

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

- and -

LEVI CAYEN

RULING ON VOIR DIRE INTO THE ADMISSIBILITY
OF THE ACCUSED'S STATEMENTS

INTRODUCTION

[1] Levi Cayen was charged with two counts: first degree murder in the death of Alexander Norwegian, contrary to section 235(1) of the *Criminal Code* and robbery of Alexander Norwegian, contrary to section 344 of the *Criminal Code*.

[2] Alexander Norwegian's body was found on December 28, 2017 on the K'atl'odeeche First Nation (Hay River Dene Reserve) near Hay River, Northwest Territories. During the subsequent investigation into his death by the Major Crimes Unit (MCU), officers with the Royal Canadian Mounted Police (RCMP) interviewed a number of witnesses and executed several search warrants. As a result of the investigation, Levi Cayen and 3 others were arrested and charged for their involvement in the death of Alexander Norwegian.

[3] Mr. Cayen was arrested on January 3, 2018. Mr. Cayen provided three statements to the police both before and after his arrest on these charges. Mr. Cayen provided a witness statement to the police on January 1, 2018; at that time, Mr. Cayen was not a suspect in the death of Alexander Norwegian. Mr. Cayen takes no

issue with the admissibility of that statement. However, he claims that the statements he provided to the police, on January 3 and 4, 2018, after his arrest, were not made voluntarily. A *voir dire* was held in relation to statements made by Mr. Cayen to the RCMP after his arrest.

[4] I ruled the statements admissible and indicated that full reasons would be provided at a later date. These are those reasons.

[5] The issue on the *voir dire* was voluntariness. Mr. Cayen has not brought an application alleging that his rights under the *Canadian Charter of Rights and Freedoms* were infringed. The Crown and Defence agreed that the police officers fully complied with Mr. Cayen's constitutional rights under section 10 of the *Charter*.

[6] The Crown called Cst. Tyler Haley, Cst. Ruen Erkin, Sgt. Eric Lane, Sgt. Brandon Humbke, Cst. Matthew Halstead, Guard Bill Naidu, Matrons Irina Shitova and Olive Herbert, Cst. John Keefe and Cst. Steve Beck. The Defence called no evidence on the *voir dire*.

[7] Cst. Keefe and Cst. Beck were the officers involved in taking the statements from Mr. Cayen and were the main witnesses at the *voir dire*. Cst. Keefe was part of the MCU investigation team and was assigned to take the statements from the four accused who were charged for their roles in the death of Alexander Norwegian. Cst. Keefe had travelled to Hay River from Yellowknife with the MCU investigation team but had been posted to the Hay River detachment from 2008-2012. Cst. Beck was posted to the Hay River detachment, had lived most of his life in Hay River and was active in the community. He had interactions with Levi Cayen in the past and was brought into the interview of Levi Cayen because of his previous rapport with Mr. Cayen.

[8] A number of exhibits were also entered into evidence including an Agreed Statement of Facts, photographs, transcripts, audio and video-recordings. The videotaped statements of the accused were also viewed as well as cell block recordings. The Crown argued that there were no inducements, oppression or police trickery that would render the statement inadmissible. The Crown argued that the voluntariness of Mr. Cayen's statements have been established beyond a reasonable doubt and that ultimately, Mr. Cayen chose to make the statement to the police

because he felt that the others involved were trying to place the blame on him. It was this concern that motivated him to make the statement to the police.

[9] The defence argued that there were a number of concerns which raised a doubt about whether the statements were voluntarily made. These included the conduct of the police officers, Mr. Cayen saying that he did not want to speak to the police, the conditions under which Mr. Cayen was held in custody, that inducements were made to Mr. Cayen and he was not taken before a Justice of the Peace in a timely fashion. The defence argued that these concerns, individually and taken together, demonstrate that voluntariness of Mr. Cayen's statements to the police have not been established beyond a reasonable doubt by the Crown.

[10] In reviewing Mr. Cayen's statements and the circumstances surrounding the taking of the statements, I have considered each of the issues raised by Mr. Cayen individually and the totality of the circumstances surrounding the taking of the statements. I am satisfied beyond a reasonable doubt that the statements were voluntarily made and that the circumstances in which the statements were taken did not have the effect of overcoming his free will. He was not deprived of his choice to decide whether to speak to the police.

BACKGROUND FACTS

[11] On January 3, 2018, the police made a decision to arrest Levi Cayen for the murder of Alexander Norwegian. A number of police officers including Cst. Tyler Haley and Cst. Steve Beck went to Levi Cayen's residence the night of January 3, 2018 to arrest him. When they arrived, they were informed that he was not there. The officers then went to Levi Cayen's girlfriend Monique Graham's house which was nearby but were unable to locate him there. They left the residence but shortly thereafter received information that Levi Cayen was at Ms. Graham's residence. Cst. Haley and Cst. Beck returned to the residence and were told that Mr. Cayen had left by the back door. Cst. Haley and Cst. Ruen Erkin located footprints in the snow that they followed to another residence. At that residence, they located Levi Cayen and Cst. Haley placed him under arrest.

[12] Levi Cayen was arrested for the murder of Alexander Norwegian just after 9:00 p.m. on January 3, 2018 in Hay River, Northwest Territories. He was advised that he was under arrest for the murder of Alex Norwegian and advised of his right

to silence, right to counsel and the police warning. Mr. Cayen indicated that he understood his rights and he wished to speak to a lawyer.

[13] Cst. Haley had an audio-recorder which he turned on shortly after the arrest. Following that point, all of the police officers' interactions with Mr. Cayen were either audio or video recorded during the relevant time frame. As such, there is no issue about what transpired during Mr. Cayen's arrest or following his arrest. The audio and video were played in court and there is a clear record of the interactions that impact on the admissibility of Mr. Cayen's statements.

[14] Mr. Cayen was transported to the R.C.M.P. detachment where after several attempts, he eventually spoke to a lawyer. After speaking with counsel, Mr. Cayen used the washroom and was then placed in the interview room at 11:23 p.m. Cst. Jack Keefe took a statement from Levi Cayen which lasted approximately 14 minutes. The statement was audiotaped and videotaped.

[15] Following the statement, Mr. Cayen was escorted to the cellblock area where his clothes were seized and he was given other clothing to wear. He was placed in a cell overnight.

[16] As part of the booking process, a C-13 Prisoner Report which records information about the accused such as his name, address, reason for arrest, etc. was completed. The Prisoner Report also includes observations about the accused's mental and physical condition as well as any medications the accused might require. There were no observations of impairment and no injuries were noted. None of the officers involved with Mr. Cayen that night observed any signs of impairment. Mr. Cayen's condition was described as placid and alert.

[17] The next day at approximately 12:38 p.m. on January 4, 2018, Mr. Cayen was removed from the cell and returned to the interview room where his statement with Cst. Keefe resumed. This statement was audio and video recorded and lasted 5 hours and 25 minutes.

[18] In that statement, Mr. Cayen eventually admitted his involvement, along with co-accused James Thomas, in the beating and robbery of Alexander Norwegian at a place known as the Portage, on an isolated road near the Old Village on the K'atl'odeeche First Nation. Mr. Cayen also admitted that he and Mr. Thomas had

left Alexander Norwegian at the scene, in -30°C weather, injured in a vehicle with the windows smashed out and having taken his parka. He also admitted that he had made an anonymous phone call from a phone booth afterwards to report an impaired driver in an attempt to get help for Mr. Norwegian.

GENERAL LEGAL FRAMEWORK

[19] The general legal framework applicable to the admissibility of statements by accused persons to persons in authority was set out by the Supreme Court of Canada in the cases of *R v Oickle*, [2000] 2 S.C.R. 3 and *R v Singh*, 2007 SCC 48.

[20] In *Oickle*, the confessions rule was restated by the Supreme Court. The Crown is required to prove the voluntariness of any statement made by an accused person to a police officer beyond a reasonable doubt. A statement will not be admissible if it is made under circumstances that raise a reasonable doubt about voluntariness. If, after considering the totality of the circumstances in light of all of the applicable factors, there is a reasonable doubt about whether the statement was made voluntarily, then the statement will not be admissible.

[21] In considering the admissibility of a statement, the protection of the rights of the accused must be balanced against society's need to investigate and solve crimes. Both objectives are fundamental to the criminal justice system and the challenge is to maintain the proper balance between the objectives.

[22] Determining the admissibility of an accused's statement involves a consideration of the voluntariness of that statement. The spectre of false confessions and the resulting miscarriages of justice that have occurred underlies the confession rule's concern with whether the accused provided the statement to the police voluntarily. A confession by an accused person can be a powerful tool for the Crown in a prosecution and as such, there is a need to ensure that any statement by the accused is reliable before it is admitted into evidence.

[23] The concern with whether a statement is voluntary is that an involuntary statement is often unreliable. The confessions rule is not just concerned about reliability but also with a broader notion of voluntariness which focuses on the protection of the accused's rights and fairness in the criminal justice system. Voluntariness, ultimately, refers to a "complex of values" which will vary in each situation according to the circumstances of a particular case. *Oickle*, paras 47, 68-70.

[24] Assessing the voluntariness of a statement is a contextual exercise which involves the consideration of the specific circumstances surrounding the taking of the statement to determine whether the will of the accused was overborne by factors such as whether the statement was the result of threats or promises by the police, whether there were oppressive circumstances, and whether the accused had an operating mind. In addition, there must not be police trickery used to obtain the statement which was so appalling it would shock the community.

[25] In determining the admissibility of a statement, these factors are considered from the standpoint of whether alone or in combination they result in the statement being involuntary. The totality of the circumstances must be considered and a key focus is the effect these factors may have had on the accused in giving a statement to the police.

ANALYSIS

[26] While Mr. Cayen has complained about some of the techniques used by the police, he has not argued that these techniques amount to police trickery which would shock the community. In a review of the evidence, there is nothing which would suggest the actions of the police officers reached that high standard.

[27] Mr. Cayen has not argued that he did not have an operating mind. A review of the videotaped statement and the evidence of the police officers who dealt with Mr. Cayen demonstrate that Mr. Cayen had an operating mind at the time the statement was taken.

[28] Mr. Cayen argues that the conduct of the police officers, that he repeatedly told the police that he did not want to speak to them, the conditions under which he was held in custody and the inducements that were made to him had the cumulative effect of rendering his statement involuntary. These arguments require a consideration of whether the police made improper inducements to Mr. Cayen and whether there were oppressive conditions that had the effect of overbearing Mr. Cayen's free will.

Statement of January 3, 2018

[29] After speaking with counsel and using the washroom on January 3, 2018, Levi Cayen was placed in the interview room at the RCMP detachment. Cst. Keefe took a statement from him that was brief, from approximately 11:23 p.m. to 11:35 p.m.

[30] Cst. Keefe testified that the statement was ended for several reasons. The statement wasn't successful, everyone was tired, it was late at night and it was felt that it would be better to take a break and allow an opportunity to rest before continuing with the statement the following day.

[31] During this statement, Cst. Keefe sat in a chair in the interview room. His tone was conversational. While Cst. Keefe testified that Levi Cayen appeared angry, he was polite in his exchanges with the officer. Levi Cayen refused to sit down and stood in the corner outside the view of the interview room camera. Levi Cayen refused to answer questions and repeatedly asked to go back to his cell. He appeared alert and did not appear to be under the influence of alcohol or drugs.

[32] During the statement, Levi Cayen was provided with water and asked if he wanted anything else. He requested pizza. Cst. Keefe offered him some pizza that the investigators were eating. Levi Cayen said he didn't want leftover pizza. Levi Cayen was provided with a couple of pieces of pizza and Cst. Keefe told him he could decide whether he wanted it or not.

[33] Early in the statement, when Levi Cayen told Cst. Keefe that he did not want to answer questions, Cst. Keefe acknowledged that he did not have to answer questions and told Levi Cayen that he had a right to silence and that was "absolutely fine." Cst. Keefe then spoke to Levi Cayen and advised him of things that he thought Levi Cayen should know about the investigation so far. Cst. Keefe told Levi Cayen that he should listen to what Cst. Keefe had to say before making a decision not to answer questions.

[34] Cst. Keefe summarized the police theory of what they believed had occurred. He then told Levi Cayen that "we're gonna go through that" and that Levi Cayen had some thinking to do. The statement ended and Levi Cayen was taken to the cell block area with the pizza and water by Cst. Haley.

[35] With respect to the January 3, 2018 statement, it was brief and there were no inducements or oppressive conditions that would cause me to conclude that the will of the accused was overborne. Levi Cayen was reluctant to speak to the police and repeatedly said that he did not want to answer questions. It is clear that Levi Cayen understood his right to silence. It is not apparent that the statement has any particular evidentiary value and Mr. Cayen does not make any admissions. The main relevance

of the January 3, 2018 statement appears to be as context for the statement taken on January 4, 2018.

Statement of January 4, 2018

[36] On January 3, 2018, once in the cellblock area, Levi Cayen's clothing was seized and he was provided with alternate clothing before being lodged in a cell for the night at 11:42 p.m.

[37] Levi Cayen was returned to the interview room on January 4, 2018 at approximately 12:40 p.m. Over the course of almost 5½ hours, he provided a statement to Cst. Keefe with the involvement of Cst. Beck.

Inducements

[38] Inducements, whether they are threats or promises, can have the effect of convincing an accused person to give a statement to the police. Not all inducements are improper. As stated in *Oickle* at para 57, the actions of the police become improper only when 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."

[39] The police are tasked with investigating crimes and one of the methods of investigation is the interview of suspects. The person who committed the crime is usually the best source of information about the crime and it has long been recognized that it is in society's interest for the police to attempt to obtain information about a crime from the best possible source of information. In attempting to obtain information, most accused persons will not spontaneously confess to a crime and the police will have to somehow convince that person to confess. *Oickle*, para 57; *Singh*, para 45.

[40] Inducements can be overt or subtle. Whether an inducement is overt or subtle is not a determining factor in deciding if it is improper. An overt inducement may be proper and a subtle inducement can be inappropriate. What is important is the effect of the inducement and other factors on the accused's decision to speak to the police. It is a contextual analysis.

[41] In considering whether the accused's will has been overborne, an important consideration is whether there is a *quid pro quo* offered by the police, whether it is a promise or a threat. It is the strength of the inducement, taking into account the accused and his particular circumstances, that is considered in the overall contextual analysis of the voluntariness of the accused's statement. *R v Spencer*, 2007 SCC 11 at para 15.

[42] 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*, para 36.

Oppression

[43] Oppressive circumstances can also result in unreliable and false confessions. If circumstances are distasteful enough, it is not surprising that an accused person might confess simply to escape those conditions. Oppressive circumstances can also cause a person to doubt their memory and to believe the accusations of the police and to eventually admit to committing a crime that they have not committed.

[44] Oppressive circumstances can arise from persistent and aggressive questioning for a long period of time and from the use of non-existent evidence. It can also arise from other factors that can create an atmosphere of oppression like denying an accused person food, clothing, water, sleep or medical attention; and denying access to counsel. *Oickle*, at paras 59-61.

[45] Oppressive circumstances can be the result of the cumulative effect of several factors, each of which on their own might not have resulted in an atmosphere of oppression. This is what is alleged by Mr. Cayen, that the cumulative effects of oppressive circumstances and subtle inducements had the effect of making it impossible for him to exercise his free will not to speak to the police.

[46] Mr. Cayen has pointed to several circumstances which he argues were oppressive and to subtle inducements which implied that his situation would change for the better if he spoke to the police.

Conditions in the Cell

[47] Mr. Cayen has argued that he was given inadequate clothing and blankets which were inappropriate for the cold conditions in the cell.

[48] Once Levi Cayen's clothing was seized, Cst. Haley provided Cst. Halstead with clothing to give to Levi Cayen which consisted of a sweater and pants. There were no socks available at the detachment to give to him and no stores were open at that time to purchase socks.

[49] Cst. Halstead described the outfit as an "outerwear set of clothing" made from a softer fleece material. Cst. Beck described the outfit that was given to Levi Cayen as a "snow camo suit" that was "a cotton polyester lined suit of some sort" that was heavier than what prisoners typically wore in cells. The RCMP policy was that prisoners are required to wear one layer of clothing while in cells.

[50] The clothing that was provided to Levi Cayen was adequate for the cells and the situation. While Mr. Cayen questioned the material and the warmth of the outfit, it is apparent that it was a long sleeve shirt or jacket and pants and I accept the description provided by Cst. Halstead that it was an outerwear set of clothing of fleece material. Cst. Halstead was the officer who provided the clothing to Levi Cayen and in the best position to describe the outfit. His description matches what can be observed on the video recording.

[51] Cst. Haley testified that he provided Mr. Cayen with a smock as the detachment was out of clean blankets. The blankets at the detachment were laundered weekly at the hospital but because of the Christmas holiday and the annual government shutdown, the laundry had not been done and the detachment had just run out of blankets. There were still smocks to be provided to prisoners which was a garment that could be worn like a poncho that was made of the same material as the blankets. While it was an unfortunate circumstance that the detachment had run out of clean blankets, Mr. Cayen was provided with a suitable alternative.

[52] Overnight, Mr. Cayen was lodged in a cell at the end of a hallway near an exit door. The temperature outside was in the -30°C range overnight. While in the cell, Mr. Cayen took some time to get settled before apparently falling asleep. He got up approximately 4 times during the night and was apparently sleeping or trying to sleep during the remainder of the time in the cell. He first got up at around 2:36 a.m. and appeared to use the washroom. He was up again at about 2:52 a.m. for 12 minutes, at 7:58 a.m. for 6 minutes and 10:41 a.m. for 10 minutes. During these times, it appears that Mr. Cayen was cold. He also tried to get someone's attention at the door of the cell. The cellblock video does not include audio so it is not clear if he yelled or said anything or banged on the door.

[53] There was no response to Mr. Cayen's attempts to get someone's attention and it is not clear from the video recording exactly what Mr. Cayen wanted. During his statement with Cst. Keefe on January 4, 2018, he said that he was trying to get someone's attention because it was cold in the cell.

[54] The cell guard and matrons who were responsible for cell block area were under instructions that only RCMP members should be dealing with Mr. Cayen. Any requests for assistance were to be conveyed to a RCMP member and the RCMP members were also responsible for providing food to Mr. Cayen. The reason for this was to limit the amount of people who dealt with Mr. Cayen prior to his statement being given.

[55] The cell guard and matrons testified that if they became aware that a prisoner needed something in this situation, that they would call a RCMP member for assistance. They each testified that they did not see or hear Mr. Cayen's attempts to get their attention and were not aware that his cell was cold.

[56] There was evidence from the guards and some RCMP members about the heating situation in the cell block area. It was generally accepted that there were times that the cell block area was cold particularly when the temperature outside got very cold like it was on January 3, 2018. There were also other times when the cell block area was very hot. The temperature also varied in different areas of the cell block. The thermostat in the cell block area was frequently adjusted by guards which resulted in inconsistent temperatures until the detachment commander, Sgt. Humbke, installed a cover which restricted access to the thermostat and the thermostat was set to a constant temperature which was between 71° and 73°F.

[57] The evidence of Cst. Keefe was that he was not aware that Levi Cayen was cold or that there was a problem with the heat in the cell until Mr. Cayen told him that he was cold during the interview. After Cst. Keefe became aware of the problem, he testified that he asked the guard to turn up the heat sometime after the interview.

[58] None of the other officers who dealt with Levi Cayen in the cellblock area were aware of the heating problem in the cell prior to Mr. Cayen giving a statement on January 4, 2018. The MCU officers were from Yellowknife and would not have been familiar with the conditions in the Hay River cell block. While Cst. Keefe had previously been posted to Hay River, he had left the community in 2012 and could

not be expected to have current knowledge regarding the conditions in the cell block. The strategy of the MCU investigative team was to limit contact with Levi Cayen to the MCU investigators so that there would be fewer individuals having contact with him prior to him giving his statement.

[59] Mr. Cayen suggested that the conditions in the cell with Mr. Cayen being provided inadequate clothing and placed in a cold cell were a deliberate attempt by the police to make his situation difficult so that he would be more inclined to provide a statement the following day. This suggestion was denied by the officers in cross-examination.

[60] There is no evidence to substantiate the allegation that there was a deliberate attempt to make the conditions that Levi Cayen experienced in cells so distasteful that he would be more amenable to providing a statement. There was an effort by the police officers to provide Mr. Cayen with suitable clothing which appeared to be more than adequate and with a smock, in lieu of a blanket, which also was suitable for the cell. The cell, unfortunately, was cold and it appears inadvertent that this was not known and did not come to the attention of someone who could adjust the temperature in the cell block area.

[61] The conditions in the cell were cold and that had an impact on Levi Cayen. At the beginning of the statement, he told Cst. Keefe that he was cold and later in the statement when Cst. Beck arrived, he told Cst. Beck that the cell was cold. As the statement continued, he did not appear to be cold during the interview.

The Accused's Physical Condition

[62] Mr. Cayen has argued that he was tired and had been denied food and water prior to giving his statement. I do not accept that Mr. Cayen was denied food or water. At no point, did Levi Cayen request food or water which was denied by the police officers. When he was brought to the cell late on the evening of January 3, 2018, Levi Cayen was provided with pizza and a bottle of water. That is apparent from the statement and the cell block video. While pizza may not have been Mr. Cayen's preferred choice of food, there is nothing to suggest that it was not suitable for Mr. Cayen to eat. In addition, he had a bottle of water and there was water available in the cell.

[63] Defence counsel noted that Mr. Cayen was not provided breakfast on the morning of January 4, 2018 and he was not fed until the statement began shortly

after noon. The provision of breakfast was something that appears to have been overlooked and not a deliberate strategy on the part of the police. Cst. Halstead had been responsible for providing the meals for James Thomas, Mr. Cayen's co-accused, who was also in custody and he was the member of the MCU assigned the task of providing meals to the accused persons in custody in this investigation. He testified that he was working on a search warrant the morning of January 4, 2018 and assumed that Cst. Keefe, who was going to be taking the statement from Levi Cayen, would be responsible for providing Mr. Cayen with a meal.

[64] Mr. Cayen was not provided breakfast which was typically provided at around 8:00 or 9:00 a.m. Mr. Cayen was up for a few minutes around 8:00 a.m. but was otherwise sleeping or attempting to sleep around that time. Once Mr. Cayen was brought into the interview room on January 4, 2018, he was offered food.

[65] It is unfortunate that no one checked with Mr. Cayen to see if he wanted breakfast, that should not generally happen. However, it is not apparent that Mr. Cayen was hungry. He did not eat the pizza he was provided. On January 4, 2018, Cst. Beck brought Mr. Cayen coffee and food during the statement. Mr. Cayen struggled to eat the burger he was provided saying "he did not have much of an appetite."

[66] Levi Cayen also said that he had a "shitty night." That would not be surprising. Mr. Cayen was a 20 year old indigenous man who had just been arrested for murder. As the interview revealed, he had a lot on his mind. While he had been involved with the police before, this was much more serious than the other times he dealt with the police. Mr. Cayen was obviously concerned about the charges; he was also concerned about his relationship with his girlfriend which appeared to be unstable. Mr. Cayen was someone with a lot on his mind and it would be natural that this affected his hunger and his ability to sleep.

[67] While Mr. Cayen claimed in the statement that he could not sleep, the video recording of his cell showed that Mr. Cayen appeared to sleep or attempt to sleep for over 12 hours, getting up for periods that totalled less than half an hour. His sleep was not disturbed by the police and he was not denied sleep.

[68] As well, during the interview, Levi Cayen's general physical condition appeared good. While he may have been tired, he was alert and responsive throughout the 5½ hour statement. In the first portion of the statement, Mr. Cayen

is laying on the floor and it not apparently in distress regarding the cold or lack of food. He appears somewhat relaxed.

[69] When Mr. Cayen was promised socks and that the heat would be addressed and provided food and coffee during the interview, there is no evidence that it was intended as an inducement and there was no *quid pro quo*. The approach of Cst. Keefe and Cst. Beck was that this would be provided to Levi Cayen and there is no mention of any expectation of Levi Cayen providing anything in return. Cst. Keefe told Mr. Cayen repeatedly that he did not have to answer questions and that it was his choice whether he said anything or not.

Conduct of the Interview

[70] Mr. Cayen also argues that the approach of Cst. Keefe during the interviews of January 3 and 4, 2018 raised concerns. He alleges that Cst. Keefe was confrontational, implied things would change if Levi Cayen spoke to the police, and he fabricated evidence.

[71] Levi Cayen stated several times to Cst. Keefe that he did not want to answer questions on January 3 and 4, 2018. During the January 3, 2018 interview, Mr. Cayen complains that Cst. Keefe told him that there was going to be an interview the next day even though he had expressed his right to silence. This continued the next day when Cst. Keefe continued to speak to Levi Cayen even though he repeatedly said that he did not want to answer questions and wanted to go back to his cell.

[72] Defence counsel referred to the case of *R v Guimond*, [1999] M.J. No. 214 (KB), for the proposition that when a person asserts the right to silence, the police are obligated to stop questioning the suspect.

[73] *Guimond* does not accurately represent the state of the law. The assertion by an accused person of their right to silence or that they do not want to speak to the police does not trigger an obligation on the police to stop an interview or to stop asking questions.

[74] The Supreme Court specifically addressed the right to silence in *Singh*. Voluntariness also includes a consideration of an accused's right to remain silent when being questioned by the police. These considerations are intertwined. A person has the right to remain silent and does not have to answer questions from

police officers. However, this is not a right not to be spoken to by police officers and it does not mean that the police cannot speak to an accused person in furtherance of their role in investigating crimes. *Singh*, at para 28.

[75] Cst. Keefe continued to speak to Levi Cayen and told Mr. Cayen on January 3 and 4, 2018 that there were things he wanted to tell Mr. Cayen and things that Mr. Cayen should know before making any decision not to answer questions.

[76] On January 3, 2018, Cst Keefe told Levi Cayen:

Keefe: I think there's some things uh that you need to know, Levi. Okay?

Cayen: I'm not answering your questions. Can I go back to my cell please?

Keefe: Yeah, you don't have to answer uh my questions. And uh you have a right to silence and that's absolutely fine. And uh I'm perfectly uh perfectly good with that. Okay? However, um there are some things that I think you should know about uh our investigation so far and uh, and sort of what we know....

And later:

Keefe: So before you, really before you make the decision not to answer my questions you should really hear what I have to say. And once I tell you about our investigation then you can make an informed decision. About whether or not you want to talk to me or not....

[77] Cst. Keefe summarized the police theory of what they believed had occurred. Cst. Keefe told Levi Cayen that "we're gonna go through that" and that Levi Cayen had some thinking to do.

[78] Cst. Keefe testified that the statement was ended for the night because it was not successful, everyone was tired and it was late at night. Cst. Keefe felt that it would be better to take a break and get some rest before continuing with the statement the following day.

[79] Cst. Keefe's approach on January 4, 2018 was very similar to the night before. He repeatedly acknowledged that Levi Cayen did not have to answer questions but also stated that he wanted to tell Levi Cayen things about the investigation and the information that the police had before so that Mr. Cayen could make an informed decision about whether he wanted to answer questions.

[80] Persistence by the police in continuing to speak to an accused person is permissible to an extent. There is a risk of persisting in questioning an accused person who repeatedly asserts their right to remain silent and that risk increases the longer the police continue questioning the person:

Under both common law and *Charter* rules, police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities.

Singh, at para 47.

[81] In this case, Cst. Keefe was persistent but he was not aggressive or confrontational in speaking with Levi Cayen. His tone was calm and matter of fact. While his manner could be considered authoritative, he did not raise his voice and was polite and respectful to Mr. Cayen.

[82] While Levi Cayen repeatedly said that he was not answering questions, Cst. Keefe correctly noted that he was not asking Mr. Cayen questions but telling him about the police investigation.

[83] Shortly after this exchange which was early in the interview, Cst. Beck entered the interview room with food and coffee for Mr. Cayen. Cst. Beck was introduced into the interview because he had dealt with Levi Cayen in the past and had a rapport with him. Cst. Beck's approach with Mr. Cayen was friendly and conversational and he expressed understanding and sympathy to Mr. Cayen about the pressures and challenges that Mr. Cayen had been experiencing generally in his life. Cst. Beck was genuinely upset about the situation Levi Cayen was in.

[84] Despite this genial approach, Cst. Beck was not there as a confidant for Levi Cayen. Cst. Beck was present as a police officer and it was apparent during his conversation with Levi Cayen that this was his role; he did not pretend otherwise. He spoke to Levi Cayen of different times he had dealt with Mr. Cayen and other youth as a police officer. Cst. Beck was not actively involved in the investigation and he did not say anything to Mr. Cayen about speaking to the police or promise him anything. It is not apparent that Mr. Cayen viewed Cst. Beck's presence as an inducement or that he had any belief that things would go better for him because Cst. Beck was there.

[85] Mr. Cayen's suggestion that the police implied that things would change if he talked is not borne out by the evidence. There was no suggestion by Cst. Keefe or another officer that if Levi Cayen spoke to the police, things would go better for him. Early in the statement, Cst. Keefe told Levi Cayen:

...you have to understand that right now, you will be charged with the murder of Alex Norwegian and this isn't like other charges. You're not gonna be given a piece of paper and go home tonight...

[86] Later in the statement, Cst. Keefe told Levi Cayen:

... you asked me about Tyler, hey, and ah and you're in a different situation than Tyler is, alright and ah you just have to understand that whether you talk to me or not has no bearing. I don't know where this investigation's gonna go right now and ah you know right now, you're you're arrested and right now you're gonna be charged and that's that's where we're at okay, and ah and no matter what you say to me that's that's not gonna change okay...

[87] Levi Cayen claims that Cst. Keefe telling him that James Thomas was "looking pretty" was fabricated evidence designed to induce Levi Cayen to speak. In assessing this comment, it is important to consider the entire context of what was said. Cst. Keefe was telling Levi Cayen about some of the information the police had gathered. The police had obtained a number of statements including from Deirdre Fraser and Tyler Cayen. By this point, Sasha Cayen, Tyler Cayen and James Thomas had all been arrested for their roles in the death of Alexander Norwegian.

[88] Cst. Keefe told Levi Cayen about what Deirdre Fraser, the girlfriend of James Thomas, had said. Deirdre Fraser was not present during the planning and execution of the robbery. Her statement related what she had been told about the robbery of Alexander Norwegian by James Thomas and others.

[89] The information the police had received from Deirdre Fraser implicated Levi Cayen in the death of Alexander Norwegian and minimized the involvement of James Thomas:

Keefe: If there's more to this, then I wanna know if there's more to this story cuz Jimmy also says he wanted to go back

Cayen: What do you mean go back?

Keefe: He wanted to go back to help Alex, that's what he says so he's ah, you know what, he's looking pretty, you know he was there and he has some responsibility and that's fine but he's also looking, you know, he's also presenting that that ah you're the ringleader here, right, you guys planned to to lure him out there

Cayen: I didn't plan shit, I dunno

[90] While Cst. Keefe suggesting that James Thomas was “looking pretty” was probably not the best way to phrase his assessment of the situation, it was not inaccurate. As the interview went on to demonstrate, the evidence gathered by the police and presented to Levi Cayen suggested that he played a significant role in the planning and execution of the robbery of Alexander Norwegian which resulted in Mr. Norwegian's death. The statement of Tyler Cayen implicated Levi Cayen in the robbery and beating of Alexander Norwegian. The statement of Deirdre Fraser had implicated Levi Cayen and James Thomas but Ms. Fraser also told the police that James Thomas had told her he wanted to go back and help Alexander Norwegian.

[91] An important part of the interview with Levi Cayen was the evidence presentation. Cst. Keefe played clips of the statements of Deirdre Fraser and Tyler Cayen for Levi Cayen to hear. This was an effective method of engaging Levi Cayen in the interview. Despite Mr. Cayen's reluctance to speak, he was clearly interested in hearing what the others had told the police.

[92] During the playing of a clip of Tyler Cayen's statement, Levi Cayen was interested and engaged. When Cst. Keefe had trouble playing the statement on a computer, Levi Cayen reached in to help him play the statement. During the playing of Tyler Cayen's statement, Levi Cayen intently watched the video and spoke up during the statement.

[93] When Tyler Cayen, in his statement, said that Levi and Jimmy had told him to keep his mouth shut, Levi Cayen spontaneously said “I didn't say anything like that.” Later, when asked, Levi Cayen agreed to continue watching the statement. Throughout the playing of the statement, Levi Cayen interjected often to disagree with what Tyler Cayen was saying or to add his own comments.

[94] During the interview, Levi Cayen looked at pictures presented by Cst. Keefe and confirmed that one was a picture of a bat that was used. For the picture, Levi

Cayen took the picture in his hand without prompting and looked at it. He also volunteered information without being asked.

[95] Following the evidence presentation, Levi Cayen began to speak about his involvement in the robbery of Alexander Norwegian. It was during this part of the interview that Cst. Keefe adopted a more question and answer format. Mr. Cayen answered most of Cst. Keefe's questions.

[96] It was clear that after hearing the statements of Tyler Cayen and Deirdre Fraser, Levi Cayen felt he was being blamed and that others were minimizing or denying their involvement. Levi Cayen stated that he was being "thrown under a fucking bus here."

[97] A consistent theme in the interview was Mr. Cayen's belief that he was being blamed by the others for what happened. Near the end of the interview, Levi Cayen stated:

The only reason why I'm telling you this is because of the way they all said it, they all fucking threw me under the bus like I did it.

[98] It was also clear that Levi Cayen understood the implications of speaking to the police. At one point, he stated he was "scared now because you guys are gonna use all this against me."

[99] Overall, while there were factors like the cold and the delay in providing food to Mr. Cayen that existed, I am not satisfied that they had the effect of raising a reasonable doubt about the voluntariness of Mr. Cayen's statement. Mr. Cayen chose to speak to the police because he felt that the others involved were trying to place the blame on him. That factor stood out more than anything in Mr. Cayen's interview with the police and it was this concern that motivated him to make the statement to the police.

Delay in going before the Justice of the Peace

[100] Section 503 of the *Criminal Code* requires that the police take an accused person before a justice without unreasonable delay and within 24 hours of arrest. Mr. Cayen argues that the police delayed taking him before a justice of the peace in order to obtain a statement which was unreasonable in the circumstances and could

have occurred earlier. Mr. Cayen has not alleged a breach of his *Charter* rights or claimed that he was arbitrarily detained as a result of this delay.

[101] In *R v Storrey*, [1990] 1 S.C.R. 241, one of the issues the Supreme Court of Canada considered was whether the detention of the accused for 18 hours for the purpose of furthering the police investigation before charging him was an arbitrary detention. The Supreme Court held that the time between detention and charging the accused was not unreasonable in the circumstances of the case noting that section 454(1) (now s. 503) requires that the police must take the person before a justice without unreasonable delay and within 24 hours which is the outer limit of the time span.

[102] It is not unreasonable for the police to attempt to obtain a statement from an accused person before bringing him before a justice. There is nothing improper with the police wanting to achieve a legitimate investigative objective prior to taking an accused person before a justice provided that they do not unduly delay attempting to do so.

[103] Levi Cayen was arrested at approximately 9:00 p.m. on January 3, 2018. He was brought before a Justice of the Peace around 7:00 p.m. the following day, approximately 22 hours later. Cst. Keefe acknowledged that it was the RCMP's intent to obtain a statement from Mr. Cayen prior to bringing him before a justice.

[104] Once Levi Cayen was at the detachment, there were attempts to have him speak with counsel as he requested. This took some time before it was accomplished as counsel could not immediately be reached. Once Levi Cayen spoke to counsel, he was brought to the interview room at 11:23 p.m. before being lodged in a cell for the night at 11:42 p.m. Mr. Cayen slept or appeared to sleep most of the night and morning of January 4, 2018. The statement commenced just after 12:30 p.m. and lasted 5½ hours, ending just after 6:00 p.m. Following the statement, Mr. Cayen was brought before a justice expeditiously and within an hour of the end of the statement.

[105] In the circumstances, attempting to obtain a statement from Mr. Cayen following his arrest was a legitimate investigative objective and the time it took to do so was not unnecessarily prolonged. While Mr. Cayen was brought before a Justice of the Peace approximately 22 hours after his arrest, the delay was not unreasonable.

CONCLUSION

[106] Considering the evidence, I am satisfied beyond a reasonable doubt that Levi Cayen's statement was voluntary. The circumstances surrounding the taking of the statement were not ideal; they rarely are. However, I have carefully considered the circumstances surrounding the taking of the statements from Levi Cayen and concluded that there were no inducements or oppressive circumstances that had the effect of overcoming Mr. Cayen's free will to decide whether to speak to the police or not.

[107] I have also considered the totality of the circumstances and considered whether the cumulative effect of all of the factors present on January 3 and 4, 2018 impacted on Mr. Cayen's ability to exercise his free will. In considering the circumstances of the statement provided by Mr. Cayen, I am satisfied beyond a reasonable doubt that the statement was voluntarily made. Mr. Cayen chose to speak to the police because he felt that the others involved were trying to place the blame on him. In making this decision to speak to the police, Mr. Cayen was aware that the statement could be used against him. He was not deprived of the choice to speak to the police and his will was not overborne.

[108] For these reasons, I have concluded that Mr. Cayen's statement was voluntary.

S.H. Smallwood
J.S.C.

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S-1-CR-2018-000137

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HIS MAJESTY THE KING

- and -

LEVI CAYEN

**RULING ON *VOIR DIRE* INTO THE ADMISSIBILITY
OF THE ACCUSED'S STATEMENTS**
