Date: 20010419
Docket No.: CAC 168264

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. M.C., 2001 NSCA 64]

Glube, C.J.N.S.; Roscoe and Saunders, JJ.A.

BETWEEN:

M.C., a young offender

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Counsel:	Megan A. Longley for the Appellant Peter P. Rosinski and Jennifer A. MacLellan for the Respondent
Appeal Heard:	April 9, 2001
Judgment Delivered:	April 19, 2001
THE COURT:	Appeal dismissed per reasons for judgment of Roscoe, J.A.; Glube, C.J.N.S. and Saunders, J.A., concurring.

<u>Publishers of this case please take note</u> that s. 38(1) of the **Young Offenders Act** applies and may require editing of this judgment or its heading before publication. Section 38(1) provides:

> "38(1) No person shall publish by any means any report
>
> (a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or
>
> (b) of a hearing, adjudication, disposition, or appeal concerning a young person who committed or is alleged to have committed an offence
>
> in which the name of the young person, a child or a young person aggrieved by the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed."

ROSCOE , J.A.:

[1] This is an appeal from conviction pursuant to the **Young Offenders Act**. The appellant, now aged fifteen years, was convicted by Justice Suzanne Hood of the Supreme Court of Nova Scotia (Family Division), of three charges arising out of an armed robbery of a bank.

[2] The issues raised on appeal relate to the admissibility of a videotaped statement made by the appellant to a police officer after his arrest. The appellant argues that the trial judge erred in admitting the statement because it was not voluntary and he was denied the benefit of sections 56(2)(b)(iv) and 56(2)(d) of the **Act**, that is, the right to have a parent present while he made his statement or a reasonable opportunity to make the statement in her presence.

[3] The relevant parts of s. 56 are as follows:

> 56. (1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.
>
> (2) No oral or written statement given by a young person to a peace officer or to any other person who is, in law, a person in authority on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless
>
> (a) the statement was voluntary;
>
> (b) the person to whom the statement was given has, before the statement was made, clearly explained to the young person, in language appropriate to his age and understanding, that
>
> . . .
>
> (iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and

> (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;
>
> (c) the young person has, before the statement was made, been given a reasonable opportunity to consult
>
> (i) with counsel, and
>
> (ii) a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person; and
>
> (d) where the young person consults any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.
>
> . . .
>
> (4) A young person may waive the rights under paragraph (2)(c) or (d) but any such waiver shall be videotaped or be in writing, and where it is in writing it shall contain a statement signed by the young person that the young person has been apprised of the right being waived.

[4] The undisputed facts and chronology of events preceding the confession are as follows:

12 noon: The appellant was arrested by Constables Armitage and Morris, as he exited a bus returning him from the Shelburne Youth facility. The appellant was advised of his right to remain silent and his rights to retain and instruct counsel and obtain free legal assistance.

12:09: The appellant and the officers arrived at the police station. The

appellant's mother, Mrs. C., arrived shortly thereafter and she was informed as to the reason for the appellant's arrest, that is, armed robbery. The appellant was given the opportunity to talk in private to counsel at Nova Scotia Legal Aid.

12:20: The appellant completed his conversation with counsel.

12:53: A videotaped statement commenced. Constable Armitage operated the camera from another room, while Constable Morris spoke with the appellant. By following the format of a YOA statement form, Constable Morris advised the appellant of all his rights to remain silent and to consult with counsel and a parent and to have them present during the statement. The appellant was also advised of the possibility of transfer to the ordinary court.

12:58: When asked if he wished to consult with a parent, the appellant said he wished to speak with his mother. The videotape was stopped and Mrs. C. was brought into the interview room and the officers left the room.

1:16: Either the appellant or his mother knocked on the door and Constable Morris reentered the interview room. The videotaping continued in the presence of Mrs. C. The balance of the form was completed. The appellant indicated he wished to have his mother present. He was then advised as follows:

> I also wish to advise you that if you choose to make a statement, that you may stop at any time you wish and exercise any of your rights. Do you understand?
>
> Do you understand that you do not have to say anything unless you want to?
>
> Do you wish to say anything?

The appellant said he understood that he could stop at any time and that he did not have to say anything. He answered "No" to the last question. Then Constable Morris indicated that although the appellant did not have to say anything, he was required to listen to what the officer had to say to the appellant. He began by telling the appellant about the evidence that led him to believe he was involved in the bank robbery: the videotape from the bank, photo line-up identifications and fingerprints on a getaway car. The officer encouraged the appellant to turn a new leaf, to confess, do the time and get on with his life. The appellant engaged the officer in the conversation, asking questions about whose prints were found and why he had not been arrested sooner.

2:30: Mrs. C. indicated that she would have to leave soon because her 16 year old daughter would be coming home from school. Constable Morris left the interview room so that Mrs. C. and the appellant could talk privately.

2:42: Constable Morris returned to the interview room, then he and Mrs. C. left the room together and went to another room. Constable Morris testified as follows concerning their conversation:

> . . . I took her into a separate interview room and obtained some information from her; name, date of birth, stuff like that, her daughter's age, which was S., and we had a discussion. I told her there was no doubt in my mind that [M.] had committed the robbery, and if he's sincere about wanting to clean up his act, the first step is that he had to take responsibility for it. And then she said fine, she went back in the room, and then she came back out at 2:54, and basically she said she was leaving.

> . . . She had mentioned something during the statement that, you know, she couldn't stay all day. I believe she said she had her daughter to pick up, and she had mentioned numerous times that I believe S. was in school . . .

2:54: Mrs. C. left the interview room.

2:56: Constable Morris returned to the room with the appellant to continue the questioning and taping resumed.

4:00: The appellant confessed to taking part in the bank robbery.

4:12: The formal interview ended.

4:15-4:56: Constable Morris came back to the interview room intermittently to ask a few clarifying questions. At 4:56 p.m. the taping concluded and the appellant called his mother.

[5] Neither the appellant nor his mother testified on the *voir dire*. Justice Hood, in her decision, reviewed the evidence and arguments in detail, considered the applicable case law and admitted the statement into evidence after finding that it was voluntary and that the appellant was afforded all of his rights pursuant to s. 56 of the **Young Offenders Act**.

[6] The defence argument on the *voir dire* that the statement was not voluntary was based on the assertions that Constable Morris had held out inducements that the appellant would not be transferred to adult court, that his sentence would not be the maximum, and that his youth record would not have to be revealed on job applications. As well, it was submitted that Constable Morris threatened the appellant by mentioning other offences under investigation and promised the appellant that he would be remanded to a youth facility that evening so that he would not be in police cells overnight.

[7] With respect to these allegations, Justice Hood stated:

¶ 20 After hearing the testimony of Constables Armitage and Morris and viewing the relevant portions of the videotape, I am satisfied beyond a reasonable doubt that the statement given by [M.C.] was voluntary.

¶ 21 I am satisfied that Constable Morris's statement about transfer to adult court was not an inducement to [M.C.] to give a statement. [M.C.] had previous convictions and previous sentences and, therefore, was not unfamiliar with the workings of the *Young Offenders Act* and the court system. Furthermore, he had just returned from Shelburne where he would have been in contact with other young offenders. It is reasonable to conclude that he would have knowledge of the sorts of offences they had committed, their sentences and whether any had been dealt with in adult court. [M.C.], although only fifteen, was not a young person having his first dealings with the police and the *Young Offenders Act*.

¶ 22 I am also satisfied that, when Constable Morris told [M.C.] "the chances" were that he would not get the maximum sentence under the *Young Offenders Act*, this was not an inducement. The word "chances", in my view, is neither a guarantee nor a promise and, therefore, cannot reasonably be concluded as being the sort of wording that would induce a statement.

¶ 23 I am also satisfied beyond a reasonable doubt that Constable Morris's comments about a young offender record and job applications was not an inducement to [M.C.] to give a statement. [M.C.] had at least one prior conviction and a confession to this offence would not change his situation in this regard.

¶ 24 The other offences to which Constable Morris referred, accessory before or after the fact of his father's robberies and car theft, were less serious than the robbery which was being investigated since a weapon was allegedly used in the bank robbery. I am therefore satisfied beyond a reasonable doubt that mentioning these other offences was not capable of inducing [M.C.] to give a statement nor threatening to him such that he would give a statement.

¶ 25 Constable Morris was very careful in the way he responded to [M.C.'s] repeated requests for remand. He consistently told him he could not do anything about it until they finished the interview. He told him that he would make a call but promised nothing. He ultimately said that the decision was that of Constable MacDonald. Had he said anything else, in my view, it could have been considered an inducement or promise. The way in which this was handled insured that [M.C.] took nothing untoward from the responses of Constable Morris to his repeated requests. I am therefore satisfied that [M.C.] was not thereby induced to give his statement.

> ¶ 26 In considering each circumstance referred to by Ms. Longley and overall in considering all the circumstances under which [M.C.] gave his statement, I am satisfied beyond a reasonable doubt that it was voluntary.

[8] The appellant had also submitted, through trial counsel, that when Mrs. C. left, the police officers should have again advised the appellant that he had the right to consult a parent or other adult, and to have that person present while the interview continued, and that by not having done so, the appellant was denied his right to be advised that a statement is required to be taken in the presence of an adult unless he desires otherwise, and the reasonable opportunity to make the statement in the presence of an adult as required by s. 56(2)(b)(iv) and s.56(2)(d).

[9] Justice Hood, after extensively reviewing case law applicable to s. 56, including: **R. v. J.T.J.**, [1990] 2 S.C.R. 755; **R. v. C.L.M.**, [2000] S.J. No. 176; **R. v. S.P.**, [1991] O.J. No. 337, 44 O.A.C. 316; **R. v. A.L.**, [1998] S.J. No. 86 (Sask. Prov. Ct.); **R. v. A.N.**, [1998] A.J. No. 855 (Alta. Prov. Ct.); **R. v. K.W.**, [1997] O.J. No. 2873 (Ont. Ct. Just., Prov. Div.); and, **R. v. B.(J.)** (1990), 109 N.B.R.(2d) 361(Q.B.), compared the facts of this case to those in **J.T.J**. and reached the following conclusions:

> ¶ 82 . . .
>
> In this case, I consider the interview to have been one continuous interview. The actual questioning related to the crime began after [C.C.] [the appellant's mother] was in the interview room and after the Young Offender Form was completed which occurred some time after 1:15 p.m. After [C.C.'s] departure, the interview continued again beginning at approximately 3:00 p.m. immediately after her departure and only two hours after M.C. had been advised of his rights under s. 56 (2).
>
> . . . Furthermore, [C.C.] was with her son on three occasions without Constable Morris present. It is not entirely clear from the J.T.J. decision whether J.T.J. was ever given an opportunity to consult with his uncle alone. Cory, J. says only that "It is worth noting that the uncle was only with the appellant for three minutes throughout the entire period of the police interrogation".
>
> ¶ 83 In any event, [C.C.] was present with [M.C.] for a period of almost two hours. She was first alone with him between approximately 1:00 and 1:15 p.m.; then present during the interview between 1:15 and 2:30; and then alone

with [M.C.] again on two occasions between 2:30 and 2:54 p.m. after which time she voluntarily left the police station.

¶ 84 In J.T.J., the young person was not even told of his right to consult counsel and a parent or other adult. The issue was not whether he had a reasonable opportunity to do so nor was it whether he had a reasonable opportunity to give a statement in that person's presence. There may be cases like J.T.J. where, as Cory, J. says, the warning must be given "again". In my view, in the circumstances of this case, this is not such a case. [M.C.] was given a warning at approximately 1:00 p.m. His mother left approximately two hours later, after being present with him for almost two hours.

¶ 85 As Cory, J. said in J.T.J., "... it is unlikely that they [young persons] will appreciate their legal rights in a general sense or the consequences of oral statements made to persons made in authority ...". He also said, "It is just and appropriate that young people be provided with additional safeguards before their statements should be admitted". It is not disputed that [M.C.] was told of his right to have a parent or other adult present. In my view, [M.C.] had the benefit of the safeguards to which Cory, J. refers. He spoke to a lawyer; he consulted alone with his mother on three separate occasions. I therefore conclude that he had a "reasonable opportunity" to consult with a parent before making a statement. In my view, this requirement is complied with in this case because of the length of time [M.C.] spent alone with his mother on three separate occasions within approximately two hours. The police did not need to tell him after her departure that he could consult with someone else. The purpose of the right to consult referred to by Cory, J., that is, to appreciate his legal rights and the consequences of an oral statement, was met by the consultation [M.C.] had with his mother.

. . .

¶ 89 Although s. 56 (2) (b) (iv) uses the word "required" in the context of the statement being required to be made in the presence of the adult being consulted, s. 56 (2) (c) does not make it mandatory for the statement to be given in that person's presence. It provides instead for a "reasonable opportunity" for it to be given in that person's presence. To paraphrase s. 56 (2), a statement by a young person is not admissible unless it is voluntary; unless the young person was told certain things; unless the young person was given a reasonable opportunity to consult certain people; and unless the young person was given a reasonable opportunity to make the statement in the presence of any person consulted.

¶ 90 To interpret s. 56 (2) (d), as the defence submits I should, would mean that every time an adult was consulted but was not, for whatever reason and through no fault of the police, present when a statement was given, a waiver would have to be obtained. I do not accept that interpretation. In my view,

> this is the very situation s. 56 (2) (d) contemplates.
>
> ¶ 91 If Parliament had intended to make it mandatory that any person consulted be present when a statement is made, appropriate wording could have been used to so provide. Since the phrase "reasonable opportunity" was used, I must give it some meaning.
>
> ¶ 92 In the context of this case, I conclude that [M.C.] did have a reasonable opportunity to give his statement in the presence of C.C.. C.C. was present during a substantial part of the interview by Constable Morris of [M.C.]. She had three opportunities to talk privately with [M.C.]. [M.C.'s] demeanour did not change after his mother's departure. Just as significantly, the nature of the interview did not change after [C.C.'s] departure: Constable Morris continued with the same tone and on the same themes before and after [C.C.'s] departure.
>
> ¶ 93 In all the circumstances, I am therefore satisfied beyond a reasonable doubt that s. 56 (2) of the *Young Offenders Act* was complied with and the statement of [M.C.] is admissible.

[10] The appellant argues on the appeal that the trial judge erred in admitting the statement, essentially repeating the arguments made at trial, that is, that the Crown did not prove beyond a reasonable doubt that the statement was voluntary, and that after his mother left, the appellant should have again been advised of his right to consult an adult and been given a reasonable opportunity to have an adult present when he made his statement. The appellant submits that in the absence of an explicit waiver of his right to have an adult present, the police should not have continued the questioning.

[11] Neither the appellant nor his mother testified on the *voir dire*. While acknowledging that the Crown has the burden of proving that all the conditions of s.56, including voluntariness, have been met, if the appellant had any evidence to present about his perceptions and feelings at the time, for example, if he felt coerced or threatened, he was certainly free to present those to the trial judge.

[12] The standard of review on this issue is as noted recently in **R. v. Oickle**, [2000] S.C.J. 38, at § 22:

> While determining the appropriate legal test is of course a question of law, applying this test to determine whether or not a confession is voluntary is a question of fact, or of mixed law and fact. . . . Therefore, as this Court held in **Ewert**, a disagreement with the trial judge regarding the weight to be given various pieces of evidence is not grounds to reverse a finding on voluntariness . . .

[13] As Justice Iacobucci indicated in **Oickle** at § 15, police have some latitude in the methods employed when questioning a suspect:

> . . . 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.

[14] Even allowing for less latitude when dealing with a youthful suspect, in my opinion there was ample evidence upon which the trial judge could have reasonably determined that the statement made by the appellant was voluntary. The trial judge had the opportunity of seeing and hearing the police witnesses and viewing the videotape and was in the best position to make findings of fact and credibility. The trial judge made no error in law or principle in determining that there were no promises, threats or inducements made by Constable Morris and that the statement was voluntarily made by the appellant.

[15] On the remaining issues, after reviewing the record, the case law to which counsel referred and the arguments, I am of the opinion that the trial judge correctly interpreted and applied the provisions of s. 56 to the circumstances of this case. The appellant was properly advised of all of his rights and given ample opportunity to exercise them, including the right to have his mother present. It was not necessary to start over from the beginning of the informational process once his mother decided that she would leave. The appellant knew his mother would be leaving and he made no objection; nor did he request that questioning cease, or be postponed until she was able to return or make other arrangements for her daughter. It was not necessary in these circumstances that the police obtain a waiver at that point because the option to have an adult present had been exercised and it was, on these facts, through no fault of the police that the appellant's mother was not present for all of the taking of the statement.

[16] I would confirm that the statement was in complete compliance with s. 56 of the **Young Offenders Act** and was properly admitted at the trial. I am satisfied that Justice Hood's decision properly reflects the relevant principles and that she made no error either in law or in fact.

[17] I would dismiss the appeal.

Roscoe, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J.A.