him. Cst. Snow testified that he also heard N.K. say the police would have to go and get “bags and drag him from there”, which Cst. Snow interpreted as body bags. It does not appear Cst. Snow relayed this latter comment to Cpl. Brodeur.

[11] Cpl. Brodeur said N.K. agreed to come to the police vehicle on his snowmobile. This was at approximately 7:15 a.m. He saw N.K. get on the snowmobile and he did not see anything in N.K.’s hands. N.K. stopped the snowmobile about thirty feet from the police vehicle and turned off the engine. He did not have a firearm. When asked on cross-examination if things were starting to de-escalate at that point, Cpl. Brodeur said “it was evolving in the right direction”. He added, however, that “things can change in a heartbeat”.

[12] Cpl. Brodeur re-holstered his pistol and approached N.K.. As he was doing so, N.K. stated “I put my finger in her vagina. I told her I was sorry”. I will refer to this utterance as the “first statement”. Cpl. Brodeur had not yet informed N.K. he was under arrest, nor had he advised N.K. of his right to silence and his right to consult a lawyer. He had not asked N.K. any questions about the sexual assault allegation.

[13] Right after N.K. made the first statement, Cpl. Brodeur told him he was under arrest for sexual assault. N.K. replied “[I am] not coming back with you guys” and he attempted to re-start the snowmobile. Cpl. Brodeur then went to where N.K. was and “tackled” him. He was concerned that N.K. would flee on his snowmobile.

[14] Once Cpl. Brodeur brought N.K. under control, he informed him again that he was under arrest and advised him of his right to counsel and he told him “Anything you do say could be used as evidence”. Cpl. Brodeur did this from memory, rather than using a police-issued card. Later on in his evidence, Cpl. Brodeur testified he had also advised N.K. of his right to silence at this time; however this was in response to a leading question from the Crown and for this reason, I have given it little weight.

[15] It was 7:23 a.m. when N.K. was placed under arrest. He was taken to the police vehicle. Cpl. Brodeur then left N.K. with Cst. Snow and went to search the cabin.

[16] Cpl. Brodeur returned to the police vehicle at 7:37 a.m. Using the police-issued card, Cpl. Brodeur advised N.K. of the reason for his arrest, his right to consult counsel

and his right to silence. Cpl. Brodeur said the card was a “standard” one, issued by headquarters.

[17] When Cpl. Brodeur asked N.K. if he understood his rights, N.K. did not respond. When asked if he wished to speak with a lawyer, N.K. indicated he did not wish to speak with anyone.

[18] N.K. was lodged in cells at the RCMP detachment at 7:50 a.m.

[19] At just past 1:00 p.m. that day, Cpl. Brodeur went to N.K.’s cell and again, reading from the police-issued card, advised him of his *Charter* rights. N.K. opted to speak with a lawyer and he did so approximately fifteen minutes later.

[20] Cpl. Brodeur took a statement from N.K. at approximately 3:30 p.m. that day. It was audio and video recorded. At the beginning of the statement there is the following exchange:¹

Cpl. Brodeur: Ok just before we go further here, okay? I just gotta read that to you. So if you have spoken to any police officer or any other person in authority including myself with respect to this matter who has offered you any hope or advantage – of advantage or threatened – made threat to you in any ways to make you speak – speak it is my duty to warn you that no such offer or suggestion or threat can be or any effect and must not influence you. But anything you do say may be used as evidence. Do you understand that?

N.K.: Uh, kind of.

Cpl. Brodeur: So it mean that, uh, let’s say like you’re in cells and, uh, either me or Mike made promises to you that you know, uh, in regard with, uh, this case ok it’s not –I – it can’t be, uh-uh, it can’t be used, ok? It-it’s not gonna – it’s no good, ok? So and anything you do say to me can be used, uh, as evidence in court, do you understand that? Make sense?

N.K.: Uh, cry.

[. . .]

Cpl. Brodeur: Can you explain to me what that mean?

N.K.: I try do the best I can.

[. . .]

¹ For convenience, this and other excerpts from the interview are reproduced from the written transcript; however, it accurately reflects what is found in the audio-video recording of the interview.

Cpl. Brodeur: It means that, uh, anything you do say to me right now could be used as evidence in court later on, okay?

N.K.: So it's like even if I say if I try?

Cpl. Brodeur: Sorry?

N.K.: Even if I say if I try? You will use that in court?

Cpl. Brodeur: I didn't understand what you said.

N.K.: If I try.

Cpl. Brodeur: Try to?

N.K.: Speak or anything like that.

Cpl. Brodeur: Well the conversation we have right now is under oath, ok? And it's mean that, uh, anything that is discuss here ok in regards to this conversation and early in the investigation, um, anything that, uh, is coming out from this in – uh, discussion could be, uh, used as evidence in court, ok for the investigation that we're, uh, completing right now, ok? The sex assault. K, so . . .

[. . .]

Cpl. Brodeur: . . . do you understand that?

N.K.: I think so.

Cpl. Brodeur: You think so? Ok, so what's that mean to you? In your own words? Speak clear please.

N.K.: If I ca – I'm (indiscernible, laughs)

Cpl. Brodeur: What?

N.K.: I dunno fucking t – over tired.

Cpl. Brodeur: Ok. So what- what's that mean to you?

N.K.: What's that mean to me? (Sighs). I wasn't thinking right that's all.

Cpl. Brodeur: Ok, but in regard with like the conversation you . . .

N.K.: I know that's what I said. I wasn't thinking right. With my compensation whatever I have to say. I dunno.

Cpl. Brodeur: Ok. But you understand that the conversation we are having right now could be used later in court. Could bring evidence in court, right? Do you understand that?

N.K.: So that means I can speak to there in front of the courts this year?

Cpl. Brodeur: Sorry, what?

N.K.: I said so that means I can't speak to you guys 'til-'til the court?

Cpl. Brodeur: No you can speak

N.K.: 'Cause . . .

Cpl. Brodeur: . . . to us

N.K.: . . . that's what – that's what my lawyer said to me.

Cpl. Brodeur: Ok

N.K.: I cannot con – I cannot talk to the cops. For I dunno well for some reason but . . .

Cpl. Brodeur: You can talk to us it's just like the conversation – the information that we gonna learn through this conversation, uh, could be used as evidence in court.

N.K.: It's gonna go – I know yeah.

Cpl. Brodeur: Against you.

N.K.: That's what I'm afraid of.

Cpl. Brodeur: Ok. So you understand that?

N.K.: Yeah

Cpl. Brodeur: Ok, alright.

N.K.: Uh, that's what I'm afraid of, uh . . .

[. . .]

[21] On cross-examination Cpl. Brodeur agreed that N.K. seemed to be having difficulty understanding the warning he was given at the start of the interview.

[22] Cpl. Brodeur agreed that he did not at any point during the interview tell N.K. that he did not have to speak to police. He said he did not feel he had to go over that part of the warning again because N.K. had spoken to a lawyer earlier that afternoon.

[23] As the interview continued, Cpl. Brodeur started asking questions connected directly to the investigation and he attempted to get N.K. to repeat the first statement. He was ultimately successful:

Cpl. Brodeur: And when you came to me, uh, towards me with a – you were sitting on a sled there, what did you tell me?

N.K.: Uh . . .

Cpl. Brodeur: You told me – you told me what happened just tell me again what you said.

N.K.: Oh I tried to – I dunno the – the very, um, correct my words but all that I said, uh-uh, what was it? Hurts good, eh, instead of going up to the cabin I should came here. What – just tryna put myself in here.

[. . .]

Cpl. Brodeur: Yeah but it's not about – that's not what I'm talking about here, and you know what I'm talking about like when, uh, you drove towards me with the sled you stopped, and then you show me your hands and then I approached you slowly and we talk. What did you tell me?

N.K.: My eye.

[. . .]

Cpl. Brodeur: [N.K.], don't change the subject here. I'll tell you - what – I'll tell you what you told me, okay? You told me "I put my fingers inside her vagina and then I told her I was sorry" that's what you told me.

N.K.: Yeah that's true. I forgot about that part, sorry about that.

[24] N.K. went on to state that he had touched the complainant in her genital area.

[25] The interview ended just under an hour later.

THE PARTIES' POSITIONS

[26] Defence counsel contends both statements should be excluded. This is based on the assertion that N.K.'s *Charter* rights were breached and that the statements were not made voluntarily. A number of arguments were put forth in support of this, summarized below.

[27] First, N.K. was detained at the time he made the first admission and had not been advised of the reasons for his arrest, his right to counsel, nor his right to silence, despite the police having a reasonable opportunity to do so. Second, N.K.'s second statement was prompted by reference to the first one and, because of the problems just described, it was tainted. Third, N.K. was not advised of his right to silence before the second statement was taken and in any event, he did not understand his right to silence, nor the jeopardy (ie., that his statements could be used against him) when he answered Cpl. Brodeur's questions during the interview.

[28] The Crown argues both the first and second statements are voluntary and that N.K.'s *Charter* rights were not violated. The first statement was made spontaneously. Further, or alternatively, the police had been told that N.K. had expressed an intention to harm himself and that he had the means with which to do so. Cpl. Brodeur was therefore justified in not telling N.K. he was under arrest for sexual assault and in not advising him of his rights until it was apparent the situation was under control. With respect to the second statement, N.K. was advised of his rights, he understood them and he exercised his right to counsel.

ISSUES

[29] The issues are these:

- a. With respect to the first statement:
 - i. Was N.K. "detained" when he made it?
 - ii. If so, was the delay in advising him of his rights justified by reason of safety concerns?
- b. If the first statement is excluded, should the second statement be excluded as well?
- c. Was the second statement voluntary?

ANALYSIS

The First Statement

[30] N.K. was not physically restrained when he made the first statement. Accordingly, as set out in *R v Grant*, 2009 SCC 32 at para 44, [2009] 2 SCR 353, the question is whether a reasonable person in N.K.'s circumstances would nevertheless conclude he was being deprived of his liberty by the police, having regard to, among other things, the following:

- a. The circumstances leading to the encounter as would reasonably be perceived by N.K.; whether the police were providing general assistance, making general inquiries about a specific event or singling out N.K. for a focussed investigation;
- b. The nature of the police conduct, including the language used, physical contact, the place where the event occurred, the presence of others and the duration of the contact; and
- c. N.K.'s particular characteristics, including his age, level of sophistication and minority status.

[31] I find N.K. was detained when he made the first statement.

[32] Although they had information suggesting N.K. might harm himself, the police went to N.K.'s cabin because the complainant reported a sexual assault. They were not there to make general inquiries. Their intent was to arrest him.

[33] The police vehicle was parked facing N.K.'s cabin with the lights on. A mag light was trained on N.K. and on the cabin as well. Cpl. Brodeur initiated communication with N.K. using a loud speaker system. He started off with what he described as a "conversation" with N.K. in order to de-escalate what could possibly be a tense situation. He did not mention the allegation, nor did he immediately tell N.K. he was under arrest. He nevertheless gave a command to N.K. to come out of his cabin with his hands visible. N.K. obeyed the command and came out of his cabin. In my view, any reasonable person would consider themselves detained in these circumstances.

[34] The informational duties of the police arise immediately upon arrest. *R v Suberu*, 2009 SCC 33, [2009] 2 SCR 460. As Crown counsel pointed out, the Supreme Court of Canada has recognized situations where the police have legitimately held off on immediately providing *Charter* rights and warnings to a detainee for reasons of public or officer safety. *R v Strachan*, (1988) CanLII 25 (SCC), [1988] 2 SCR 980 at 998-999 and at 1013; *R v Debot*, (1989) CanLII 13, [1989] 2 SCR 1140 at 1163-1164; *R v Suberu*, at para 42. It is clear from these cases, however, that this exception to the ordinarily strict requirement to discharge the informational duty immediately upon detention is limited and reserved for situations characterized by significant volatility. In *Strachan*, for example, former Chief Justice Dickson noted, at 998-999:

The trial judge rejected the argument that Constable Bisceglia needed to get the situation "under control" before allowing any telephone calls and held that the violation of the right to counsel occurred as soon as the Constable refused to let the appellant telephone his lawyer. Esson J.A. disagreed with the trial judge on this point and held that Constable Bisceglia's concern to stabilize the situation was a proper one. Although it is not necessary to decide the point in this case, I would be inclined to agree with Esson J.A. *The combination of an arrest in the accused's home, the presence of two unknown people, and the knowledge that two restricted weapons were in the apartment, was a potentially volatile situation. It is true the accused had the proper registration permits for the weapons, but, notwithstanding, the possibility of their use was a serious matter for a police officer to consider while taking a person into custody. In my opinion, Constable Bisceglia was justified in preventing any new factors from entering the situation until some of the unknowns had been clarified.* Thus I would say that the violation of s. 10(b) did not occur when Constable Bisceglia initially prevented the appellant from telephoning his counsel. But once the accused had been arrested, the weapons located, and the other two people had left, the police were clearly in control and there was no reason why they should not have allowed the appellant to telephone a lawyer. I would hold that the denial of counsel began from that point. (Emphasis added)

[35] The police had reason to be cautious when they arrived at N.K.'s cabin and for a short period thereafter. The cabin was located in a remote area, outside of the nearest town and far from additional police resources. The police had been provided with information suggesting N.K. might harm himself and that he had access to firearms. When he exited the cabin, N.K. appeared agitated and he said he wanted the police to shoot him. Cpl. Brodeur thought perhaps N.K. was holding a firearm when he first came out of the cabin.

[36] As things unfolded, however, the risk factors initially identified, particularly respecting firearms, quickly diminished. Much of the uncertainty disappeared as well. It was apparent when N.K. exited the cabin that he was not carrying a firearm. Cst. Snow, who was closer to N.K., did not see one. Presumably, Cpl. Brodeur would have asked Cst. Snow to confirm if N.K. was carrying a firearm if his concerns continued after N.K. came out of the cabin. There is no evidence he did so. N.K. might have tried to flee, but that is a risk in any arrest situation and it was not, in these circumstances, a risk that justified delay in advising N.K. of his *Charter* rights.

[37] The circumstances here simply did not pose the type of extraordinary danger that would justify a delay in the police discharging the informational duty and immediately advising N.K. of his rights. The police had ample and safe opportunity to tell N.K. that he was under arrest, the reasons for it and to advise of him of his rights, in the fifteen minutes before N.K. got on his snowmobile and approached Cpl. Brodeur.

[38] N.K. has shown on a balance of probabilities that he made the first statement while detained, without having been advised of the reasons for the arrest, his right to silence or his right to counsel. This also makes the first statement involuntary. Accordingly, it is excluded.²

The Second Statement

[39] For reasons that follow, I find the second statement should be excluded. It was tainted by the first and, standing alone, it is involuntary by reason of N.K. not understanding his rights.

[40] The starting point for considering whether a subsequent statement should be excluded was set out succinctly in *R v Wittwer*, 2008 SCC 33, [2008] 2 SCR 235:

[21] . . . The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: *Strachan*, at p. 1005. The required connection between the breach and the subsequent statement may be “temporal, contextual, causal or a combination of the three”: *R. v. Plaha* (2004), 2004 CanLII 21043 (ON CA), 189 O.A.C. 376, at para. 45. A connection that is merely “remote” or “tenuous” will not suffice: *R. v. Goldhart*, 1996 CanLII 214 (SCC), [1996] 2 S.C.R. 463, at para. 40; *Plaha*, at para. 45.

² As noted in *R v Singh*, 2007 SCC 48, [2007] 3 SCR 405, at para 8 “if circumstances are such that the accused can show on a balance of probabilities that the statement was obtained in violation of his or her constitutional right to remain silent, the Crown will be unable to prove voluntariness beyond a reasonable doubt.”

[41] These factors are relevant and applicable whether considering exclusion under the common law of confessions or the *Charter*. *R v I(LR) and T(E)*, [1993] 4 SCR 504; *Wittwer, supra*.

[42] The two statements were part of the same transaction and the relationship between them is anything but tenuous. There are strong temporal, contextual and causal connections between the first statement and the admissions N.K. made in the second statement. The second statement was taken a few hours following N.K.'s arrest. It was taken by Cpl. Brodeur, one of the two police officers who had arrested N.K. and, importantly, the person to whom N.K. had made the first statement. Finally, the admissions were elicited in response to Cpl. Brodeur asking N.K. to repeat what he said in the first statement.

[43] This is not attenuated by N.K. having exercised his right to speak with counsel before making the admissions. Cpl. Brodeur confronted N.K. with his own incriminating words spoken at the cabin only hours earlier. As noted by Sopinka, J., in *R v L (LR) and T(E)*, *supra*, at 527, "An explanation of one's rights by either a police officer or counsel may not avail in the face of a strong urge to explain away incriminating matters in a prior statement".

[44] The admissions in the second statement were obtained in a manner that violated N.K.'s constitutional rights and should be excluded under s. 24(2) of the *Charter*. As stated in *Grant, supra*, at para 93, "Police conduct in obtaining statements has long been strongly constrained. The preservation of public confidence in the justice system requires that the police adhere to the *Charter* in obtaining statements from a detained accused".

[45] It was apparent to Cpl. Brodeur that N.K. did not understand his rights against self-incrimination. N.K.'s interests were significantly undermined by the admissions he made in the interview. Excluding the second statement will not adversely affect the public interest in having the case tried fairly on the merits. On the contrary, it will aid in ensuring trial fairness for N.K.

[46] Even if the first statement did not taint the second, it must be excluded because it is involuntary. It is not at all clear that N.K. understood the advice he received from his lawyer regarding his right to silence. He stated he did not know why the lawyer told him he could not speak to the police.

[47] Further, the information Cpl. Brodeur provided at the start of the interview was confusing and incomplete. He warned N.K. that anything he said to police could be used in evidence. He did not, however, tell N.K. at any point during the interview that he was not required to say anything to the police. Although N.K. acknowledged at one point that what he said to Cpl. Brodeur could “go against” him, N.K.’s other responses to questions about this during the interview suggest strongly that he did not understand his rights. Moreover, as noted, Cpl. Brodeur was aware that N.K. was having difficulty understanding his rights.

[48] In these circumstances, I am unable to conclude that the Crown has proved beyond a reasonable doubt that the second statement was voluntary.

CONCLUSION

[49] Both the first and second statements are excluded. N.K.’s *Charter* rights were breached by reason of delay in advising him of the reasons for his arrest, his right to counsel and his right to silence. The admissions he made in his second statement were tainted by the issues with the first statement. Moreover, N.K. did not understand his right to stay silent when he made the second statement.

Dated at Yellowknife, NT, this
3rd day of January, 2019.

K. M. Shaner
J.S.C.

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Kate Oja

Counsel for the Crown:

Trevor Johnson

S-1-CR 2017 000148

**IN THE SUPREME COURT OF THE
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-and-

K. (N.L.)

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OF THE HONOURABLE JUSTICE K.M. SHANER**
