SUPREME COURT OF NOVA SCOTIA
Citation: R v. W.H.A., 2011 NSSC 157

Date: 20110421
Docket: CR Ant. 336695
Registry: Antigonish

Between:

Her Majesty The Queen

Provincial Crown

v.

W. H. A.

Accused

Editorial Notice

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

Restriction on publication: s. 486.4 of the *Criminal Code*

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	April 15, 2011, in Antigonish, Nova Scotia
Written Decision:	April 21, 2011
Counsel:	Catherine Ashley, for the Provincial Crown Coline Morrow, for the Accused

By the Court:

Background

[1] Mr. A. is to be tried by a judge and jury regarding two sexual assault charges alleged between January 21 and 22, 2010. The first allegation is that he touched K.F., the complainant, in ways that violated her sexual integrity, outside of her clothing without her consent. The second allegation is that he had sexual intercourse with her without her consent in his home. Mr. A. and the complainant knew each other.

[2] Mr. A. was arrested at 6:50 p.m., January 25, 2010. During the arrest process, Mr. A. blurted out, at least once, "I didn't rape anybody". He was taken into custody and had contact with legal counsel at the police station between 9:49 and 9:59 p.m. A videotaped statement conducted by Constable James Dykstra and later by Constable Shaw-Davis spans the time from 10:25 p.m. to 2:53 a.m.

[3] The Crown wishes the Court to rule as admissible both these statements. The Defence argues that Mr. A. 's s. 7.10(b) and 10(a) rights under the *Charter of*

Rights have been violated. The Defence and Crown also disagree on whether there is proof beyond a reasonable doubt that the statements given were "voluntary".

[4] A blended *voir dire* was held to resolve these issues. I heard from RCMP constables Shaw-Davis, Ryan, Dow, Merchant and Dykstra. The Defence called no evidence.

Factual Findings

[5] I found the evidence of the police officers to be credible. Although there were some minor inconsistencies, I do not find that any of those detract from the substance of their testimony.

(i) General Chronology

[6] As to the chronology of events touching on these issues, I find as follows:

1. Mr. A. was arrested at 6:50 p.m., January 25, 2010;

2. At 6:58 p.m., he was placed in the police car by Constables Dow and Merchant, who drove directly to the local RCMP detachment which is a distance of approximately 2 to 4 kilometres;

3. He was searched and placed in cells by 7:18 p.m.;

4. At 7:42 p.m. after complaining of a sore shoulder (as a result of a struggle during his arrest) and an examination by Emergency Health Services, he was transported to the St. Martha's Hospital, a distance of approximately 2 kilometres;

5. After receiving extra strength Tylenol from a medical doctor after examination, Constables Merchant and Dow transported Mr. A. directly back to the detachment, leaving the hospital at 8:53 p.m., and placing him in cells at approximately 9:09 p.m.;

6. At 9:30 p.m., Constable Dykstra and Shaw-Davis had returned to the RCMP detachment after concluding their search of Mr. A.'s house. Constable Dykstra examined the prisoner log and discovered that it appeared Mr. A. had declined to speak to legal counsel. Constable Shaw-Davis, became aware of this, and encouraged Mr. A. to contact legal counsel. She facilitated

the call so that Mr. A. was able to speak to legal counsel (duty counsel);

7. Between 9:49 and 9:59 p.m., January 25, 2010, Mr. A. consulted legal counsel;

8. The videotaped interview of Mr. A. commences at 10:25 p.m., January 25, 2010 and ends at 2:53 a.m., January 26, 2010. It is a complete, fair and accurate record of the only interrogation of Mr. A. by the police prior to 2:53 a.m., January 26, 2010;

9. Constable Dykstra alone conducted the interview from 10:25 p.m. until 1:21 a.m. Constable Shaw-Davis alone continued the interview from 1:28 a.m. to 2:47 a.m., at which time Mr. A. is left alone until retrieved by the officers at 2:53 a.m., January 26, 2010;

10. There is no evidence that any other persons in authority, other than these five officers, had any dealings of significance with Mr. A..

(ii) Charter and Right to Silence Chronology

[7] Specifically in relation to the advisements that the police gave to Mr. A. (*Charter of Rights* and right to silence), I find as follows:

1. At 6:50 p.m., Janaury 25, 2010, Constable Shaw-Davis advised him he was “under arrest for sexual assault”, and she produced for his inspection a copy of the arrest warrant for him, and the search warrant for his house premises. I infer that the search warrant contents contained sufficient detail to reinforce to Mr. A. the nature of the allegation against him, and that he had some opportunity to view and appreciate its contents;

2. Sometime during his arrest (it may have been before his police caution and *Charter of Rights* advisements or afterwards), Mr. A. blurted out “I didn’t rape anybody”;

3. Constable Shaw-Davis advised Mr. A. from memory the “police caution”, which she testified was that she told him not to say anything;

4. She similarly from memory advised him of his right to counsel, which I find was that she told him that he had a right to speak to a lawyer (including duty counsel). She also explained to him the “process” , which is that two officers would take him into custody and the remaining three would be searching his house;

5. Mr. A. appeared to understand all these advisements. He was alert and sober. A copy of the search warrant was also provided to his wife who was present;

6. Outside of his home at the police car Constable Merchant, from a preprinted card provided to him by the RCMP, re-read Mr. A. the police caution and *Charter of Rights* advisements - he did not have his card with him while testifying, but from memory indicated he told Mr. A. he had the right to speak to counsel and he would have that opportunity at the detachment (including a telephone number to reach duty counsel) and that he could apply for legal aid. Moreover, he told Mr. A. that he need not

say anything, but that anything he did say could be used in Court;

7. Mr. A. appeared to understand all the advisements given at or near the police car;

8. Mr. A. indicated to Constable Merchant that he did not want to speak to counsel;

9. After being placed in cells, Constable Dykstra noticed at 9:30 p.m., when he returned to the detachment that A. had declined to speak to counsel. Shortly thereafter, Constable Shaw-Davis encouraged Mr. A. to contact legal counsel and in fact called duty counsel to whom she spoke, and then provided the phone to Mr. A. in privacy at sometime around 9:55 p.m., January 25, 2010. Constable Merchant was also present to see Constable Shaw-Davis encourage A. to contact duty counsel. I find that A. did so, and spoke to counsel in private from 9:49 p.m. to 9:59 p.m.;

10. At the beginning of the videotaped interview, Mr. A. is again advised that he is under arrest. Constable Dykstra asks him: "They (officers) talked to you about some of your rights. Do you remember that conversation? I'm sure they had it with you in the car".

11. Mr. A. answers: "Read me my rights and stuff... Right not to say anything... That whatever you say gets recorded... And then I talked to a lawyer... And he told me not to say anything" - Transcript p. 13 - 14;

12. Constable Dykstra reiterates to him: "The first one is the most important one, and that is that you have the right to speak to a lawyer, okay?... Anybody that's, you know, arrested by the police has the right under the Constitution to speak to a lawyer and to get legal advice... And we as, the police, have the obligation to make sure that you get advice from the lawyer". - Transcript - p. 14;

13. Constable Dykstra also says: “The second thing that’s really important is that you don’t have to answer my questions today. You don’t have to say anything to me if you don’t want to... It’s your right not to have to say anything okay. And that’s again under the Constitution okay. It’s there to protect everybody, it’s there to protect you, it’s there to pick me in situations where we find ourselves under arrest or where, you know, we’re sitting here, you and me, talking in this chair, have a conversation. You don’t have to answer my questions if you don’t want to. But anything you do say to me today could be used as evidence in any proceedings okay? That’s important for you to understand.” - Transcript p. 15 and 16;

14. A. confirms that he has spoken to a lawyer - Transcript (12);

15. At 1:28 a.m., Constable Shaw-Davis takes over the interview and advises Mr. A.: “Anything that you felt compelled to say earlier with other members you’re now not compelled to say.

> But anything you say can be used as evidence with me also." - Transcript p. 179. From the transcript and reviewing of the videotape, Mr. A. appears to understand at each and every occasion, these advisements. At no time does he ask for clarification of the right to counsel or the right to silence.

Section 10(a) *Charter of Rights*

[8] Section 10 of the *Charter of Rights* reads:

> Everyone has the right under arrest or detention
>
> (a) to be informed promptly of the reasons therefor
>
> (b) To retain and instruct counsel without delay and to be informed of that right;...

[9] In *R v. Latimer* [1997] 1 SCR 217, Lamer, CJ for the Court stated:

> The purpose of this provision is to ensure that a person "understand generally the jeopardy" in which he or she finds himself or herself: R. v. Smith, [1991] 1 S.C.R. 714, at p. 728. There are two reasons why the Charter lays down this requirement: first, because it would be a gross interference with individual liberty for persons to have to submit to arrest without knowing the reasons for that arrest, and second, because it would be difficult to exercise the right to counsel protected by

> s. 10(b) in a meaningful way if one were not aware of the extent of one's jeopardy: R. v. Evans, [1991] 1 S.C.R. 869, at pp. 886-87.

[10] Whether a person understands generally the jeopardy in which they find themselves will depend on the facts in each particular case. In the case at Bar, Mr. A.'s immediate response to becoming aware of the nature of the arrest was to say: "I didn't rape anybody".

[11] This statement suggests he was certainly aware of the extent of the jeopardy that he was facing. He had been shown the arrest warrant and search warrant, and was advised expressly that he was "under arrest for sexual assault".

[12] In the circumstances, I find that, on a balance of probabilities, there is no violation of Mr. A.'s s. 10(a) *Charter of Rights.*

Section 10(b) *Charter of Rights*

[13] Similarly in relation to s. 10(b), I find there is no violation of Mr. A.'s rights, and even if it could be said that there was, I find that both the oral statement at the house and the videotaped statement should not be excluded under s. 24(2) of the *Charter* because having regard to all the circumstances, the admission of those statements in the proceedings would not bring the administration of justice into disrepute - after specifically applying the analysis suggested by the Supreme Court of Canada in its decisions including *R v. Suberu* [2009] 2 SCR 460.

[14] In *Suberu*, the Supreme Court Majority had to decide whether the words "without delay" in s. 10(b) of the *Charter* "require the police to execute their duties to facilitate a detainee's right to counsel immediately upon detention, or whether this obligation can be fulfilled at a later point in time".

[15] The Majority decision answered:

> "A situation of vulnerability relative to the State is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the State, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must

> immediately inform them of their right to counsel as soon as the detention arises" - para. 41.

[16] The Majority went on to say as well:

> "Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention." - para. 42.

[17] I have found that Mr. A. was advised of his right to counsel concurrently with the reason for his arrest. His right to counsel was reiterated to him by Constable Merchant, and it appears that Mr. A. knowingly declined to exercise his right to counsel, until he was encouraged to do so by Constable Shaw-Davis. Her encouragement led to him speaking to duty counsel between 9:49 and 9:59 p.m., January 25, 2010.

[18] Therefore Mr. A. had exercised his right to counsel prior to the videotaped statement. He therefore had the opportunity to be advised of the right to silence and other incidental legal advice respecting his arrest.

[19] Mr. A. argued that he was not specifically provided with a telephone number associated with free immediate preliminary legal advice, and therefore his statements should be excluded.

[20] As the Supreme Court of Canada observed in *R v. Latimer* [1997] 1 SCR 217 at para. 32:

> When Mr. Latimer was arrested by the police, he was not specifically informed of the existence of a toll-free telephone number by which he could access immediate free legal advice by Legal Aid duty counsel. Relying on this Court's judgment in Bartle, the appellant argues that this omission was unconstitutional, because it did not meet the standard for the informational component of s. 10(b). However, I reject this submission, because Bartle stands for quite a different proposition - that s. 10(b) encompasses the right to be informed of the means to access those duty counsel services which are available at the time of arrest...
>
> However, Brydges only required that information be provided about the existence and availability of duty counsel; there is no doubt that the appellant was told about duty counsel here, and so Brydges is satisfied. Bartle imposed the additional requirement that persons be informed of the means necessary to access such services. However, whether the police have met this burden in a particular case must always be determined with regard to all the circumstances of that case, including the duty counsel services available at the time of arrest or detention.

[21] I have been unable to find a case where after an imperfect s. 10(b) *Charter of Rights* advisement, an arrested person who has had contact with duty counsel, has successfully argued that evidence obtained after the contact with counsel should be excluded.

[22] Our Court of Appeal has dealt with cases where either duty counsel is not contacted at all or the evidence precedes the contact with duty counsel/private counsel - see for example *R v. Wallace* 2002 NSCA 52 [2002] NSJ No. 179, where Saunders, JA for the Court noted:

> Here, what the officer told the appellant shortly after pulling him over in his truck was clear, correct and informative. It would have been pointless for the police to have imparted a telephone number or numbers to the detainee at that stage.
>
> As with any case, some measure of common sense ought to be applied when considering the circumstances surrounding the detention, the advice given and the detainee's declared intentions. - paras. 20 - 21.

[23] **Regarding the oral statement**: "I never raped anybody", it was made so spontaneously by Mr. A. that Constable Shaw-Davis did not have an opportunity to give Mr. A. his s. 10(b) *Charter of Rights* advisement. I am inclined to find that at the time Mr. A. made the statement, he was not detained or arrested - see *R v. Suberu* [2009] 2 SCR 460, at paras. 21 - 25 regarding what is "detention"; and *R v. Hope* 2007 NSCA 103, [2007] NSJ No. 433 at regarding what is required to accomplish a lawful "arrest".

[24] In *Hope*, Fichaud, JA stated:

> To accomplish a lawful arrest, it is necessary that the officer have the subjective belief and objective grounds for an arrest, that he informs the individual of the arrest and that either he touches the individual or, if there is no touch, the individual submits to the constraint of arrest: R. v. Asante-Mensah, [2003] 2 S.C.R. 3, at paras. 42-43, 45-47, 57, 80; R. v. Latimer, [1997] 1 S.C.R. 217 at para. 4.

[25] In these circumstances, I do not conclude that there is a violation of Mr. A.'s s. 10(b) *Charter of Rights* in relation to the oral statement.

[26] **Regarding the videotaped statement**, it is clear that Mr. A. was advised of his right to counsel (in one form or another) by Constable Shaw-Davis, Constable Merchant, and then was encouraged to actually contact duty counsel by Constable Shaw-Davis at the detachment, which Mr. A. did in fact do.

[27] In the circumstances, I do not conclude that there is a violation of Mr. A.'s s. 10(b) *Charter of Rights* in relation to the videotaped statement.

[28] Defence counsel also argued, albeit not strenuously, that "Mr. A.'s right to counsel was not videotaped as such things often are. Therefore we do not have all the circumstances surrounding it". This point was argued to be relevant to s. 10(b) and s. 7 of the *Charter*.

[29] There are cases, particularly from Ontario, which would suggest that if the statement is not videotaped in circumstances in which such facilities are available, the voluntariness of the statement is suspect. In *R v. Fraser* 2011 ONCA 238 [2011] O.J. No. 1323, Mr. Fraser argued that the failure to video record police interaction with him in the three hours prior to his confession, undermines a finding of voluntariness. The Court rejected that submission and stated:

> The failure to record the three-hour interval before the confession does not per se adversely affect the reliability of the subsequent confession. That confession was videotaped. The failure to videotape the interaction between the appellant and the police in the time period preceding the confession does, however, alert the trier of fact to the need to carefully scrutinize both the interaction between the police and the accused during that time period and the explanation offered for not videotaping that interaction. - Para. 5. [Emphasis added]

[30] Here the entire statement was videotaped. It contains confirmation that Mr. A. was advised of his right to counsel and in fact exercised that right prior to the videotaped statement. There was no evidence that, other than “small talk”, the officers engaged in any material conversation with Mr. A. prior to 10:25 p.m., January 25, 2010.

[31] No authority has been provided for this precise kind of legal obligation upon the police. I doubt there is any such authority because such a proposition is neither practical nor based upon sound legal principle.

[32] I find that argument is without merit. Therefore there are no s. 10(a) or 10(b) *Charter of Rights* violations in relation to the oral or videotaped statement of Mr. A..

Both statements are voluntary

[33] In view of my earlier findings of fact and comments regarding Mr. A.'s *Charter of Rights* protections, I am similarly satisfied beyond a reasonable doubt that his oral statement ("I didn't rape anybody"), was voluntary.

[34] In relation to the intersection between s. 7 *Charter of Rights* (right to silence) and the requirement that any statements of an accused person to a person in authority be proved to be voluntary beyond a reasonable doubt, the comments of Justice Charron in *R v. Singh* [2007] 3 SCR 405 are instructive.

[35] On behalf of the Majority she stated:

> On the question of voluntariness, as under any distinct s. 7 review based on an alleged breach of the right to silence, the focus is on the conduct of the police and its effect on the accused's ability to exercise his or her free will. The test is an objective one, but the individual characteristics of the accused are obviously relevant considerations in applying this objective test.
>
> Therefore, voluntariness, as it is understood today, requires that the court scrutinize whether the accused was denied his or her right to silence. The right to silence is defined in accordance with constitutional principles. A finding of voluntariness will therefore be determinative of the s. 7 issue. In other words, if the Crown proves voluntariness beyond a reasonable doubt, there can be no finding of a Charter violation of the right to silence in respect of the same statement. The converse holds true as well. If the circumstances are such that an accused is able to show on a balance of probabilities a breach of his or her right to silence, the Crown will not be in a position to meet the voluntariness test. - Paras. 36 and 37.

[36] To the extent that there is a dispute about whether a proper right to silence caution was given to Mr. A., it is important to remember that, “there does not appear to be any uniformity in Canada as to the content of the “police caution” - per Justice Beveridge in *R v. K PLF* 2010 NSCA 45 [2010] NSJ 291 at para. 28.

[37] Moreover, one should not lose sight of the purpose of the right to silence. In *R v. Broyles* [1991] 3 SCR 595 at para. 22, Iacobucci, J. stated:

> ...the purpose of the right to silence is to limit the use of the coercive power of the state to force an individual to incriminate himself or herself; it is not to prevent individuals from incriminating themselves per se.

[38] To similar effect in *R v. Hebert* [1990] 2 SCR 151, McLachlan J, (as she then was) stated at para. 55:

> The guarantee of the right to counsel in the Charter suggests that the suspect must have the right to choose whether to speak to the police or not, but it equally suggests that the test for whether that choice has been violated is essentially objective. Was the suspect accorded his or her right to consult counsel? By extension, was there other police conduct which effectively deprived the suspect of the right to choose to remain silent, thus negating the purpose of the right to counsel?

[39] Notably in the case at Bar, Mr. A. did not testify during the *voir dire*.

[40] In *Singh*, Justice Charron observed that:

> At common law, the protection afforded by the confessions rule has always been intended to guard against the potential abuse by the state of its superior powers over a detained suspect. - para. 44.

> Ten years later, this Court in Oickle made express reference to the analysis in Hebert and embraced this modern expansive view of the confessions rule which, significantly for our purposes, clearly includes the right of the detained person to make a meaningful choice whether or not to speak to state authorities: see paras. 24-26. Iacobucci J. then reviewed the various components of the contemporary confessions rule, stressing, of course, that "[t]he application of the rule will by necessity be contextual" and that "all the relevant factors" must be considered (para. 47). He went on to describe the more common circumstances that vitiate the voluntariness of a confession using the well-known headings: (a) threats or promises, (b) [page426] oppression, and (c) operating mind. In keeping with the broader modern approach to the confessions rule, he also added a final consideration in determining whether a confession is voluntary or not -- the police use of trickery to obtain a confession that would "shock the community" (para. 66). He explained that: "Unlike the previous three headings, this doctrine is a distinct inquiry. While it is still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system" (para. 65).

> Finally, it is noteworthy that, in summarizing the parameters of the confessions rule, Iacobucci J. made express reference to the right to silence as a relevant facet of the rule:
>
> > 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. [Emphasis added; para. 69.]

[41] Let me then examine whether there is a proof beyond a reasonable doubt that the statement of Mr. A. was “voluntary”.

[42] The seminal case regarding the common law confessions rule is *R v. Oickle* 2000 SCC 38 [2000] 2 SCR 3.

[43] There Iacobucci, J. felt it “important to restate the rule...” - para. 32. He summarized the contemporary confessions rule as follows:

> The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not

> always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession. - para. 47.

[44] He then went on to examine the following categories of concern:

1. Threats or Promises;

2. Oppression;

3. Operating Mind;

4. Other police trickery

[45] The “threats or promises” category is at the core of the confessions rule and derives from the decision of the Privy Council in *Ibrahim v. R.* [1914] AC 599 where the Court stated at p. 609:

> It is 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 shown 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.

[46] Justice Iacobucci concluded: “The most important consideration in all cases is to look for a quid pro quo”. He elaborated:

> In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. **This becomes improper only when the inducements**, whether 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**. On this point I found the following passage from R. v. Rennie (1981), 74 Cr. App. R. 207 (C.A.), at p. 212, particularly apt:
>
> > Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. **If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law.** In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the [page38] confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession. [Emphasis added]

[47] When “oppression” is under consideration, the concern as with threats or promises (para. 57), is that the suspect’s will will be overborne to a point where the statement is not voluntary (para. 58):

> “Without trying to indicate all the factors that can create an atmosphere of oppression, such factors include depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time.” - para. 60.

[48] Regarding “operating mind”, the Court refers back to its decision in *Whittle* in which Sopinka, J. “explained that the operating mind requirement “does not imply a higher degree of awareness and knowledge of what the accused is saying than that he is saying it to police officers who can use it to his detriment” - para. 63.

[49] Regarding “other police trickery” the Court referred back to its *Rothman* decision with approval on this specific point. If the trickery might “shock the community” then chances are it will be considered involuntary - para. 67.

[50] It was the position of the Defence at the hearing that there is no material evidence of oppression, nor that A. did not have an operating mind, nor that there was police trickery. Mr. A. argues that his will was overborne by the police interviewers who created an atmosphere of trust, minimized the charge, which in the circumstances, caused Mr. A. to lose sight of his right to silence.

[51] Mr. A. argues collectively these items caused his will to be overborne and rendered his statement involuntary. I keep in mind that it is the Crown who must prove beyond a reasonable doubt that his statements are “voluntary”.

[52] It is argued that examples of the unfair and inappropriate level of trust created by the officers which lulled Mr. A. into providing an involuntary statement are exemplified by the comments of Constable Dykstra as follows:

> "I think it's really important for you today and for me today... Especially for you in your future... For us to have a conversation okay." - p. 9(24) transcript;

> "It's your right not to have to say anything okay. And that's under the Constitution okay. It's there to protect everybody, it's there to protect you, it's there to protect me, in situations where we find ourselves under arrest or where, you know, we're sitting here, you and me, talking in this chair, have a conversation. You don't have to answer my questions if you don't want to. But anything you do say to me today could be used as evidence in any proceedings okay. That's important for you to understand. I'm hoping that what you're going to allow me to do is for us to have a conversation about what's going on. Because I think what you and I have to chat about today is important for you today and for your future." - p. 16 of the transcript.

[53] In her testimony, Constable Shaw-Davis candidly conceded that she was trying to build a trust relationship with Mr. A. during the interview. The transcript bears this out:

> "Answer: ...I'm not going to lie to you.
>
> Question: I appreciate it. I'm not going to lie to you...

Answer: The same thing I'm not lying about anything else here. I know, yeah, she did (K.F. smoked a couple of joints).

Question: Fair. I appreciate it, your honesty. Obviously, she's been forthcoming with some things to me, so I know stuff. So now I know I'm building trust with you to me... So you understand that.

Answer: Well, I'm not going to lie to you about it, you know.

Question: Good. I won't lie to you either... Okay. I appreciate your honesty." - p. 182 - 183 of the transcript.

[54] Having viewed the videotaped statement, I would characterize the interaction between Constable Dykstra and Mr. A. as restrained and free-flowing except for one notable heated incident in which both Mr. A. and Constable Dykstra are standing up and other officers entered the room - p. 83 of the transcript.

[55] In *R v. Oickle*, Iacobucci, J. discusses a similar argument made in that case under the heading "abuse of trust". He commented:

> In essence, the court criticizes the police for questioning [page52] the respondent in such a gentle, reassuring manner that they gained his trust. This does not render a confession inadmissible. To hold otherwise would send the perverse message to police that they should engage in adversarial, aggressive questioning to ensure they never gain the suspect's trust, lest an ensuing confession be excluded.

[56] Although it may be that Mr. A. dropped his guard because he felt comfortable speaking to these two police officers, but he did so willfully, aware of his right to silence, and notably in an effort to persistently reinforce his position that he was not guilty of sexual assault because he did not even have sexual intercourse with K.F.

[57] Mr. A. also claims that the officers minimized the charge, by suggesting to him that they believed he was not capable of “rape”, and that based on their investigation there clearly had been sexual intercourse, therefore it must of been either consensual or started as consensual and then things got out of hand (and became non-consensual).

[58] The officers did employ this approach. In relation to such approaches, Iacobucci, J. observed in *Oickle* that:

> Insofar as the police simply downplayed the moral culpability of the offence, their actions were [page46] not problematic. As even the Court of Appeal recognized (at para. 126), "minimizing the moral significance of the offence is a common and usually unobjectionable feature of police interrogation". Instead, the real concern is whether the police suggested that "confession will result in the legal

> consequences being minimal" (para. 126). As discussed above, this is inappropriate.
>
> However, and with the greatest respect to the Court of Appeal, I believe they have mischaracterized the police interrogators' words. The offending passages are well represented by the following excerpt...
>
> The Court of Appeal focused on the underlined passage to suggest that the police were offering a "package deal", whereby the respondent would not be charged with multiple crimes if he confessed to them all. However, as the rest of the passage makes clear, the police were doing nothing of the sort. Instead, they were simply pointing out their reasons for believing that he was responsible for all the fires, not just one: namely, that it was a series of fires in issue, not isolated incidents. The police therefore treated the fires as a [page47] "package", all of which were likely set by the same person. - paras. 74 - 76.

[59] In my view, on a review of the entire circumstances and in particular the videotaped statement, I do not conclude that Mr. A.’s will was in any way overborne by this approach in the case at Bar.

[60] Ultimately, to argue successfully that Mr. A.’s will was overborne by a combination of factors cumulatively over time, it would be more persuasive if he confessed at some point to the offences in question. In the videotaped statement, Mr. A. maintains his position from start to finish that he did not have sex with K.F. Having not changed his core position about the offences, there is no apparent manifestation of his will being broken down, and an involuntary statement made as a consequence.

[61] Given that Mr. A. did not testify on the *voir dire*, this argument becomes that much more difficult to advance successfully. His perception of, or other comments, regarding his own circumstances at that time is not in evidence.

[62] To the extent that Mr. A. claims he was subtly induced, so much so that his will was overborne to continue discussions with the officers (which though exculpatory may provide a rich basis for evidence against Mr. A. in the Crown case in chief or as a means of cross-examining Mr. A.), I can find no *quid pro quo* - that is, what did the officers give to Mr. A. as a response for the "statement" that Mr. A. gave to them?

[63] Normally in the case of a expressly inculpatory statement (confession), such analysis is more meaningful. What is given and what is received is more obvious. The fact that what is allegedly given to Mr. A. by the police is not obvious, significantly weakens his argument that anything was given to him for his providing of the statement.

Conclusion

[64] I find as a matter of fact that Mr. A. well aware of his right to silence, having had the benefit of legal advice, and being of an operating mind, took part in the conversations that were videotaped January 25 - 26, 2010, in a completely voluntary fashion. He was not offered any inducements, nor was he threatened in any way that would undermine the voluntariness of his statement.

[65] In no way was his will to remain silent overborne. There was no abuse of a trust relationship, no atmosphere of oppression, and no deception amounting to police trickery which would "shock the conscience of the community".

Ruling

[66] I find that there are no *Charter of Rights* breaches in relation to either statement, moreover I find both statements to be voluntary beyond a reasonable doubt, and therefore I rule that both statements are admissible at the trial herein.

J.