

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Wabason, 2018 ONCA 187

DATE: 20180226

DOCKET: C62534

MacFarland, Pardu and Benotto JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Shaldon Wabason

Appellant

Andrew Furguele, for the appellant

Mabel Lai, for the respondent

Heard: January 29, 2018

On appeal from the voluntariness *voir dire* ruling of Justice John F. McCartney, dated February 24, 2014, and from the conviction entered by Justice Terrence A. Platana of the Superior Court of Justice, sitting with a jury, on October 2, 2015, and from the sentence imposed on January 14, 2016, with reasons reported at 2016 ONSC 349.

Pardu J.A.:

[1] Shaldon Wabason was convicted of manslaughter and break and enter. He participated in a home invasion with others. One of the others stabbed and killed a man who had come to the home to help defend the occupant.

[2] Following his arrest, the appellant was questioned by police and gave a statement. In a pre-trial ruling, the application judge concluded that the statement was voluntarily made. The application judge retired before the trial took place. In a pretrial application before the trial judge, the appellant applied to reopen the voluntariness *voir dire*. The trial judge refused to do so and expressed his agreement with the application judge's reasons.

[3] The appellant submits that the application judge erred in concluding that the statement to police was voluntarily made. For the reasons that follow, I agree. I would allow the appeal and order a new trial.

[4] The appellant also seeks leave to appeal against his sentence. He argues that he was catastrophically affected by systemic factors identified by the Supreme Court in *R. v. Gladue*, [1999] 1 S.C.R. 688 and that the trial judge did not reflect this in the sentence he imposed. Given my conclusion on the conviction appeal, there is no need to consider the appeal from sentence.

The application judge's decision on voluntariness

[5] Based on a review of the evidence, the application judge concluded that the appellant was properly advised of and understood his right to counsel, his right to remain silent, and that nothing said to him should influence his making of a statement.

[6] Applying *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, the application judge found that there had been no *quid pro quo*, that is to say no promise by police that they would do anything in exchange for a statement by the appellant. At para. 19 of his reasons, the application judge stated:

Further, I do not agree with [Wabason] when he argues that the questioning by [the officer] left the improper implication that if Wabason made a statement that things would be better for him or would not get worse for him. Wabason already knew that he had been arrested for first degree murder. [The interviewing officer] may have used a variety of themes, as mentioned, to try to get Wabason to make a statement. But at no time did he ever suggest, or was the topic ever mentioned, that the police could or would do anything to assist Wabason. As set out in *Oickle* there was no *quid pro quo*, implicit or otherwise.

[7] The application judge distinguished other cases like *R. v. Nugent* (1988), 84 N.S.R. (2d) 191 (C.A.), where a police suggestion that they would help reduce a murder charge to manslaughter made a statement inadmissible, and *R. v. Monk and Alexis*, 2002 BCCA 103, 163 C.C.C. (3d) 387, where a confession was excluded after police suggested that cooperation with them could be considered by a sentencing judge. The application judge determined that, unlike these cases, “there was no direct threats or promises or suggestions that the police could do anything to assist Wabason if he made a statement” (emphasis added).

Standard of review

[8] The determination of whether a confession is voluntary is a question of fact or of mixed law and fact. Disagreement about the weight to be given to pieces of evidence is not a basis for appellate interference. If the application judge properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for “some palpable and overriding error which affected [the application judge’s] assessment of the facts”: *Oickle*, at paras. 22, 71; and *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500, at paras. 16-17.

The voluntariness of the statement

(i) Positions of the parties

[9] The appellant maintains that the application judge erred in ruling that the appellant’s statement was voluntary. Specifically, the appellant challenges the application judge’s determination that there were no direct threats or promises, and thus no *quid pro quo* to induce a statement. The appellant points to the interviewing officer’s repeated inducement that by making a statement, the appellant could establish that he was guilty of break and enter only, and the threat that if he did not make a statement, he would “take the fall” for murder.

[10] The appellant also claims the application judge erred by stating that the interviewing officer told the appellant “it did not matter who did the stabbing –

they were all implicated”; and in determining that the interviewing officer telling the appellant he faced a charge of first degree murder because the stabbing occurred during a robbery was a harmless mistake.

[11] The Crown maintains that the voluntariness finding reflects no palpable and overriding error. It argues that the application judge reasonably found that there were no direct threats or inducements, no *quid pro quo*, implicit or otherwise, and no problematic strategies used or mistakes made by the interviewing officer.

(ii) Analysis

[12] The transcript of the police interrogation shows that although the appellant attempted to assert his right to silence numerous times, police repeatedly told him that if he spoke, he would be in less jeopardy, while if he did not speak, he would “take the fall” for a murder he did not commit. On one occasion, for example, the interviewing officer queried: “If I was in your shoes I wouldn’t be taking responsibility for that if I didn’t do it (pause) I mean you really wanna take the fall for something you didn’t do”?

[13] Throughout the interrogation, the interviewing officer told the appellant that he did not think the appellant stabbed anyone, but that the appellant should not take the blame for something he did not do. Moreover, the interviewing officer told the appellant that unless he spoke up immediately, he would “go down” for

first degree murder. The following exchange illustrates the tone, and themes, the officer employed:

Q. Can't even say you didn't do it (pause) but we know you were there (pause) if you wanna take the fall for this then you're making that choice right now in this room ... I know you wanna tell me that you didn't do it cause if I was sitting in your chair I certainly wouldn't wanna be the one going down for this if I didn't do it but time is very quickly running out

...

Q. ... [S]o that's it then eh you're gonna let someone else's actions you're gonna take the rap for somebody else's actions for murder something I don't think you did at nineteen years old (pause) and you made decisions that night that brought you here but somebody else made the decision to put a knife in that man not you and now this is where we are because somebody else put a knife in that man this is where you are because somebody else put a knife in that man over and over again because he was trying to protect his girlfriend ex girlfriend and now you're in jail for it and you don't even have the stones to tell me that you didn't do it (pause) which makes me think maybe I'm wrong (pause) but

A. I'm just listening to my lawyer he told me

Q. I know what you're

A. Well then quit (inaudible) (sighs)

Q. And it's your decision whether you want to talk to me or not

A. I don't wanna talk to you

Q. Like I said you don't have to

A. I know

Q. That's your right but to sit here and show me that you don't even feel bad about what happened cause that's what I'm seeing from you right now you don't even care about this this guy died and you didn't do it but you're gonna fall for it now you're gonna go down with these guys for it ...

...

Q. ... I mean the nets closing here and the time to talk is now with me in this room because this is an opportunity that's not gonna come again so rest assured the decisions you make now are gonna be affecting the rest of your life... [Emphasis added.]

[14] I agree with the appellant that these statements by the officer were at once an inducement – suggesting it was to the appellant's advantage to speak to police to avoid conviction for first degree murder – and a threat – that unless the appellant spoke, he would be convicted of first degree murder for a crime he did not commit.

[15] There was no bargain by police in that they did not make any promise of conduct on their part in exchange for the appellant speaking to them. In that limited sense, I agree that there was no *quid pro quo* as described by the application judge. However, this is to confine too narrowly the notion of inducements or threats leading to a statement.

[16] For police to characterize the legal consequences of making or not making a statement as a given, as opposed to promising an act that would be worked out

by police or a judge, is in this context more coercive, if anything. As pointed out in *Oickle*, at para. 44:

[T]he literature bears out the common law confessions rule's emphasis on threats and promises. Coerced-compliant confessions are the most common type of false confessions. These are classically the product of threats or promises that convince a suspect that in spite of the long-term ramifications, it is in his or her best interest in the short- and intermediate-term to confess.

[17] In *Oickle*, at paras. 53-54, Iacobucci J. held that phrases like “it would be better if you told the truth” do not automatically require exclusion, but rather require exclusion only where, in the entire context of the confession, the circumstances reveal an implicit threat or promise. Here, the comments made by the officer were far more coercive than words to the effect of “it would be better” to talk. In the entire context of the appellant's interrogation and statement, the officer's comments went beyond spiritual exhortations, or appeals to conscience and morality. They amounted to both threats and promises.

[18] The application judge erred in discounting the inducements and threats on the basis that no police or court action was promised in return. Properly conceived, the interviewing officer's veiled inducements of decreased jeopardy for speaking and threats of increased jeopardy for silence gave rise to an implicit *quid pro quo*.

[19] Given this *quid pro quo*, the application judge should have gone on to assess whether, in all the circumstances, the inducements and threats “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”: *Oickle*, at para. 57.

[20] In so doing, the application judge was required to consider the characteristics of the individual suspect: *Oickle*, at para. 42. Yet, the application judge did not consider the effect of the threats and inducements upon a 19-year-old aboriginal youth who had attempted to assert his right to silence on at least 6 occasions during the interview, and who asked several times to return to his cell.

[21] In light of the application judge’s errors, it falls to this court to assess whether the appellant’s statement was voluntarily made despite the inducements and threats. I am not persuaded beyond a reasonable doubt that the statement was voluntarily made, taking into account the appellant’s age, his personal circumstances, his futile assertions of the right to silence, his requests to return to his cell, and the impact upon him of the officer’s repeated statements that, unless the appellant spoke up, he was going to take the fall for a first degree murder he had not committed.

[22] Having reached this conclusion, it is unnecessary for me to consider the other alleged errors identified by the appellant.

[23] I would allow the appeal, set aside the convictions and order a new trial.

“G. Pardu J.A.”
“I agree J. MacFarland J.A.”

"I agree M.L. Benotto J.A."

Released: February 26, 2018