

IN THE COURT OF APPEAL OF MANITOBACoram: Philp, Twaddle and Monnin JJ.A.**B E T W E E N:****HER MAJESTY THE QUEEN***Respondent**- and -***CHARLES BUNN (also known as
CHARLES GEORGE WOODINGTON)***(Accused) Appellant***T. J. Preston***for the Appellant***G. A. Lawlor***for the Respondent**Appeal heard:***December 12, 2000***Judgment delivered:***January 24, 2001****TWADDLE J.A.**

1 The accused appeals from his conviction on a charge of break, enter and theft. The issue is whether, in admitting the accused's oral statements to the police as having been given voluntarily, the trial judge erred in law by imposing a burden on the accused to prove that the statements had been induced by a hope of advantage held out by police officers.

The Facts

2 Suspected of being the perpetrator of a commercial break-in, the accused was taken to a district police station for questioning. Neither video nor audio recording equipment was available (or so we were told by the police witnesses). Nor did the officers take notebooks with them into the interview room. One of the officers explained:

In my experience, bringing a notebook into the interview room creates a little – basically, I believe the person I am speaking to isn't at ease – and doesn't want to speak, so I usually leave our notebooks outside and we take – basically, we remember what the interview interrogation was all about and once we are completed we'll sit down afterwards, and we'll talk about the interview to refresh our memory and we'll complete our notes.

3 The interview lasted some twenty-five minutes during which no notes were taken by anyone. Once the interview was over, the officers sat down together and reconstructed their twenty-five minute interview by writing down, as one of them explained, “words to the effect of what was said.” These notes contained details of the accused's alleged incriminatory statements, but no mention of the accused saying that he wanted to make sure he was out for Christmas (some ten days away) or of his possible release on a form of bail.

4 Nonetheless, giving evidence on the *voir dire* into the admissibility of the accused's oral statements, the officers acknowledged that the accused had expressed the wish to be out for Christmas and that his possible release on a promise to appear, thus enabling him to be at home for Christmas, had been discussed. They said, however, that the accused's expression of his wish and the discussion of his possible release came at the end of the interview after the incriminating statements had been made.

5 The accused, on the other hand, testified that his wish to be out for Christmas was expressed early in the interview and that he made untrue admissions only because he was first told by the officers that, if he gave

them an incriminating statement, he would be released on his promise to appear.

The Trial Judgment

6 With respect to the absence of a contemporaneous record, the trial judge said:

No doubt there would be a greater chance of accuracy if the statement had been written down simultaneously with the questions and answers but the police had a reasonable explanation for not approaching the statement in that way

7 On the issue of whether the statement had been made voluntarily, the trial judge said:

The only other issue is whether he did so voluntarily. His position is that he was promised that he would be released on his own undertaking to appear if he gave a statement or at least that there was a connection between such a promise and his giving of the statement. The police, on the other hand, are insistent that no such promise was made. I have no doubt that the question of a promise to release or promise to release on the undertaking of the accused to appear was discussed and it may well be that the accused had the impression that this would happen and that it would be a good idea for him to make a statement because then he could get out but, as I say, I am satisfied that no such promise was actually made. The police had no authority to give that undertaking to the accused and I am not prepared to find that they would have deliberately misled him by promising him something that they could not guarantee would be fulfilled.

The Law

Admissibility of Confessions

8 The classic statement of the law regarding the admissibility of confessions in cases such as the present is, perhaps, that of Lord Sumner in *Ibrahim v. Rex.*, [1914] A.C. 599 (P.C.) (at p. 609):

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.

9 Almost half a century later, in *Smith* (1959), 43 Cr.App.R. 121 (Courts-Martial A.C.), Lord Parker C.J. commented on the principle in these terms (at p. 126):

It has always been a fundamental principle of the courts, and something quite apart from the Judges' Rules of Practice, that a prisoner's confession outside the court is only admissible if it is voluntary. In deciding whether an admission is voluntary, the court has been at pains to hold that even the most gentle, if I may put it that way, threats or slight inducements will taint a confession.

10 This statement by Lord Parker was quoted with approval by Lord Reid in *Commissioners of Customs and Excise v. Harz and Power* (1966), 51 Cr.App.R. 123 (H.L.) (at p. 159). Lord Reid also made it clear that the promise of advantage, sufficient to make the accused person's statement inadmissible, need not have reference to the accused person's escape from the charge against him or her.

11 Although these statements were made with respect to the law of England, they are equally valid with respect to the law of Canada as is evident from the following passage from the reasons of Iacobucci J. in the recent decision of the Supreme Court of Canada in *R. v. Oickle* (2000), 147 C.C.C. (3d) 321, 2000 SCC 38 (at para. 15):

Confessions will only be admissible if the Crown proves, beyond a reasonable doubt, that they were made voluntarily. A statement will be involuntary if it is the result of either “fear of prejudice” or “hope of advantage” held out by persons in authority. Vigorous and skillful questioning, misstatements of fact by the police, and appeals to the conscience of the accused do not necessarily make a resulting statement inadmissible. The statement will not be excluded simply because the accused believes it will be to his or her advantage to confess. It is only when this belief is induced or confirmed by persons in authority that the statements should be excluded.

12 Obviously, having regard to the first sentence of the passage I have just quoted, the final sentence must be qualified by the need for the Crown to prove, beyond reasonable doubt, that the accused’s belief in the advantage to be gained by a confession was not induced or confirmed by persons in authority. There is thus no onus on the accused to prove that his or her confession was induced by a promise or that he or she was misled. It is sufficient to exclude the statement that the accused believed it would be to his or her advantage to make the statement and there is a reasonable doubt as to whether this belief was the result of an inducement held out by the police.

The Credibility of Police Evidence of Interrogations

13 Although an accused's statement is not rendered inadmissible for want of a contemporaneous recording of the interview in which the statement was made, the law greatly favours "the growing practice of recording police interrogations, preferably by videotape" per Iacobucci J. in *R. v. Oickle, supra*, (at para. 46).

14 A police officer who questions an accused person without keeping a contemporaneous record of the interrogation risks an adverse finding on the accuracy of what he or she recalls. This is true not only on the question of the content of the accused's statements, but also on the question of the sequence in which matters were discussed.

15 The absence of a contemporaneous recording of an interview, in one form or another, is a factor which a trial judge should take into account in assessing the credibility of police evidence concerning the sequence in which matters were discussed in the interview. And this is so, in my view, even if the officer believed that the absence of recording equipment (be it audio or videotape or a notebook) will make the accused feel more at ease and more likely to speak. If such an explanation were to be given universal acceptance, there would be no incentive for the police to make a contemporaneous recording of the interview, a practice which "can greatly assist the trier of fact in assessing the confession" per Iacobucci J. in *R. v. Oickle, supra*, (at para. 46).

Application

16 If the accused's evidence was believed, or raised a reasonable doubt as to the circumstances in which his statements were made, the promise of

his release on bail (or the possibility that such a promise was made) was sufficient to render his statements inadmissible.

17 The trial judge clearly did not accept the evidence of the accused, but I am troubled by his assessment of credibility. He accepted the officers' explanation for failing to make a contemporaneous record of the interview as a reasonable one, an explanation which, in my view, is unacceptable. The absence of a contemporaneous record should have been considered as a factor militating against acceptance of the police account of the sequence in which the statements were made and the release of the accused discussed. This is particularly so in the absence of any reference to a discussion about the accused's release in the notes subsequently made by the officers.

18 Fortunately for us, it is unnecessary to question the trial judge's finding of credibility as he did not accept the police evidence in its entirety. In finding that "it may well be that the accused had the impression that this would happen [his release] and that it would be a good idea for him to make a statement because then he could get out ...," the trial judge recognized that the accused's mind may well have been influenced by something the police had said before he made the statements. The word "impression," as I understand it, refers to a thought provoked by an external source and not one which is self-generated. Such a finding indicates a reasonable doubt as to whether the statements were induced by what the police said to him about his possible release.

19 Although the trial judge found that no promise was actually made, he justified that finding by stating: "I am not prepared to find that they would have deliberately misled him by promising him something that they could

not guarantee would be fulfilled.” It was not, of course, necessary for the judge to so find in order to exclude the statements; it was sufficient that a reasonable doubt existed as to whether such a promise had been made or something said which could reasonably be viewed as an inducement.

20 In the absence of a contemporaneous record of the police interview with the accused, the trial judge was faced with the almost impossible task of determining whether the accused’s release on bail was discussed before or after the statements were made. As I read his reasons, he placed a burden on the accused to prove that the police deliberately misled him. No such burden exists. Yet, he found the accused to have had “the impression” that he should make a statement. This can only mean that something had been said to give the accused that impression. There was thus a reasonable doubt in the judge’s mind as to the circumstances which led to the statements being made, a doubt which should have resulted in their exclusion.

21 There being no other evidence against the accused other than his statements, I would allow the appeal, set aside the conviction and direct the entry of an acquittal.

_____. J.A.

I Agree:

_____. J.A.

I Agree:

_____. J.A.