

REGINA V. BELANGER

40 C.C.C. (2d) 335

Ontario High Court of Justice
Pennell, J.

February 28, 1978

Evidence — Confessions and admissions — Person in authority — Accused and another arrested for murder — Common law wife of other person allowed by police to see accused and telling accused that her common law husband would be released if accused confessed — Accused confessing to her and again to police in her presence — Whether she was capable of being person in authority — Whether offer of immunity to other person capable of being inducement — Whether statement proved voluntary — Whether subsequent statements to police following caution where others not present inadmissible.

Evidence — Confessions and admissions — On voir dire accused testifying he confessed to murder as part of plan made with two others — Plan was that if one of the others was arrested accused would confess but third party who was actual killer would testify for accused under protection of Canada Evidence Act, R.S.C. 1970, c. E-10 — Whether existence of plan constituting inducement rendering statement inadmissible.

The accused and one Sp were arrested for murder. Following a lengthy interview of Sp by the police at which Sm, his common law wife was present, Sm was allowed to talk to the accused. Sm, although not instructed to convey any message to the accused, testified that she may have told him that if he confessed Sp would be released. The accused then told her that he did the killing (statement No. 1). The accused was then interviewed by the police in the presence of Sp and Sm, cautioned, and gave a second oral inculpatory statement although he was told by Sp that he need not make a statement (statement No. 2). Sp and Sm were then removed and the accused was cautioned again. He then wrote out a confession (statement No. 3). The accused was then taken back to the cells and in response to a question from a police officer gave an explanation for the killing (statement No. 4). The accused testified on the voir dire that he gave the statements because of a pre-arranged plan which was that if Sp was arrested, the accused would confess to the murder although a third party who was with them the night of the killing had actually done the killing. According to the plan this third person would then testify at the accused's preliminary hearing under the protection of the Canada Evidence Act, R.S.C. 1970, c. E-10, and admit that he actually killed the deceased. The accused also testified that he confessed because of his affection for Sm, whom he regarded as a mother to him so as to gain the release of Sp. On the trial of the accused for murder, held, statements Nos. 1 and 2 were inadmissible, but statements Nos. 3 and 4 were admissible.

Sm's indication to the accused that if he confessed Sp, her common law husband, would be released could be construed as an offer of immunity to Sp. A promised benefit such as this to a person other than the accused may constitute an inducement and there was a reasonable doubt that this inducement operated on the mind of the accused so as to induce him to make the statement to Sm. Further, in the circumstances Sm could be considered a person in authority. The test whether or not one is considered to be a person in authority is a subjective one and the accused could reasonably believe that Sm was conveying a message from the police as to the promise of immunity and was, therefore, acting on their behalf. It did not matter that she was not instructed by the police to convey any information; the police provided her with the opportunity and her words to the accused were capable of arousing in him the hope that the police would make good their promise if he confessed. The Crown had therefore failed to prove that the first statement was voluntary. This was so notwithstanding the accused's testimony that the main inducement for this statement and the others was the existence of the pre-arranged plan which plan was in law not an inducement capable of rendering the confessions involuntary. Once it is shown that an improper influence, such as that by Sm in this case, may have been a material inducement the statement must be excluded. With respect to the second statement, notwithstanding it was preceded by a caution the presence of Sp and Sm may well have caused the inducement which rendered inadmissible the first statement

to act on the mind of the accused and it too should be excluded.

However, the third statement made when only the police officers were present was admissible. It was preceded by a caution and was written by the accused himself. Further, the accused had a lengthy record and testified that he realized the consequences which could flow from a written confession. As to the fourth statement, although it was not preceded by a caution the evidence indicated it was made casually in response to a question and was proved voluntary. Accordingly, it was admissible.

[R. v. Wolbaum, [1965] 3 C.C.C. 191, 50 W.W.R. 405; R. v. Jackson (1977), 34 C.C.C. (2d) 35, 1 B.C.L.R. 380; R. v. Weighill (1945), 83 C.C.C. 387, [1945] 2 D.L.R. 471, 61 B.C.R. 140, [1945] 1 W.W.R. 861; R. v. Myles (1922), 40 C.C.C. 84, [1923] 2 D.L.R. 880, 56 N.S.R. 18; R. v. Pettipiece (1972), 7 C.C.C. (2d) 133, 18 C.R.N.S. 236, [1972] 5 W.W.R. 129; R. v. Towler, [1969] 2 C.C.C. 335, 5 C.R.N.S. 55, 65 W.W.R. 549; R. v. Demenoff, [1964] 1 C.C.C. 118, 43 W.W.R. 610; affd [1964] 2 C.C.C. 305, [1964] S.C.R. 79, 41 C.R. 407; Perras v. The Queen (1973), 11 C.C.C. (2d) 449, 35 D.L.R. (3d) 596, [1974] S.C.R. 659, 22 C.R.N.S. 160, [1973] 5 W.W.R. 275; R. v. Cleary (1963), 48 Cr. App. R. 116; R. v. Smith, [1959] 2 Q.B. 35, 43 Cr. App. R. 121; Boudreau v. The King (1949), 94 C.C.C. 1, [1949] 3 D.L.R. 81, [1949] S.C.R. 262, 7 C.R. 427, *refd to*]

Evidence — Confessions and admissions — Accused while being transported by police making inculpatory statements — Accused not cautioned — Police unable to record their questions and all of accused's answers — Due to inadequate recording of conversation and lack of caution Crown failing to prove statements voluntary.

RULING on the accused's trial for murder as to the admissibility of statements made by the accused.

A. Berzins, for the Crown.

L. M. Shore, for accused.

PENNELL, J. :— The indictment in this case charges the accused with the murder of one, Andre Picotte. In the course of the trial, a question arose whether a series of statements allegedly made by the accused were admissible. There followed a lengthy voir dire. Upon the conclusion of the hearing, I thought it proper to announce forthwith my rulings in order to expedite a long-drawn trial while postponing an exposition of the reasons which rendered the rulings necessary.

I think at right at the outset to repeat the principle upon which an examination of the admissibility of these alleged statements must proceed. The principle is, as I view the judgment, set forth succinctly in the case of R. v. Wolbaum, [1965] 3 C.C.C. 191, 50 W.W.R. 405.

On p. 199, Chief Justice Culliton observed:

It has been firmly established that the law governing admissibility of a statement by an accused is as was stated by Lord Sumner in Ibrahim v. The King, (1914) A.C. 599 at pp. 609-10: [page337]

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

On p. 200, the Chief Justice continues:

The law, too, is well settled that the presence or absence of warning will not of itself determine the admissibility of a statement. It is one of the factors to be considered, the importance of which will depend upon the circumstances in each case; Boudreau v. The King, *supra*. Nor will the mere asking of questions necessarily amount to inducement or persuasion,

such as would render the statement inadmissible: *Prosko v. The King*, supra, and *R. v. Bellos*, 48 C.C.C. 126, [1927] 3 D.L.R. 186, [1927] S.C.R. 258.

The primary and only question for determination is, were the statements attributed to the accused freely and voluntarily made?

The onus rests upon the Crown to show beyond a reasonable doubt the voluntariness of the alleged statements.

I confine myself to such a brief statement of the facts as is necessary to illustrate and render intelligible the rulings which I shall hereafter set out.

At around 10:10 p.m., April 29, 1976, the accused and Leslie Sparrow were arrested for the murder of Andre Picotte. They were taken to the Gloucester Police Station. Yvonne Smith, the common law wife of Leslie Sparrow, arrived at the station at approximately 11:15 p.m. She requested and was allowed to see and to have a private conversation with Leslie Sparrow. Mrs. Smith was allowed to remain in the boardroom during the questioning of Sparrow by Sergeants Wincherook and Stinson -- a period which lasted some 70 minutes. Although there is some dispute on the matter, I am satisfied that the police allowed Yvonne Smith to remain in the hope that she would exert some influence over Sparrow. Indeed, she pleaded with Sparrow to co-operate with the police at various times during the questioning. During this 70-minute questioning, it was indicated to Sparrow that there was no point in keeping the two persons in jail when only one pulled the trigger. Sergeant Wincherook admitted that he told Sparrow, in Smith's presence, that if Sparrow gave a written statement and was not otherwise implicated, he would not be charged. Sparrow refused to give any information; in fact he denied any knowledge of the killing.

At the end of this 70-minute period, Yvonne Smith requested to see the accused. Her request was acceded for two reasons:

- (1) to appease Leslie Sparrow; i.e.; Sergeants Wincherook and Stinson were prepared to comply with any reasonable request in the hope that Sparrow would in turn co-operate and give a statement. Both Wincherook and Stinson frankly admitted [page 338] that without a statement, they had insufficient information to charge either Sparrow or Belanger.
- (2) the police were hopeful that Yvonne Smith might, because of her relationship to the accused, exert her influence to obtain information from the accused. It should be noted that no prior attempt had been made to question the accused.

Smith was taken to the cells by Sergeant Wincherook. At her request, she was allowed to see the accused alone. She was not instructed to convey any message to the accused. At the time she visited the accused, Yvonne Smith was distraught and crying. She was concerned to get her common law husband home -- a concern which she communicated to the accused. The conversation between Smith and the accused lasted only three to four minutes. Smith testified that she may have told the accused that the police had told her that if the accused confessed, then Sparrow could go home. According to Smith, the accused said "OK I did it." Smith asked him "Why?" The accused replied: "It was either you or that guy."

I pause here to make this observation. There is evidence that Yvonne Smith had collapsed at her apartment house as a result of taking an overdose of tranquillizers; that word of her condition came to the attention of Sparrow and the accused who were at the apartment of a friend; that the two immediately left with the intention of rendering aid to Yvonne Smith; that on the way they were in a minor automobile accident involving the deceased, Andre Picotte; that words followed and then shots. I assume without deciding that the words attributed to the accused, namely, "It was either you or that guy" refer to the circumstances which I have set out above.

With this observation, I resume the narrative of the circumstances giving rise to the voir dire.

Yvonne Smith then requested the accused to give a statement to the police. He agreed. Thereupon Smith went

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authority.

In the circumstances of this case, the questions that arise are the following:

- (1) Are Mrs. Smith's words and actions capable in law of being an inducement?
- (2) Did the inducement operate on the mind of the accused in the sense that the accused felt moved to make a statement?
- (3) Was the inducement held out by a person in authority?

In my view, Yvonne Smith's indication to the accused that if he confessed, then Sparrow could go home, can be construed as an offer of immunity to Sparrow, in return for the accused's confession. There is convincing authority for the proposition that a promised benefit to one other than the accused can constitute an inducement: see *R. v. Jackson* (1977), 34 C.C.C. (2d) 35, 1 B.C.L.R. 380; *R. v. Weighill* (1945), 83 C.C.C. 387, [1945] 2 D.L.R. 471, 61 B.C.R. 140; *R. v. Myles* (1922), 40 C.C.C. 84, [1923] 2 D.L.R. 880, 56 N.S.R. 18.

On the evidence adduced in the voir dire, I do not believe that the relationship between the accused and Yvonne Smith approached the bond of a mother-son relationship. She is 35 years old; the accused is 26. Yvonne Smith testified that she had no authority over the accused; that although she confided in the accused, he never discussed things of a personal nature with her. The accused probably had an affection for Yvonne Smith but I entertain a reasonable doubt whether it was of strength sufficient to induce the accused to make the alleged statements.

Having decided that Mrs. Smith's words and actions were capable of being an inducement, which inducement may have moved the accused to confess, it must be determined whether Mrs. Smith falls into the category of a person in authority. Whether or not one is considered to be a person in authority must be considered subjectively from the point of view of the effect on the mind of the accused: see *R. v. Pettipiece* (1972), 7 C.C.C. (2d) 133, 18 C.R.N.S. 236, [1972] 5 W.W.R. 129; *R. v. Towler*, [1969] 2 C.C.C. 335 at p. 339, 5 C.R.N.S. 55, 65 W.W.R. 549; *R. v. Demenoff*, [1964] 1 C.C.C. 118, 43 W.W.R. 610; affirmed [1964] 2 C.C.C. 305, [1964] S.C.R. 79, 41 C.R. 407; *Perras v. The Queen* (1973), 11 C.C.C. (2d) 449, 35 D.L.R. (3d) 596, [1974] S.C.R. 659.

Mrs. Smith's statement to the accused that the police had said that if he confessed, then Sparrow could go home, could reasonably be viewed by the accused, on the facts, as a message from the police. It was reasonable for the accused in the circumstances to believe that Mrs. Smith was giving him this information with the approval and acquiescence of the police; in short, that she was holding out the promise of Sparrow's immunity on behalf of the police. Yvonne Smith could, therefore, fall within the term of a "person in authority". It matters not that she was not instructed by the police to convey this information; the police provided her with the opportunity and her words to the accused were capable of arousing in him the hope that the police would make good their promise if he confessed: see *R. v. Demenoff*, supra, *R. v. Weighill*, supra, at pp. 390-1; *R. v. Cleary* (1963), 48 Cr. App. R. 116.

I was not satisfied beyond a reasonable doubt that statement No. 1 was voluntary. I, therefore, ruled it inadmissible. In so ruling, I am not unmindful of the accused's testimony that all six statements were mainly induced by another influence, viz., pursuant to the alleged preconceived plan between himself and Donald Graydon. "Once it is established that the improper influence may have been a material inducement it cannot be said that the confessions have been proven to be voluntary and they must therefore be excluded": per Davey, J.A., dissenting, in *R. v. Demenoff*, [1964] 1 C.C.C. 118 at p. 132. An appeal to the Supreme Court of Canada was dismissed for lack of jurisdiction; [1964] 2 C.C.C. 305 at p. 306 the Court states:

In the case as bar, the majority and minority disagreed with respect to the admissibility, as a voluntary statement, of a confession of guilt ... It does not appear from the reasons ... that this disagreement is based on a conflicting view of the law governing the admissibility of confessions ... the difference of opinion is attributable to different inferences being drawn ... from the accepted evidence relevant to the voluntariness of the confession.

My concern here is with the inference to be drawn from the facts.

I hold, then, that statement No. 1 is inadmissible.

It may clarify my other rulings, if, in each instance, I reproduce, however shortly, the circumstances immediately surrounding the making of the statement.

Statement No. 2

The accused was taken from the cells into the boardroom at 1:15 a.m. on April 30, 1976. Sergeants Stinson and Wincherook were present. Sergeant Stinson warned the accused that the police were investigating a homicide that the accused should disregard any threat or inducement held out to him by any person in authority; that notwithstanding that the accused may have made a statement he need not repeat it and need say nothing at all but that anything he did say could be given in evidence. As soon as this warning was completed Leslie Sparrow and Yvonne Smith were brought into the boardroom. This procedure was followed because Sparrow had requested to speak to the accused. The accused was then advised [page342] that Sparrow had refused to give the police any information. Sergeant Stinson told the accused that the police did not wish to get anyone in trouble who was not involved but that they would like to know what had happened and who was responsible. Sergeant Stinson then began to review the facts disclosed by the police investigation. At one point Sparrow interjected words to the effect: "they can put our cars together." During this review of the facts in the possession of the police, the accused interrupted and said:

"I done it." A conversation followed between Sparrow and the accused wherein Sparrow asked: "Do you know what you're doing?"

Accused: Yeah.

Sparrow: You don't have to do this if you don't want to; I'll fight it all the way with you.

Accused: No, I done it. Go ahead and tell them.

Sparrow: Are you sure? Are you sure?

At this point, Smith and Sparrow were led out of the boardroom.

Although these statements were preceded by a caution, the presence of Yvonne Smith and Leslie Sparrow may well have caused the inducement which rendered inadmissible the first statement to continue to act on the mind of the accused: see *R. v. Smith*, [1959] 2 Q.B. 35, 43 Cr. App. R. 121.

I was disinclined to believe that the inducement was still operative, especially in view of Sparrow's assurance that the accused need not confess. However, I did have some doubt, and out of an abundance of caution, I must say that I was not satisfied beyond a reasonable doubt that the statement was voluntary. I therefore ruled it inadmissible. I add only this. In my view, the police procedure was disfigured by an unusual circumstance: the presence of Yvonne Smith and Sparrow. When I talk of disfigurement, I exclude the slightest suggestion of conscious impropriety on the part of Sergeants Stinson and Wincherook.

Statement No. 3

To continue the sequence of events, Yvonne Smith and Sparrow, as I have pointed out above, were led out of the boardroom. The accused and Sergeants Stinson and Wincherook remained in the room. Sergeant Stinson then formally charged the accused with murder. Having done so, he proceeded to caution the accused in these terms:

It is my duty to advise you that if you have spoken previously to any person in authority regarding this matter; and if any threats, promises or inducements were made to you prior to this time as a result of which you felt compelled to make any statement, I wish to warn you that whatever you may have said on any previous occasions to any person in authority you are not now obliged to repeat. Nor are you obliged to say anything further but whatever you may now say may be taken down in writing and may be given in evidence. [page343]

(Q) Do you understand the warning? -- (A) Yeah.

(Q) Do you wish to give a statement? -- (A) Yeah.

The accused then asked Sergeant Stinson if he could write the statement himself. He was allowed to do this and he wrote a half-page statement (ex. A on this voir dire) wherein he admitted killing Andre Picotte. The accused testified that the reason he chose to write his own statement was because he did not want to get mixed up. After the accused finished writing the statement, he handed it to Sergeant Stinson who read it, then asked certain questions to clarify what the accused had written. (These questions also form part of ex. A.) The statement was completed, read over and signed by the accused at 2:15 a.m. April 30th.

There is a dispute between the accused and the two police officers as to what was said immediately before and after the making of the statement. The accused testified that he made the statement because the police promised him that if he wrote and signed a confession, Sparrow would be released. He further testified that the police told him that he might as well sign the statement because they knew that he had killed Picotte. Both police officers deny these allegations.

This conflict in the evidence, I resolve in favour of the police. I am satisfied that no such statements were made to the accused.

The accused, as already noted, is 26 years old. He has spent most of his adult life in prison for crimes of a serious nature. In cross-examination, he admitted that on each prior charge, he confessed. I wish to make it meticulously plain that the admission of prior confessions cannot be used in any sense of the word as evidence tending to show the confession in controversy (statement No. 3) was free and voluntary. The accused acknowledged that he realized the consequences that could flow from a written confession. This realization together with the repeating of the caution, the accused's request to write his own statement and an anxious consideration of the whole of the evidence adduced on the voir dire satisfied me beyond a reasonable doubt that the atmosphere of inducement which had rendered inadmissible the previous statements was spent and that the Crown had discharged the onus of proving that statement No. 3 was freely and voluntarily given in the sense that it was not obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority.

I, therefore, ruled it admissible.

Statement No. 4

After the accused had read and signed his written statement (statement No. 3), he was taken back to the cells by Sergeants Stinson and Wincherook. As already mentioned, while he was being put into a cell, Sergeant Stinson asked: "Why did you shoot him; were you just trying to scare him"? [page 344]

Accused: No, I was trying to kill him.

Stinson: Why?

Accused: He threw stones at Les' car.

No caution preceded this statement. As was stated by Kerwin, J., in *Boudreau v. The King* (1949), 94 C.C.C. 1 at p. 3, [1949] 3 D.L.R. 81, [1949] S.C.R. 262:

The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected; Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.

Despite the absence of a warning, I was satisfied that the statement was voluntary. It followed the written confession by minutes. The evidence indicates that the statement was made casually in response to the question. The only explanation the accused could offer at trial for the statement was that he had made it so that the police would believe that he had killed Andre Picotte. I was satisfied beyond a reasonable doubt that the statement was voluntary.

I, therefore, ruled it admissible.

Statements Nos. 5 and 6

I deal with these two statements together.

At 3:10 a.m., April 30, 1976, the accused was removed from the cells by Sergeants Stinson and Wincherook. He was handcuffed and placed in the rear seat of a police vehicle. The accused was not cautioned. He was driven to the area of the shooting where he was asked to trace the route followed by the Sparrow vehicle on the night of the killing. He indicated the location where the collision between the Sparrow and Picotte vehicles had occurred. The accused then stated: "I told Les to pass him because I was mad because he threw stones at Les' car. I fired four times." He was asked about the gun, and he indicated that he had thrown it over a bridge on Montreal Rd. The accused remarked that he was sorry about the killing; that he had fired the shots because he had a temper. The accused was later returned to the cells.

So much for statement No. 5.

On April 30th at approximately 2:25 p.m. the accused was removed from the cells and transported to the office of the Justice of the Peace by Sergeants Stinson and Wincherook. He was not cautioned on this occasion. On the way to the office of the Justice of the Peace, the accused was instructed that efforts to recover the gun had been unsuccessful. At the officers' request, he led them to a location distant some three feet from the location that he had previously indicated. He stated that he had definitely thrown the gun into the river and that he had also thrown in a box of bullets. He described the gun as having a white-coloured handle. [page 345]

Both statements Nos. 5 and 6 were recorded by Sergeant Wincherook. However, none of the questions were recorded because as Wincherook explained, he was driving and trying to write at the same time. Neither Sergeants Stinson nor Wincherook could recall the specific questions put to the accused. Sergeant Wincherook frankly admitted that because of the circumstances prevailing when he recorded the statement, he was unable to record all of the remarks made by the accused. He could not recall the entire conversation with any certainty.

I am satisfied that both Sergeants Stinson and Wincherook acted in good faith in respect to statements Nos. 5 and 6. However, as stated by Mr. Kaufman (now Mr. Justice Kaufman) in his book: *The Admissibility of Confessions*, 2nd ed. (1974), p. 88:

When questions are asked it is important to keep a complete record of all questions and answers, and to avoid the tendency to reduce to writing only that part of a statement which is clearly inculpatory.

Here, the inadequate recording of what was said by both the accused and the police, together with the absence of a caution caused me to hold that the Crown had failed to establish that the statements were free and voluntary.

I accordingly ruled statements Nos. 5 and 6 inadmissible.

For the reasons above given, I felt constrained to pronounce at trial the rulings as stated in this judgment.

Ruling accordingly.