Date: 2020 03 03
Docket: S-1-CR-2019-000 045

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

D.R.E.

Applicant

Restriction on Publication

Pursuant to s.486.4 of the *Criminal Code*, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

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.

The names of the accused and certain other individuals have been initialized, and the name of the community omitted, to ensure compliance with these restrictions on publication.

RULING ON *CHARTER* APPLICATION

[1] This is an application by the accused ("D.E.") to exclude a statement he made to police subsequent to arrest based on a breach of his rights under s. 8 of the *Charter*.

BACKGROUND

[2] D.E. is charged with sexual interference and sexual assault, under ss. 151 and 271 of the *Criminal Code*, respectively.

[3] The alleged events took place in a small community in the Northwest Territories. That community has an RCMP detachment staffed by two officers. The evidence in this application came through the testimony of those two officers, Corporal Kerr and Constable Whynot.

[4] At the time of the alleged events, D.E. was living in a leased house (the "house") with his sister and his father, W. Both W.'s and D.E.'s names are on the lease. I find as a fact that this was D.E.'s home and accordingly, he had a reasonable expectation of privacy there.

[5] On March 9, 2018 at approximately 11:00 a.m., the complainant's mother went to the RCMP detachment and reported that she had just found her daughter, aged 12, in bed with D.E. at the house. She stated that she found her daughter naked from the waist down, with new hickeys on her neck. The complainant told Constable Whynot that she had blacked out from drinking alcohol and she had no memory of anything sexual happening. She explained she got the hickeys from someone else.

[6] The two officers discussed the possibility that a sexual assault had occurred. They decided to take steps to obtain statements and they went to the house. They knocked on the main door. D.E. was not at the house. W. told the officers that D.E. was at his mother's residence. The officers proceeded to take statements from W. and D.E.'s sister. Subsequently, the officers concluded that a sexual assault had taken place and they decided that they should arrest D.E.

[7] The police did not obtain an arrest warrant.

[8] The following day, the officers went to D.E.'s mother's residence with the intention of arresting him. She told them he had gone back to the house he shared with his father. The officers went there, with the intention of arresting D.E.

[9] At all times, the officers were in uniform and wearing duty belts. They drove a marked police truck.

[10] The officers arrived at the house. They knocked on the main door and W. answered. Corporal Kerr asked if W. "would mind" if they entered. W. allowed them in. They stepped through the doorway, to the entryway area inside the house. They said they needed to "see" or "speak with" D.E. They did not explicitly

advise W. that he could refuse them entry, nor did they advise him they were there to arrest D.E. W. told them that D.E. was in the shower.

[11] It appears that D.E. finished his shower at about that time. The officers saw him in the hallway, which they could see from the entryway. He had a towel draped around his upper body. His lower body was clothed. The officers told D.E. that he needed to go to the detachment with them, but they did not tell him what it was about. The word "arrest" was not used. Corporal Kerr testified that this was influenced by W.'s presence. He did not want to embarrass D.E. by making the arrest in front of his father.

[12] D.E. was permitted to finish getting dressed. He entered another room to do that. The officers waited at the entryway. They did not monitor D.E. and they did not conduct any other searches in the house as they waited. They did not proceed farther into the house. D.E. then accompanied the officers outside to the police truck, which he entered voluntarily. There was no physical contact between D.E. and the police. Once he was in the truck, D.E. was placed under arrest and advised of his rights.

[13] Once the arrest was effected, the officers took D.E. to the detachment. He spoke with a lawyer by telephone. The call lasted approximately one minute. He subsequently gave a statement to the police in which he admitted to having sexual intercourse with the complainant. The voluntariness of that statement is not in issue.

[14] There is no allegation of police misconduct following the formal arrest.

[15] The time that elapsed between when the police arrived at the house and when D.E. began his statement was approximately forty minutes.

THE PARTIES' POSITIONS

D.E.

[16] D.E. contends his right to privacy under s. 8 were violated by this process. He was under psychological detention, and effectively arrested, while inside the house. The police did not obtain a warrant before attending at his house and arresting him. W.'s consent to allow the police entry for the purposes of the arrest was not informed and therefore invalid and, in any event, W. could not consent to waive D.E.'s privacy interests. D.E. says the events inside the house and the statement are connected sufficiently that the statement is tainted by the s. 8 breach. D.E. asks that the evidence be excluded under s. 24(2) of the *Charter*.

The Crown

[17] The Crown contends that the arrest occurred outside the house and accordingly, a warrant was not required. Alternatively, the requirement for a warrant was obviated by W.'s act of granting the police permission to enter the house. The Crown argues that even if there was a s. 8 breach as a result of the events inside the house, the statement is not part of the same transaction. Finally, the Crown says the statement should not be excluded, even if there was a breach.

ISSUES

[18] The issues are these:

a. Did the arrest occur inside the house?

b. Could W. consent to police entry into the house?

c. Were the events inside the house and the statement part of the same transaction?

d. If D.E.'s s. 8 rights were breached, should the statement be excluded under s. 24(2) of the *Charter*?

ANALYSIS

Did the arrest occur inside the house?

[19] Section 8 of the *Charter* provides that everyone has the right to be secure against unreasonable search or seizure. A person claiming a section 8 breach must establish that they had a reasonable expectation of privacy. That D.E. had a reasonable expectation of privacy in the circumstances is not in issue.

[20] In *R v Feeney*, 1997 2 SCR 13, 1997 CanLII 342 (SCC) the Supreme Court of Canada ruled that the police must obtain prior judicial authorization to arrest a suspect inside their home. Otherwise *Charter* rights, including privacy rights under s. 8, are breached. This requirement is now included in s. 529 of the *Criminal Code*. There are exceptions to this, namely imminent loss or destruction of evidence or the imminent risk of death or bodily harm. These are set out in s.529.3(2)(a) and (b). Neither of those circumstances presents here. Consent to enter a premises by a third party may also create an exception. This is discussed later in these reasons.

[21] The "formal" arrest did not occur until D.E. was outside the house; however, the police were *inside* the house when they told D.E. that he needed to come with them. So the question is whether, by reason of that police conduct, D.E. was under psychological detention at that point and would conclude he had no choice but to accompany the officers outside.

[22] The legal framework and factors relevant to this analysis are set out in *R v Grant*, 2009 SCC 32 at para 44, [2009] 2 SCR 353 and reiterated in *R v Le*, 2019 SCC 34 at para 31. These are: the circumstances leading to the encounter as they would be reasonably perceived by D.E.; the nature of the police conduct; and D.E.'s particular characteristics, including his age, level of sophistication and minority status. This is a non-exhaustive list.

[23] The circumstances giving rise to the encounter were that the police, having concluded that there were reasonable grounds to arrest D.E. on charges of sexual assault and sexual interference, went to the house to effect his arrest. They were not there making general inquiries or to take a statement.

[24] In looking at the nature of the officers' conduct, I note that they were inside the house with W.'s permission, something I will return to later. The officers were in uniform and wearing their duty belts, although this does not, without more, lend itself to a finding that they were unusually intimidating. They were dressed in the manner than any on-duty police officer would be. They remained in the entryway area and made no move to approach D.E. when he appeared in the hallway. They did not take D.E. aside or isolate him in any way to question or speak to him at any point inside the house, nor does it appear from the evidence that they were in unusually or inappropriately close physical proximity to him.

[25] The police relayed to D.E. that he needed to accompany them to the detachment. There is no evidence suggesting they did so in an aggressive or authoritative manner, nor did they tell D.E. that if he did not accompany them, he would be arrested. D.E. was given time and privacy to finish getting dressed, in a separate room. The police did not exercise or threaten to exercise any physical force over D.E., either inside the house or as they walked to the police truck.

[26] At the hearing, both officers were asked what would have happened had D.E. refused to accompany them to the detachment, and both said that they would have arrested him. In my view, this is not relevant to the analysis. The fact is,

D.E. accompanied the police out of the house. What might have happened had he refused to do so is speculative.

[27] I now turn to D.E.'s personal characteristics and how they might reasonably be expected to affect his decision to leave the house with the officers. D.E. is a young adult who has spent his life in a small, isolated community. He is indigenous and thus part of a group of people in Canada who may have had more frequent and often, more negative, interactions with police than the norm. Nevertheless, the evidence points to the conclusion that D.E. does not personally have any type of history, negative or otherwise, with the police. Corporal Kerr testified that he knew D.E. from volunteer work that D.E. did at the arena, but he had never had occasion to deal with D.E. in a professional capacity until this matter arose. I conclude that D.E.'s personal circumstances and background are such that he may lack sophistication when it comes to his *Charter* rights, but the fact that he has no official history with the police militates against a finding that he would have felt compelled to accompany them to the detachment.

[28] In all of the circumstances, I find that D.E. was not "detained" while he was in the house. He left the house with the officers voluntarily. The arrest took place outside, at the police truck and his rights under s. 8 of the *Charter* were not violated.

Could W. consent to police entry?

[29] Even if the arrest had occurred inside the house, the circumstances do not support a finding that D.E.'s s. 8 rights were breached. This is because W. consented to the police entering the house and he was entitled to do so. Moreover, W.'s consent was valid.

[30] The Supreme Court of Canada has not definitively answered the question of whether one resident can consent to the police entering into the common areas of a residence to investigate or arrest another resident. While the question arose in *R v Reeves*, 2018 SCC 56, the majority of the Court declined to address it. The key issue in *Reeves* was whether Mr. Reeves' spouse could effectively waive his s. 8 rights over data in a shared personal computer by consenting to its seizure.

[31] I infer from D.E.'s written argument that he invites this Court to rule that the conclusion in *Reeves*, ie., that a co-resident cannot waive another resident's s. 8 privacy interest over data in a computer, applies equally to the situation where the

police seek entry to a residence to effect an arrest. D.E. also specifically asks that this Court apply the approach proposed in the concurring reasons of Moldaver, J. Specifically, he proposed applying the ancillary powers doctrine to the analysis of whether the police can lawfully enter a joint residence when invited by a co-resident. Respectfully, I decline to do either, for three reasons.

[32] First, the circumstances in this case are not analogous those in *Reeves.* What was at stake in *Reeves* was the right to privacy over data stored on a computer. That is far more specific than the issue of whether a co-resident can consent to police entry for the purpose of an arrest. As noted, the majority specifically declined to deal with the latter issue. *Reeves*, paras 25-26.

[33] Second, and as pointed out by Smallwood, J. in *R v Thrasher* , 2019 NWTSC 44 at para 54, Moldaver, J. stated (at para 76) that his description of the ancillary powers was "tentative", as the paradigm he proposed was not raised by the parties.

[34] Third, as noted by both Karakatsanis, J. and Côté, J. in *Reeves*, there is appellate level jurisprudence on this point which supports the proposition that a co-resident may permit police entry into common areas of a dwelling, provided certain circumstances exist. These cases include *Tymkin v Ewatski et al*, 2014 MBCA 4, *R v RMJT*, 2014 MBCA 36, *R v Clarke*, 2017 BCCA 453 and *R v Squires*, 2005 NLCA 51. There are also trial-level authorities from this Court, in *R v Thrasher* and from the Yukon Supreme Court, in *R v Krizan* 2016 YKSC 66, which expressly follow the authorities from Manitoba and British Columbia. The conclusions in those cases on this issue are unequivocal. I see no reason to depart from the reasoning set out in them, particularly *Tymkin, RMJT* and *Clarke.*

[35] In *Tymkin,* the Manitoba Court of Appeal held (at para 89) that the police may gain entry and effect an arrest without a warrant where they obtain the informed consent of a person with a sufficient privacy interest to allow them to do so.

[36] In *RMJT,* a co-resident allowed the police to enter a shared area to seize a computer. The Court held (at paras 50-52) that there was a reduced expectation of privacy in shared areas of a residence. Moreover, the co-resident had the authority to provide consent and her consent was informed.

[37] *R v Clarke* involved the warrantless entry into a residence. The tenant was the primary occupant of a residence owned by Clarke and his mother. The tenant

had a friendship, a business relationship and a sexual relationship with Clarke. Clarke had a key to the residence and could come and go as he pleased. The tenant allowed the police inside the residence to search for firearms. The Court of Appeal for British Columbia found that the primary occupant could consent to police entry into common areas. It concluded there was a reasonable expectation by Clarke that the tenant would have the authority to consent to police entry into common areas. This was based on the fact that the tenant was the primary occupant, the nature of her relationship with Clarke, and their use and treatment of the residence. *Clarke*, para 55.

[38] D.E. and W. were co-tenants of the house at the time these events occurred. Therefore, just as in *Clarke*, D.E. would have a reasonable expectation that W. would have authority to let the police enter into a common area if he so chose.

[39] Accepting the conclusion in *Tymkin* and others that third party consent to police entry can create an exception to the need for a *Feeney* warrant, I turn to the question of whether W.'s consent was valid; specifically, whether W. had a sufficient privacy interest in the house and whether his consent was informed.

[40] W. was an occupant of the house and his name was on the lease, along with D.E. when these events occurred. I have no hesitation in finding that his privacy interests were equal to those of D.E. and that he was entitled to allow the police entry.

[41] With respect to the issue of informed consent, the starting point is *R v Wills*, (1992) 7 OR (3d) 337 (CA), (1992) CanLII 2780. In *Wills*, the Ontario Court of Appeal set out six requirements which must be satisfied on a balance of probabilities to prove valid waiver or consent:

a. there was a consent, express or implied;
b. the giver of the consent had the authority to give the consent in question;
c. the consent was voluntary in the sense that that word is used in *Goldman, supra*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
d. the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
e. the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
f. the giver of the consent was aware of the potential consequences of giving the consent.

[42] The first three requirements are satisfied. There is no dispute that W. consented to police entry and that he had the requisite authority to do so. There is no suggestion of coercion or oppressive conduct by the police.

[43] The fourth and sixth requirements overlap in this situation. The police told W. they were there to "see" or "speak to" D.E. and they asked permission to enter; however, they did not specifically tell him that they intended to arrest D.E. The fact that the police did not explicitly state they were there to arrest D.E. does not necessarily lead to the conclusion that W. was unaware of why they were there and what the consequences would or could be. In the circumstances, it was not a material non-disclosure.

[44] Communications between people, and our understanding of what is being communicated, is informed by more than just the words spoken at a particular moment. The overall context has to be taken into account. In this case, the police had been at the house the previous day, investigating the sexual assault allegation. There is no evidence that they had been there previously for any other purpose. They took a statement from W. and they asked about D.E.'s whereabouts. It is reasonable to infer that when the police returned the next day and asked to see or speak with D.E., W. concluded that they were there to arrest D.E.

[45] Although the police did not specifically tell W. that he could refuse them entry, I am satisfied on a balance of probabilities that W. knew he could say "no". Again, the overall context of the communication has to be considered. When they arrived, the police asked W. if he "minded" or "would mind" if they entered the house. That necessarily implies that entry can be refused. Further, there is no evidence that the police were forceful or coercive in their request, through words or gestures, or did anything else that would remove W.'s freedom to choose.

Were the events inside the house and statement part of the same transaction?

[46] A statement will be tainted if the breach and impugned statement are part of the same transaction or course of conduct. The connection may be temporal, contextual, causal or a combination of all three, and it must be something more than a tenuous or remote connection. *R v Wittwer*, 2008 SCC 33 at para 21, [2008] 2 SCR 235.

[47] The connection between the events in the house and statement D.E. gave following his formal arrest is too tenuous and remote to be considered part of the same transaction.

[48] Certainly, there are contextual and temporal links between the officers' attendance in the house and the statement. The contextual link is obvious. It was the same officers who attended at the house, accompanied D.E. outside, arrested him and then took his statement.

[49] Temporally, only about forty minutes elapsed between the time the police arrived at the house and when D.E. began his statement. This does not mean that the temporal connection was particularly strong, however. It is more a function of the fact that the events took place in a community that is both geographically and demographically small. The detachment was only a short drive from the house, lasting only three minutes on this occasion.

[50] I find that the causal link is weak and the way the events unfolded imports a strong element of remoteness to the statement. The events inside the house and the statement were interrupted by two significant things: the police formally arrested D.E. and advised him of his rights; and D.E. spoke with counsel before he made the statement. The propriety of the process the police followed after the arrest and in taking the statement is not challenged. Further, D.E. did not make any statements before the arrest, nor was any other evidence seized from the house. He was not confronted with statements or other evidence resulting from any police misconduct before he made the statement following the arrest.

[51] Thus, even if D.E.'s s. 8 rights were breached by reason of the events inside the house, there is not a strong enough connection between those events and the statement to say it was part of the same transaction or course of events.

Would the evidence have been excluded under s. 24(2) of the Charter?

[52] Had I found that the statement was obtained in a manner that violated D.E.'s s. 8 rights, I would not have excluded it.

[53] The Court must consider three factors in deciding if evidence should be excluded under s. 24(2) of the *Charter:* the seriousness of the police conduct; the impact of the breach on the accused's *Charter*-protected rights; and society's interest in the adjudication of the case on its merits. *Grant,* para 71.

[54] The police conduct in this case falls at the lower end of the spectrum of seriousness and the impact on D.E. was minimal. Unlike the situation in *Le,* for example, the police were not trespassers. They were inside the house with the permission and informed consent of a co-resident. The officers stayed in the entryway and did not intrude into areas of the house. They did not isolate D.E., use intimidating language or apply any physical force. They did not raise their voices and they did not give orders, such as restricting D.E. to an area of the house where he could be monitored. D.E. was allowed time to finish getting dressed and he was allowed to do so in private. His dignity was not violated in any way. In fact, Corporal Kerr testified that the decision to arrest D.E. outside of the house, and away from his father and sister, was in part driven by a desire to preserve both his dignity and that of his family members. Finally, the police were operating under the reasonably held belief that they had reasonable and probable grounds to arrest D.E.

[55] The allegation against D.E. is that he had sexual intercourse with a twelve-year old child. This is among the most serious criminal acts. Society has a vested interest in seeing the case adjudicated on the merits and exclusion of this evidence would seriously interfere with that process.

CONCLUSION

[56] The application is dismissed.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
3rd day of March 2020

Counsel for the Applicant: Kate Oja

Counsel for the Respondent: Jeffery Major-Hansford

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