SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Calnen*, 2015 NSSC 291

Date: 2015-10-14
Docket: CRH No. 426776
Registry: Halifax

Between:

Her Majesty the Queen

v.

Paul Trevor Calnen

Judge:	The Honourable Justice James L. Chipman
Heard:	September 28-30, October 1, 5, and 7, 2015 in Halifax, Nova Scotia
Counsel:	Eric R. Woodburn and Susan MacKay, for the Crown Peter D. Planetta and Sarah M. White, for Mr. Calnen

By the Court:

Introduction

[1] Paul Trevor Calnen is charged with second degree murder and indecently interfering with the human remains of the victim, Reita Louise Jordan. A five-week jury trial is scheduled to take place between November 2 and December 4, 2015.

[2] This six-day *voir dire* was held to determine the admissibility of statements made by the accused to persons in authority. The Crown seeks to admit the statements and introduce them for the truth of their contents as part of the Crown's case.

[3] The confessions rule provides that a statement or a confession made to a person in authority cannot be used as evidence unless it is first proved through a *voir dire* to have been voluntarily given.

[4] The parties agree and I find that the Crown bears the burden of proving beyond a reasonable doubt that the statements were given voluntarily.

Background

[5] On March 28, 2013, Ms. Jordan was reported missing to the Halifax Regional Police. An initial missing person investigation was conducted, led by D/Cst. Paul Trider.

[6] At the time, Ms. Jordan was a 35 year-old prostitute and the mother of one child. Mr. Calnen was a 50 year-old plumber with three grown children. For approximately two years before Ms. Jordan went missing, the two were in a relationship and lived together at Mr. Calnen's home.

[7] A few days after Ms. Jordan was reported missing, D/Cst. Trider visited Mr. Calnen at his home. Shortly after this initial contact, on April 5, 2013, D/Cst. Trider interviewed Mr. Calnen in an interview room at the Tantallon RCMP detachment (the "April 5 statement"). The statement began at 7:55 p.m. and concluded at 10:15 p.m.

[8] The police carried out further investigations including a polygraph test of Mr. Calnen on May 30, 2013. By this time the police considered the investigation to be a homicide investigation.

[9] On June 17, 2013, as he was leaving a work site near the Halifax police station on Gottingen Street, Mr. Calnen was arrested for the murder of Ms. Jordan.

[10] Following his arrest, Mr. Calnen was taken to the Halifax police station where he was interviewed by D/Cst. Jason Withrow from 2:50 p.m. until approximately 6:00 p.m. (the "June 17 statement"). There is a break of nearly one hour (4:27 p.m. to 5:21 p.m.) when Mr. Calnen is away from the interview room. During this time Mr. Calnen exercised his right to counsel and met with Peter Planetta.

[11] After the June 17 statement came to an end, Mr. Calnen was transferred to the Lower Sackville RCMP detachment. He was taken to an interview room for further questioning. Over the next 18 hours, Mr. Calnen was questioned by a number of individuals: Sgt. Greg Vardy, S/Sgt. Tom Townsend, Cst. Bruce Briers, D/Cst. Jason Hurley, and the victim's mother, Donna Jordan. The statement began at 7:40 p.m. on June 17 and concluded at 1:50 p.m. the next day (the "June 17 and 18 statement").

[12] In the midst of the June 17 and 18 statement, Mr. Calnen was given a break of about six hours. From 2:00 a.m. until 8:00 a.m. he was taken to a cell in the detachment. After the break, Mr. Calnen was returned to the same interview room and questioning resumed.

[13] At about 11:40 a.m., Donna Jordan was brought into the interview room. She pleaded with Mr. Calnen to reveal where her daughter was buried. At approximately 12:15 p.m. Mr. Calnen confessed to knowing the location of Reita Jordan's ashes. Roughly a half hour after this revelation, Donna Jordan left the interview room and the police continued to question Mr. Calnen until about 2:00 p.m. During this time, he provided details concerning the incineration of Ms. Jordan's remains and an explanation concerning how she died. He also signed a s. 527 application and consented to carry out a re-enactment of how Ms. Jordan's death occurred.

[14] The re-enactment took place at Mr. Calnen's residence during the early evening of June 18, and lasted about twenty minutes (the "Re-enactment

statement"). Then Mr. Calnen was taken back to the cells at the RCMP detachment in Lower Sackville.

Statements Under Consideration

[15] The Crown and Defence agree that the purpose of this *voir dire* is to determine the admissibility of three of the four statements:

1) June 17 statement (the audio/video recording of this statement (Exhibit VD-1) was played in court and the 16-page transcript (Exhibit VD-6) was provided to and reviewed by the Court);

2) June 17 and 18 statement (the audio/video recording of this statement (Exhibits VD-1 and VD-4) was played in court and the 167-page transcript (Exhibit VD-7) and 159-page transcript (Exhibit VD-8) were provided to and reviewed by the Court); and

3) Re-enactment statement (the audio/video recording of this statement (Exhibit VD-2) was played in court; there was no transcript).

[16] The Defence conceded the April 5 statement (the audio/video recording of this statement (Exhibit VD-3) was played in court and the 115-page transcript (Exhibit VD-5) was provided to and reviewed by the Court) to be admissible.

Positions of the Parties

Crown

[17] The Crown submits that given the state of the law, all of the statements were voluntary. In their submission, there were no threats, inducements or promises made to the accused at the time the statements were elicited. They take the position that at all times Mr. Calnen had an operating mind.

[18] The Crown relies on seminal Supreme Court of Canada authorities as well as these decisions in support of their position:

R. v. Warren, (1997) 117 C.C.C (3d) 413 (N.W.T.C.A.)
R. v. Waskewitch, 2000 SKQB 583
R. v. Riley, 2001 BCSC 1169

R. v. Grouse, 2004 NSCA 108
R. v. J.K.E., 2005 YKTC 40 ("*J.K.E.*")
R. v. Leung, 2013 BCSC 1229
R. v. Foerster, 2014 BCSC 544 ("*Foerster*")
R. v. Mensah, 2014 NSPC 51 ("*Mensah*")

Defence

[19] The Defence takes the position that the police created an atmosphere of oppression such that the statements obtained from Mr. Calnen were involuntary and hence inadmissible. The Defence relies upon the following authorities in support of their common law position:

R. v. Hebert, [1990] 2 S.C.R. 151
R. v. I.(L.R.) and T.(E.), [1993] 4 S.C.R. 504
R. v. Oickle, 2000 SCC 38 ("*Oickle*")
R. v. Ciliberto, 2005 BCSC 1859 ("*Ciliberto*")
R. v. Singh, 2007 SCC 48
R. v. Keats, 2014 NSPC 108

I say common law because the Defence did not give notice of a *Charter* application and confirmed in their submissions that this *voir dire* is not a *Charter* hearing.

Oral Evidence

[20] In addition to introducing the exhibits, the Crown called as witnesses D/Cst. Trider, (now) Sgt. Withrow, Sgt. Vardy and (now) Cpl. Hurley. Cpl. Hurley was the Crown's first witness and gave evidence via video link as he now lives and works in Yellowknife, NWT.

[21] As the Crown did not call S/Sgt. Townsend and Cst. Briers, background concerning their involvement was elicited from Sgt. Vardy. The recordings (Exhibits VD-1 and VD-4) confirm Sgt. Vardy was in the interview room with each of these officers during parts of their questioning of Mr. Calnen.

[22] The Crown did not call Donna Jordan. Cpl. Hurley and Sgt. Vardy gave evidence regarding her involvement in the questioning. Exhibit VD-4 confirms (then) D/Cst. Hurley remained in the interview room during the entirety of Donna Jordan's questioning of Mr. Calnen.

[23] From my observations of the police officers (both on the witness stand and in the video/audio recordings), I formed the impression that they are well-trained, skilled professionals. Importantly, I find that their interactions with and questioning of Mr. Calnen were at all times appropriate. That is to say, I find that their interactions and questioning were within the bounds of authorized police behaviour. With this in mind, it is without hesitation that, in addition to the April 5 statement, I find that all of Mr. Calnen's statements –the June 17 statement and the first part of the June 17 and 18 statement up until the time that Donna Jordan entered the interview room – were voluntary.

[24] In my view, the portion of Mr. Calnen's statements requiring more scrutiny and analysis (albeit, in the context of what transpired from the time of his arrest) relates to the time from when Donna Jordan was brought into the interview room (11:38 a.m.) and beyond on June 18, 2013. In keeping with the Supreme Court of Canada's direction (see para. 71 of *Oickle*), I will undertake a contextual analysis.

Governing Law

Person In Authority

[25] Generally speaking, the voluntariness of a confession comes under scrutiny only when the confession was made to a person in authority (or an agent of the state). If the confession was not made to a person in authority, there is no need to prove voluntariness.

[26] When the confession is made to a police officer in the context of a police interview, it is obvious that the confession was made to a person in authority. However, a police officer may sometimes step outside of the role of a person in authority when, for example, he/she goes undercover to elicit a confession. Further, sometimes a person who is not a police officer may step into the role of a person of authority or state agent when, for example, he/she is recruited by the police to assist with an interview.

Voluntariness

[27] Once it is decided that the confession was made to a person in authority, the Crown has the burden of establishing beyond a reasonable doubt that the confession was made voluntarily. In *Oickle*, Justice Iacobucci, on behalf of five of six judges (Justice Arbour dissenting), confirmed that the confessions rule is concerned with voluntariness, broadly understood:

24 As indicated by McLachlin J. (as she then was), in *R. v. Hebert*, [1990] 2 S.C.R. 151 (S.C.C.), there are two main strands to this Court's jurisprudence under the confessions rule. One approach is narrow, excluding statements only where the police held out explicit threats or promises to the accused. The definitive statement of this approach came in *Ibrahim v. R.*, [1914] A.C. 599 (Hong Kong 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.

This Court adopted the "*Ibrahim* rule" in *R. v. Prosko* (1922), 63 S.C.R. 226 (S.C.C.), and subsequently applied it in cases like *R. v. Boudreau*, [1949] S.C.R. 262 (S.C.C.), *Fitton, supra*, *R. v. Wray* (1970), [1971] S.C.R. 272 (S.C.C.), and *R. v. Rothman*, [1981] 1 S.C.R. 640 (S.C.C.).

25 The *Ibrahim* rule gives the accused only "a negative right — the right not to be tortured or coerced into making a statement by threats or promises held out by a person who is and whom he subjectively believes to be a person in authority": *Hebert*, *supra*, at p. 165. However, *Hebert* also recognized a second, "much broader" approach, according to which "[t]he absence of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental element of deciding between alternatives is absent" (p. 166).

26 While not always followed, McLachlin J. noted at p. 166 that this aspect of the confessions rule "persists as part of our fundamental notion of procedural fairness". This approach is most evident in the so-called" operating mind" doctrine, developed by this Court in *Ward, supra*, *R. v. Horvath*, [1979] 2 S.C.R. 376 (S.C.C.), and *R. v. Whittle*, [1994] 2 S.C.R. 914 (S.C.C.). In those cases the Court made "a further investigation of whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found": *Ward*, *supra*, at p. 40. The "operating mind" doctrine dispelled once and for all the notion that the confessions rule is concerned solely with whether or not the confession was induced by any threats or promises.

27 These cases focused not just on reliability, but on voluntariness conceived more broadly. None of the reasons in *Ward* or *Horvath* ever expressed any doubts about the reliability of the confessions in issue. Instead, they focused on the lack of voluntariness, whether the cause was shock (*Ward*), hypnosis (*Horvath, per* Beetz J.), or "complete emotional disintegration" (*Horvath, supra*, at p. 400, *per* Spence J.). Similarly, in *R. v. Hobbins*, [1982] 1 S.C.R. 553 (S.C.C.) at pp. 556-57, Laskin C.J. noted that in determining the voluntariness of a confession, courts

> should be alert to the coercive effect of an "atmosphere of oppression", even though there was "no inducement held out of hope of advantage or fear of prejudice, and absent any threats of violence or actual violence"; see also *R. v. Liew*, [1999] 3 S.C.R. 227 (S.C.C.) at para. 37. Clearly, the confessions rule embraces more than the narrow *Ibrahim* formulation; instead, it is concerned with voluntariness, broadly understood.
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> [Emphasis added]

[28] More recently in *R. v. Yasinowski*, 2014 SKQB 431, Justice Chicoine extensively reviewed the case law on voluntariness:

> 22 In *R. v. Rogers*, 2014 SKQB 167, [2014] 9 W.W.R. 772 (Sask. Q.B.), I recently had the opportunity to review the effect that the advent of the *Charter* has had on the common law confessions rule and the application of both in any given case. I wrote, at paras. 151 to 159:
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> > [151] In *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, Iacobucci J. on behalf of majority of the justices of the Supreme Court of Canada took the opportunity to set out the proper scope of the confessions rule and to discuss how the rule has been affected by the advent of the *Charter*. One aspect of the confessions rule is what is referred to as the "*Ibrahim* rule" which arose from the case of *Ibrahim v. The King*, [1914] A.C. 599 (P.C.). That rule dictates that a statement ought to be excluded where that police held out explicit threats or promises. The second aspect is known as the "operating mind" doctrine, which requires an inquiry as to whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found. Iacobucci J. referred to *R. v. Hobbins*, [1982] 1 S.C.R. 553 at pp. 556-57, wherein it was noted that in determining voluntariness of a confession, courts should be alert to the coercive effect of an "atmosphere of oppression", even though there was "no inducement held out of hope of advantage or fear of prejudice, and absent any threats of violence or actual violence."
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> > [152] The Supreme Court noted that the *Charter* constitutionalized a new set of protections for accused persons. However, the *Charter* did not subsume the common law rules of confessions as the *Charter* rules are narrower in scope and the burden of proof and standard of proof are different. Under the *Charter*, the burden is on the accused to show, on a balance of probabilities, a violation of constitutional rights. Under the common law confessions rule, the burden is on the prosecution to show beyond a reasonable doubt that the confession was voluntary. In addition, the remedies are different. Pursuant to *R. v. Stillman*, [1997] 1 S.C.R. 607 and *R. v. Collins*, [1987] 1 S.C.R. 265, the *Charter* excludes evidence obtained in violation of its provisions under s. 24(2) only if admitting the

evidence would bring the administration of justice into disrepute. In the case of a violation of the confessions rule, the confession is always excluded.

[153] One of the major purposes of the common law confessions rule is the prevention of the use of false confessions. This involves both voluntariness and reliability. "A confession that is not voluntary will often (but not always) be unreliable." (*Oickle*, at para. 47) Iacobucci J. cautions that hard and fast rules cannot account for the variety of circumstances that vitiate the voluntariness of a confession. A trial judge should therefore consider all of the relevant factors when reviewing a confession, he states. He thereafter reviews the four factors to be considered.

[154] The first is "threats or promises". The *Ibrahim* case ruled that statements would be inadmissible if they were the result of "fear of prejudice or hope of advantage". An example of hope of advantage is the promise of leniency from the courts. Another is the offer of psychiatric assistance or other counselling in exchange for a confession. However, even a statement like, "it would be better if you told the truth" should not automatically require exclusion as it depends on the entire context of the confession. At the end of the day, the police may often offer some kind of inducement to the suspect to obtain a confession to convince the suspect that it is in his or her best interest to confess.

[155] The second factor is "oppression". Oppression has the potential to produce false confessions if the police create conditions distasteful enough. Iacobucci J. gave as an example of oppression the case of *R. v. Hoilett* (1999), 136 C.C.C. (3d) 449, where the suspect was arrested and made to stand naked in a cold cell for hours after his clothes were taken from him for forensic examination and he was forced to stay awake through the night. Iacobucci J. gave as further examples (at para. 60) such factors as depriving the suspect of food, clothing, water, sleep or medical attention. He also mentioned denying access to counsel and excessively aggressive, intimidating questioning for a prolonged period of time.

[156] The third factor is the "operating mind". In *R. v. Whittle*, [1994] 2 S.C.R. 914, Sopinka J. explained that the operating mind requirement "does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying to police officers who can use it to his detriment" (p. 936). Iacobucci J., in *Oickle*, (at para. 63) stated that the operating mind doctrine should not be understood as a discrete inquiry divorced from the rest of the confessions rule but should form part of the broader question of voluntariness in the ordinary sense of the word.

[157] The fourth factor is "other police trickery". This is a distinct inquiry from the other three. It involves maintaining the integrity of the criminal

justice system. For example, in *R. v. Rothman*, [1981] 1 S.C.R. 640, a statement to an undercover police officer who had been placed in a cell with the accused was admitted. However, Lamer J. in that case gave as examples of tricks or tactics that would not be acceptable because they might "shock the community" would include a police officer pretending to be a chaplain or a legal aid lawyer.

[158] Iacobucci J. in *Oickle*, summarized the confession rule as follows (at paras. 68-69):

> 68 While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow Ibrahim rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.
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> 69 The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J.'s concurrence in Rothman, supra, both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process": J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 339. Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.

[159] Iacobucci J. then went on to give the following advice to the trial judge in the implementation of the modern confessions rule (at para. 71):

> 71 [A] court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all

> the aspects of the rule discussed above. Therefore a relatively minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation: see *Hoilett*, *supra*. On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary. If a trial court 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 trial judge's] assessment of the facts" *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at p. 279 (quoting *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808) (Emphasis in Schwartz).
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> [Emphasis added]

[29] Of the four factors Justice Iacobucci requires a trial judge to consider, the Defence has asked the Court to focus on oppression. To quote from the second page of Mr. Planetta's pre-hearing brief:

> It is anticipated that the evidence will disclose that police officers created an atmosphere of oppression and that consequently the statements of June 17, 18 and 19 obtained from Mr. Calnen were involuntary and hence inadmissible.

[30] Later in his brief, counsel notes that the factors set out in *Oickle* are not to be viewed in silos, but rather in their totality. Defence counsel then concludes with this:

> Essentially, if actions which amount to any or all of oppressive, threatening or inducive behavior and/or deprives someone of their operating mind, the statement is involuntary and inadmissible.

Threats or Inducements

[31] In *Oickle*, the Supreme Court of Canada offered some helpful statements about what might constitute a threat or inducement (see paras. 53, 54, 56, 79 and 80). At para. 80, Justice Iacobucci stated as follows:

> 80 To hold that the police officers' frequent suggestions that things would be better if the respondent confessed amounted to an improper threat or inducement would be to engage in empty formalism. The tapes of the transcript clearly reveal that there could be no implied threat in these words. The respondent was never

> mistreated. Nor was there any implied promise. The police may have suggested possible benefits of confession, but there was never any insinuation of a quid pro quo. I therefore respectfully disagree with the Court of Appeal that these comments undermined the confessions' voluntariness.
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> [Emphasis added]

[32] In argument, the Defence emphasized *Ciliberto*. In *Ciliberto*, the accused made some statements to the police. The police then met with the accused's parents and "provided them with some instructions" (para. 7). The accused was then placed in a room with his parents. An emotional conversation ensued. A further interview followed. The accused was left alone for a while, and then brought to the "soft interview room". The victim's parents were in that room. They had been briefed by the police shortly beforehand. The families were well known to one another. The victim's mother testified that the accused was a regular guest in their home and indeed, she treated him almost like another son. This partly explained why the atmosphere in the room was highly emotionally charged. The accused made a further statement.

[33] The defence opposed admission of the various statements because they were not made voluntarily and because the police had violated the accused's right to silence. They pointed to the fact that the accused had a mental illness, and although the police were aware of this, they had not sought any professional advice on what this might mean about the accused's mental state. Further, the police had not inquired into how long the accused had been taking medication for the mental condition (para. 24).

[34] Justice Williamson made the following observations regarding threats or inducements at paras. 29 – 35:

> 29 Other than as it relates to an oppressive atmosphere, I do not find any threats as that word is used in the traditional cases on voluntariness. There are some inducements, but they are not of the obviously unacceptable type of a promised benefit in the sense that he was not told talking would result in a lesser charge or a lesser sentence. There is a theme, however, that at the time he was being viewed as a cold-blooded murderer, a person who deliberately planned and carried out a killing, and that if there was some other explanation, such as accident or mistake, he should disclose that explanation. An accused in these circumstances may, as a result of such suggestions, believe that talking would result in a lesser charge or lesser penalty. <u>There was also the suggestion that the accused would benefit from explaining what happened as his parents and the</u>

victim's parents would be spared the pain both of not knowing what happened and the pain of the belief that Ciliberto deliberately killed his friend.

30 Promises or inducements aimed at a benefit to someone other than the accused may have a coercive effect. This is discussed in Oickle at paragraph 51 and following. At para. 52, Iacobucci J. noted McIntyre J.A.'s observation, when he was a member of our Court of Appeal, in R. v. Jackson (1977), 34 C.C.C. (2d) 35 (B.C. C.A.), at 39, that the question turns on whether "the immunity of one was of such vital concern to the other that he would untruthfully confess to preserve it".

31 Here, I find the well-being of Ciliberto's parents was a vital concern to him. His comments and responses throughout the interrogations repeatedly demonstrated this. He was constantly urged and prodded by the police to explain things in order to benefit his parents.

… I also observe that just before Ciliberto was confronted with the victim's parents, Sergeant Dhillon raised another possibility, in effect, escalating the potential criminal liability by suggesting that people were wondering if, in fact, he had set out to kill not only Brian Paskalidis but the entire Paskalidis family, as well. This I conclude had the effect of enhancing a benefit. If you talk, you will avoid being labelled a person who intended to become a multi-murderer or a serial killer. The police reinforced this by comparing the idea that Ciliberto would be so considered to the reputation of alleged serial murderer Willie Pickton and convicted serial killer Clifford Olson.

34 The Crown points to the evidence of the police that they intended these as moral or spiritual inducements only. This submission refers to the observation in Oickle , at para. 56, that generally such inducements do not produce an involuntary confession because they are not in the control of the police. I do not find that persuasive here. The inducement was that "If you give us an explanation, we," that is the police, "will report it to your parents and relieve their suffering". This is not a situation in which the interrogator had no control over the suggested benefit.

35 Regardless of what was intended, I find these suggested, if somewhat indirect, benefits to the accused would have the characteristics of inducements. I would not exclude the statements on this basis alone, but they are factors I take into account as directed by the Supreme Court of Canada in considering the circumstances, that is, the overall context in which the statements were made.

[Emphasis added]

[35] At the end of the day, Justice Williamson determined the police had made indirect inducements which, coupled with other factors, justified exclusion of the statement.

[36] By contrast, the Crown alerted the Court to *Foerster*, a more recent British Columbia trial decision. In this case, Justice Rogers considered whether a moral inducement can vitiate voluntariness. The Court also considered whether the police had induced the accused to confess by promising that he could see a family member. The Court noted as follows at paras. 45, 81 and 83:

> 45 Police often suggest that confessing will assuage a suspect's conscience. An appeal to a suspect's moral compass is generally not considered to be a threat of [sic] a promise. That is because such an appeal usually goes something like: "You will feel better if you confess", and the police have no control over whether the suspect will, in fact, feel better after talking.
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> …
>
> 81 I find that there is no merit in Mr. Foerster's argument that by satisfying Mr. Foerster's desire to speak to Mr. Hangartner [his half-brother], the police manufactured in Mr. Foerster an obligation to make inculpatory statements. I have come to that conclusion because throughout the interview, the police were careful to say to Mr. Foerster that if he took responsibility for his actions both he and his family would feel better and that he should take the opportunity afforded to him in the interview to make that happen. Never did anyone suggest to Mr. Foerster that if he confessed, he would then be allowed to see Mr. Hangartner or any other member of his family…
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> …
>
> 83 The inducements that the police did put to Mr. Foerster to make a confession were to his conscience, his moral compass, and to his sense of responsibility to the emotional well-being of his family. The police had no control over the impact that a confession would have on Mr. Foerster's conscience or his family. Mr. Foerster must be taken to have understood that to be the case. It follows that Mr. Foerster could not have understood that the appeals by the police to his conscience were actually offers to make a bargain. Mr. Foerster must be taken to have understood that the police were doing nothing more than guessing that he and his family would feel better if he confessed. There is nothing improper in the police making an appeal such as this.
>
> [Emphasis added]

[37] Accordingly, Justice Rogers held that moral inducements did not negate voluntariness because the accused must have known that the police had no control over those types of outcomes. Further, the police had never used the notion of Mr. Foerster seeing his family as a "bargaining chip".

Oppression

[38] The second factor in assessing voluntariness is oppression. Were the circumstances of the interview so oppressive that the accused's will was overborne? In *Oickle* Justice Iacobucci said this about oppression at para. 58:

> 58 There was much debate among the parties, interveners, and courts below over the relevance of "oppression" to the confessions rule. Oppression clearly has the potential to produce false confessions. If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternately, oppressive circumstances could overbear the suspect's will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession.
>
> [Emphasis added]

[39] He expanded on the meaning of oppression with examples at paras. 59-62. In the earlier case of *R. v. Rothman*, [1981] 1 S.C.R. 640 ("*Rothman*"), the Supreme Court of Canada dealt with oppression at paras. 120 – 126. In *Ciliberto*, Justice Williamson referred to *Oickle* as well as *R. v. Liew*, [1999] 3 S.C.R. 227, as follows at paras. 37 and 38:

> 37 In *R. v. Liew*, [1999] 3 S.C.R. 227 (S.C.C.) at para. 37, Major J., speaking for the majority, characterized oppression as typically, but not exclusively, thought of as "persistent questioning, a harsh tone of voice and applied psychological pressure" on the part of the state agent.
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> 38 The following year, in *Oickle* , while discussing oppression, Iacobucci J. stated at para. 58 that:
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> > If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions.
>
> In subsequent paragraphs he stated that excessively aggressive intimidating questioning for a prolonged period of time and confronting a suspect with non-existent evidence are factors in the creation of an oppressive atmosphere.

[40] The authorities tend to agree that physical contact with the accused does not necessarily create an atmosphere of oppression. The following excerpt offers support for this statement:

> Touching the suspect, when done respectfully, does not affect voluntariness. In *R. v. Pappas*, 2012 ABCA 221 (Alta. C.A.), the investigating officer drew close to the suspect, and touched his knee, his thigh, and his wrist, to get his attention. This conduct did not appear to bother the suspect in any way, and therefore did not affect voluntariness. (Gibson, John L., *Criminal Law Evidence: Practice and Procedure* (Thompson Reuters Canada Limited) at 18(C)(h))

[41] In *R. v. Thornton* (1999), 180 N.S.R. (2d) 23 S.C., the Court considered police techniques that involved physical contact. At para. 18, Justice Haliburton noted:

> … Sgt. Taker testified as to the techniques he used; that he approached Thornton with a sympathetic attitude, making "physical contact', in an effort to comfort him. He found Thornton distraught, shaking, speaking of pains in his stomach, but that he was coherent and after receiving medication, was more relaxed. The interview was "not going to stop" if Murray arrived or not. Officer McCort, who found the rifle as a result of the reenactment by the Accused, observed him to be "tired, coherent, cooperative".
>
> [Emphasis added]

[42] The impugned statement was admitted into evidence (para. 47).

Operating Mind

[43] The third factor addressed in *Oickle* is the operating mind and Justice Iacobucci dealt with this at paras. 63 and 64. The Ontario Court of Appeal had cause to consider what is meant by an operating mind in *R. v. Sidhu*, 2013 ONCA 719, [2013] O.J. No. 5382, noting as follows:

> 10 The trial judge correctly set out the test for voluntariness and the need to consider the circumstances as a whole to assess the effect of police conduct on the accused's ability to exercise his free will. In addition to presiding over the *voir dire*, during which the Crown tendered its evidence, she noted that she watched the videotape of Mr. Sidhu's statements to police, both before and after his wife's intervention, comprising a period of over eight hours. The trial judge stated that she observed Mr. Sidhu's comportment and demeanor, finding that he appeared "calm and alert" despite the length of the interview, and that he had an operating mind throughout. The appellants contend that the police did not allow Mr. Sidhu

> to use the bathroom until he provided them with one of the captor's phone numbers. However, the trial judge found no improper *quid pro quo* between the police and Mr. Sidhu. On her view of the evidence, when the accused asked to use the bathroom, he was properly accommodated.
>
> [Emphasis added]

Other Police Trickery

[44] According to *Oickle*, the fourth factor is a distinct inquiry from the other three. It involves maintaining the integrity of the criminal justice system. In *Rothman*, Justice Lamer made some general comments regarding police trickery:

> 127 The judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge and the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit, and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer should pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty Legal Aid lawyer, eliciting in that way incriminating statements from suspects or accused; injecting pentothal into a diabetic suspect, pretending it is his daily shot of insulin, and using his statement in evidence would also shock the community; but, generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.
>
> [Emphasis added]

[45] In *Foerster*, after finding that the police had not used his half-brother as an inducement, Justice Rogers considered whether the tactic amounted to police trickery:

> 96 Mr. Foerster characterizes Mr. Hangartner's participation in the interview as a police trick. He complains that the police knew that familial relationships were

very important to him and that they used Mr. Hangartner as a tool to pry out of him confessions that he would not otherwise have made.

97 In support of this argument, Mr. Foerster notes that the tone of the interview changed when Mr. Hangartner arrived. Whereas before he had been somber and occasionally weepy, when he saw his half-brother he became happy and animated. He says that the police tricked him by offering Mr. Hangartner's company as a sort of savior. He complains that the police played upon his high emotions, and thereby hoodwinked him into saying things against his interest.

…

99 I have no doubt that Mr. Hangartner's appearance in the interview came as a huge surprise for Mr. Foerster. I have no doubt that Mr. Foerster was very happy to see Mr. Hangartner. His expression and demeanor, and the fact that several times he had asked to speak to his family, all support that conclusion. The decision by the police to have Mr. Hangartner participate in the interview definitely had the effect of changing, at least temporarily, Mr. Foerster's emotional tone. I cannot say, however, that Mr. Foerster's change of emotional tone caused him to become disconnected from the process in which he was involved. His behaviour while Mr. Hangartner was in the room demonstrates that he still knew that he was being interviewed for the purpose of investigating his participation in the events that led to the charges against him.

100 The police did not use subterfuge or misdirection to suggest to Mr. Foerster that Mr. Hangartner's participation changed the interview from a serious investigation to a chat between family members. For that reason, I can give no weight to Mr. Foerster's assertion that by saying this:

> HANGARTNER: I'm here to support you buddy. You know like, whether if I'm here or I'm not here, for you to be telling the truth and coming forward Matt, is what you're doing for the victims and what you're gonna be doing for yourself in the long run, is what's best for you man. And whether we be sitting here in a police detachment or out by a river with a fishing rod in our hands, you'd be doing the same thing for yourself, man. You know.

that Mr. Hangartner gave Mr. Foerster reason to believe that all of a sudden, he could speak as freely to Mr. Hangartner as he might while on a fishing trip.

101 Further, the police did not represent Mr. Hangartner to be anything other than what he demonstrated himself to be: viz, a sympathetic and caring ear.

> **Summary Voluntariness**
>
> …
>
> 104 It is, in my opinion, significant that Mr. Foerster made his first confession concerning Ms. Van Diest early in the process and contemporaneously with his sister Stephanie's appeal to him to tell the truth and that the confessions he made later were made around the same time as Mr. Hangartner's similar appeals to tell the truth. The evidence does not suggest that Mr. Foerster was tricked or bullied or bargained into making those admissions. Instead the evidence shows and I find as a fact that Mr. Foerster made the admissions because he accepted the proposition that it would, in the end, be better for him to be honest and tell the truth. Of course whether what he said is in fact the truth will be for the trier of fact to find.
>
> [Emphasis added]

[46] Thus, the half-brother's attendance at the interview did not amount to police trickery that duped the accused into believing that the circumstances of the interview had changed.

[47] Similarly, in *J.K.E.*, Lilles C.J.T.C. found that involving the accused's social worker and the baby's father in the interview "could be viewed as a police trick but in the circumstances would not be a trick that would shock the community" (para. 52).

[48] In *Mensah*, Derrick Prov. Ct. J. concluded that having the accused's mother present for the interview was an effective tactic, and not a police trick (para. 96).

Analysis

Person In Authority

[49] Donna Jordan was recruited by the police to assist with interviewing Mr. Calnen. Although no evidence was led by way of Donna Jordan, we have the evidence of Cpl. Hurley and Sgt. Vardy.

[50] Sgt. Vardy said it was his decision to bring Donna Jordan into the interview room. He discussed the matter with Cpl. Hurley and Cst. Langille and went ahead with the plan. On cross-examination he acknowledged that when the decision was made it was "late in the game". He agreed that the police had exhausted approximately 22 of the 24 hours they had for questioning. Sgt. Vardy

acknowledged Mr. Calnen said "nothing of note" prior to Donna Jordan's involvement.

[51] On cross-examination Sgt. Vardy agreed it was unusual to bring a civilian into a police interrogation; however, he said he had done it before. Over the course of hundreds of interviews, Sgt. Vardy said that in perhaps five cases he had involved non-police officers. He added that this approach had only been used in the last four to five years.

[52] Sgt. Vardy said he was familiar with other situations where the police involved civilians. Asked about the *Ciliberto* case, he recalled the case had "mental health issues in play".

[53] Cpl. Hurley said there was discussion with the interview team on the morning of June 18 and there was an overall sense of how the interview was going. He allowed, "a decision was made [to bring Ms. Jordan in] if Donna was willing".

[54] During the morning of June 18 (presumably while questioning was ongoing with Sgt. Vardy and Cst. Briers), D/Cst. Hurley attended at Donna Jordan's place of work to pick her up. He brought her to the Lower Sackville detachment. On the way to the detachment, D/Cst. Hurley said they discussed certain ground rules for the interview. For example, she was told that she could not threaten Mr. Calnen.

[55] Sgt. Vardy said Ms. Jordan and her husband, Warren Jordan, were brought into the detachment on the morning of June 18. He recalled the officers discussing with the Jordans who would be best to "go in" and it was decided to be Donna. Sgt. Vardy said he gave her, "a brief run down… there were to be no threats or promises… I told her to be herself… I didn't tell her sentences to say."

[56] On the basis of the evidence of Sgt. Vardy and Cpl. Hurley, I find Ms. Jordan was assisted and instructed by the police. Further, given her role in the interview room, she acted as an agent of the state.

[57] D/Cst. Hurley escorted Donna Jordan into the interview room and remained there at all times during the time she was with Mr. Calnen. His role in the conversation varied between passive and active. Once again, I find that Donna Jordan was clearly acting as an agent of the police. In my view, it would not have been reasonable for Mr. Calnen to see her otherwise.

[58] In any event, a police officer was at all times present so regardless of Donna Jordan's status, the impugned statements were clearly made to a person in authority.

Voluntariness

Threats or Inducements

[59] As in *Ciliberto*, there were statements made by the police which may be said to have the characteristics of inducements. The well-being of his three children was used to entice Mr. Calnen to make an admission. The police also used Mr. Calnen's own peace of mind. However, in *Ciliberto*, there was a clear offer of a benefit over which the police themselves had control: they would report the confession to the accused's parents "and relieve their suffering". Here, I do not find that the police made any such clear inducements. Indeed, I find the circumstances are more like those in *Foerster*, where the accused "must be taken to have understood that the police were doing nothing more than guessing that he and his family would feel better if he confessed." Further, I do not believe that the police held out Donna Jordan's visit as a kind of benefit or reward, so that Mr. Calnen felt compelled to give information.

Oppression

[60] I find that Donna Jordan's participation is most relevant to this branch of the analysis. The police played to Mr. Calnen's emotions. They made countless references to his children. They played audio recordings from his son and from Donna Jordan. They read a letter from one of his daughters. There was significant "build-up" before they eventually brought Donna Jordan into the room. Donna Jordan immediately embraced Mr. Calnen and for the remainder of her time in the room, her physical contact with Mr. Calnen hardly ever ceased. She held his hand. She touched his leg, arm and face. She made references to their history as friends, of "partying together". They both cried. Donna Jordan promised Mr. Calnen that she forgave him, that she thought he was a good man who had made a mistake. Eventually, she resorted to begging Mr. Calnen for information. She simply wanted to know where her daughter's body was for closure, she said. Recall in *Ciliberto*, Justice Williamson's comments at para. 44 and then this:

> 45 It is difficult to express in words the atmosphere, or the environment, evident when one views the videotape of this meeting and listens to the disturbing heartfelt weeping, sobbing, whaling, moaning and crying. At times all three

> principal participants were crying. "Crying" in this context is in itself an inadequate word. Sergeant Dhillon's tactic of placing Ciliberto's hand in Mrs. Paskalidis, his tactic of physically moving, albeit gently, Ciliberto closer toward Mrs. Paskalidis, his physically turning of Ciliberto's face towards Mrs. Paskalidis' face, his ensuring that the four of them are face to face in very close physical proximity, either inches apart or actually touching, and at a time when Mrs. Paskalidis is demonstrably falling apart emotionally, crying and pleading, his raised voice stating repeatedly, and I quote,
>
> > Look at her. Look at her. Look at her, Johnny. Look at her, Johnny. Look at her, Johnny. Look at her, Johnny. This is what you have done.
>
> all contribute to what I find is an oppressive atmosphere. At one point, Mrs. Paskalidis vomits. Ciliberto is described as wiping snot and tears from his face. The police do not end this disturbing scene. They persist. I find that in this situation the "aversive interpersonal pressures," the words used in *Oickle* at paragraph 38, were such that a stress compliant admission likely resulted.

[61] I do not find the emotional warfare in the case before me to be on the same level as in *Ciliberto*. Further, a number of factors in *Ciliberto* made the police's tactics particularly distasteful, as I will expand upon below. In the case before me I do not find distasteful police tactics. I say this incorporating the same reasoning I have applied in my discussion at paras. 67, 68, 72 and 74.

Operating Mind

[62] I find that Mr. Calnen had an operating mind at the time of his statements and ultimate confession. Throughout, there is no evidence Mr. Calnen did not understand the police warnings. From what I observed and read, it is apparent he had an operating mind as he was coherent and capable of understanding the questions put to him. He appeared to be in complete and total control of his faculties. While I have no doubt that he was somewhat sleep deprived, he did not once complain of this and never gave the impression of not comprehending what was being asked of him.

[63] When the questioning of Mr. Calnen took a break at 2:00 a.m., he had hardly said anything to first Sgt. Vardy and then S/Sgt. Townsend. Mr. Calnen was then taken to the cells. He spent six hours alone there. The Crown did not call the guard who may have been able to speak to whether Mr. Calnen slept. Sgt. Vardy was asked what the cell logs revealed but I am leery of this form of hearsay.

[64] What I have before me is Exhibit VD-4 which shows Mr. Calnen arriving back in the interview room at a little after 8:00 a.m. He appears and sounds alert as he takes Sgt. Vardy up on his offer of a coffee with one sugar cube. Mr. Calnen comments on the breakfast sandwich he was given, "… it was dead on to what I like except for they gave me a home-style biscuit instead of an English muffin."

[65] The banter continues and then goes back to the level of questioning of the night before. At no time does Mr. Calnen appear sleepy. For example, he rarely yawns and never dozes off. He does not give the impression of not comprehending what is going on. He never complains of being uncomfortable and does not shift much in his seat, even when he is left alone in the interview room. At the end of the day, I find no indication that he was not throughout the piece thinking clearly and speaking coherently.

Other Police Trickery

[66] In *Foerster*, defence counsel argued that the police had used the accused's half-brother "as a tool to pry out of him confessions that he would not otherwise have made" (para. 96). This argument was not overtly made in this case as Defence counsel placed the emphasis on the overriding theme of oppression. In any event, consistent with Justice Rogers, I reject any notion that police trickery was used. Recall Justice Iacobucci's words in *Oickle* at paras. 65 and 67, and this advice:

> 67 In *Hebert*, *supra*, this Court overruled the result in *Rothman* based on the *Charter*'s right to silence. However, I do not believe that this renders the "shocks the community" rule redundant. There may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness per se, is so appalling as to shock the community. I therefore believe that the test enunciated by Lamer J. in *Rothman*, and adopted by the Court in *Collins*, is still an important part of the confessions rule.
>
> [Emphasis added]

[67] I do not find that bringing Donna Jordan into the interview room was behaviour so appalling as to shock the community. Further, picking up on more recent words from the Supreme Court of Canada (see *R. v. Hart*, 2014 SCC 52 at para 117), I do not believe that what went on in the interview room can in any way be characterized as "misconduct that offends the community's sense of fair play and decency".

[68] Indeed, I find that Mr. Calnen's demeanor and emotional tone did not significantly change upon Ms. Jordan's arrival. It cannot be said that he became disconnected from the process in which he was involved. The police did not use subterfuge or misdirection to suggest to Mr. Calnen that Donna Jordan's participating changed the interview from a serious investigation to a chat between friends. Mr. Calnen had no reason to believe that all of a sudden, he could speak freely to Ms. Jordan.

Conclusion

[69] There is no dispute that upon arrest Mr. Calnen was advised of his right to counsel and shortly thereafter he exercised that right. He met with Mr. Planetta for in the order of 45 minutes. I infer Mr. Calnen was advised to remain silent because this is what he did throughout most of what would become hours of repeated questioning.

[70] In reviewing the recordings and transcripts of the statements, I find there is nothing to suggest anything untoward. Indeed, there is nothing which causes me to conclude Mr. Calnen did not understand the police warnings. From my observations, he had an operating mind throughout the entirety of the questioning.

[71] From listening to and observing the officers on the recordings, they would appear to have considerable experience and skill in conducting such interviews. Whereas Mr. Calnen was continually urged by the police to explain things so as to benefit his family and the Jordan family, I find these urgings amounted to moral inducements only. In applying a contextual analysis, I have come to the conclusion that there was no *quid pro quo* offered.

[72] While obviously not a police officer and lacking in the experience and training, I nevertheless find Ms. Jordan was appropriately briefed. In scrutinizing her questioning of Mr. Calnen, it cannot be said that she offered any inducements or the like. Without question, her presence in the interview room upped the emotional quotient. Mr. Calnen and Ms. Jordan clearly had an emotional exchange, characterized by hugging, crying and whispered voices. In this regard, the session was unorthodox but I do not find that it crossed the line. Indeed, I find Ms. Jordan exhibited great skill, composure and discipline as she pled for Mr. Calnen to tell her of the whereabouts of (the remains of) her daughter.

[73] Quite apart from the situation in *Ciliberto*, there is no evidence Mr. Calnen suffered from a mental illness. There is no evidence he was on mind-altering medication. There is no evidence that the authorities lied to him in any way.

[74] From the *Oickle* factors, the Defence has chosen to emphasize oppression. When I examine the totality of the recordings and transcripts as well as evaluate the *viva voce* evidence, I see no contextual basis for arriving at the conclusion that there was an oppressive atmosphere. To the contrary, Mr. Calnen was treated with respect and he exhibited an operating mind. The police strategy was clearly designed to play to Mr. Calnen's emotions. I do not say this critically. It seems to me that appealing to the man's conscience by playing an audio plea from his son, reading a letter from his daughter, and putting a picture of Reita Jordan and her sisters before him were prudent things to do. Similarly, I have no problem with the constant refrain of the officers to "do the right thing".

[75] Bringing Donna Jordan into the interview room was obviously a late attempt to elicit a confession. It worked and Mr. Calnen subsequently told the police more details and walked them through a re-enactment. When I consider all of the facts, the law, and apply a contextual analysis, I come to the overwhelming conclusion that the Crown has proven beyond a reasonable doubt that the statements were voluntary.

Chipman, J.