

CANADA / JUDGMENT

R. v. Alexander

2024 BCSC 1488

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1488 R. v. Alexander

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alexander,

2024 BCSC 1488

Date: 20240405

Docket: 75942-2

Registry: Prince George

Rex

v.

Charlene Jane Alexander

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

(Voir Dire re Voluntariness of Statement)

Counsel for the Crown:

T.G. Bauman

E.A. Sukkau

Counsel for the Accused:

L.J. Helps

Place and Date of Trial/Hearing:

Prince George, B.C.

February 20-22, 2024

Place and Date of Judgment:

Prince George, B.C.

April 5, 2024

- [1] THE COURT: This ruling addresses the voir dire held to determine the voluntariness of a statement taken from the accused, Charlene Alexander, shortly after her arrest on a charge of first degree murder.
- [2] Ms. Alexander submits her statement is inadmissible because Crown has not proven beyond a reasonable doubt that it was given voluntarily. She submits that when looking at the evidence as a whole, the officers were, or should have been, on notice that she may have been in a vulnerable state, thus necessitating them to take further steps. She contends that the conditions in which her statement was taken were oppressive, and therefore she was effectively deprived of her voluntariness.
- [3] The Crown submits it has met its burden to prove the voluntariness of the statement beyond a reasonable doubt. Rather than oppressive, the Crown submits the officers were respectful and sensitive throughout their interactions with Ms. Alexander. The Crown also submits that Ms. Alexander's demeanour and conduct were not consistent with her position that she was vulnerable.
- [4] There is substantial agreement on the governing law. Before turning to that, I set out the facts, most of which are not contested.

I. FACTS

- [5] It is alleged that Ms. Alexander fatally stabbed Jessie-Mae Hayward-Lines on or about July 2, 2020 in Prince George, after the two women had a brief altercation. The stabbing took place on the courtyard immediately in front of the Prince George courthouse.
- [6] Crown called two witnesses during the voir dire, both of whom were members of the Serious Crimes Unit of the RCMP detachment in Prince George at the time: Corporal Katarzyna Walaszczyk and Corporal Scott Gardiner. Officer Walaszczyk arrested Ms. Alexander and Officer Gardiner took a statement from Ms. Alexander.
- [7] The Serious Crimes Unit had a briefing around 8:00 a.m. on July 3, 2020, regarding the investigation into Ms. Hayward-Lines' death. Team members were given various tasks. Officer Walaszczyk approached businesses around the courthouse asking to view any surveillance video. She also sought to speak to anyone who had witnessed or had information about the stabbing.

- [8] She received relevant information from people associated with the needle exchange located across the street from the courthouse, and from the Association Advocating for Women in the Community ("AWAC"), a local shelter that is situated very close to both the courthouse and the needle exchange. Through information gathered during this phase of the investigation, Officer Walaszczyk formed reasonable and probable grounds to arrest Ms. Alexander. Around the same time, she became aware that Ms. Alexander was in the dining hall at AWAC.
- [9] Given that Ms. Hayward-Lines had been fatally stabbed, Officer Walaszczyk was aware of the possibility of DNA evidence being on the hands and clothes of the person who stabbed her. In order to preserve that possible evidence, she decided to immediately arrest Ms. Alexander. In other words, this was not a planned arrest.
- [10] Ms. Alexander was escorted outside the building and arrested at about 17:23. Officer Walaszczyk immediately informed Ms. Alexander of her right to retain and instruct counsel. Ms. Alexander was then transported by police cruiser to the RCMP detachment, which was nearby. She was handcuffed, but not until she was put into the vehicle.
- [11] Ms. Alexander was brought into the detachment. A different officer took swabs of her hands. Officer Walaszczyk then escorted Ms. Alexander to a private area, where she could not be seen by any camera or officer. The RCMP gave Ms. Alexander a change of clothes, and seized her clothes and hair clips as evidence. The RCMP took her photo, then brought her to what is referred to as the "lawyer room", which is a small private room with a telephone.
- [12] Officer Walaszczyk contacted Legal Aid, but no one answered, so she left a voicemail. She escorted Ms. Alexander to a holding cell at about 18:03. Legal Aid called back and Ms. Alexander was escorted back to the lawyer room at about 19:59 to speak with a lawyer. She finished her phone call in private, and was escorted back to the cell at about 20:07.
- [13] At about 21:49, Officer Gardiner retrieved Ms. Alexander from her cell and walked her into an interview room, where she remained while he conducted the interview, which lasted until about 23:08. He left the room briefly two times during the interview. Ms. Alexander was taken back to her cell and was released from the detachment at about 23:41.
- [14] She was charged with indictment 75942-2 on July 27, 2022 for the count of first degree murder.

A. Admissions

- [15] Pursuant to s. 655 of the Criminal Code, R.S.C. 1985, c. C- 46, Ms. Alexander admitted the following facts:
- a) Officer Walaszczyk arrested Ms. Alexander for murder on July 3, 2020, at about 17:23.
 - b) After her arrest the police transported Ms. Alexander to the Prince George city RCMP detachment.

- c) While at the detachment on July 3, 2020, Ms. Alexander provided a statement to Officer Gardiner, starting at approximately 21:50.
- d) No state agent or person in authority did anything or omitted to do anything that materially impacted the voluntariness of the statement prior to Ms. Alexander's arrest at 17:23.
- e) Except for Officers Gardiner and Walaszczyk, no state agent or person in authority did or omitted to do anything that materially impacted the voluntariness of Ms. Alexander's statement while she was in police custody on July 3, 2020.
- f) While at the detachment, Ms. Alexander was recorded on video surveillance by several different cameras. A computer technician at the detachment converted all of that footage into a format that is compatible with commonly-used programs. The process of converting that footage did not alter or change the footage in perceptible or material ways. The footage truly and accurately depicts the scenes recorded at the detachment on July 3, 2020.
- g) A computer technician at the detachment compiled the footage into a single digital file (the "Compilation Video"), allowing for the entirety of Ms. Alexander's time at the detachment to be viewed as a single video recording, instead of having to switch between separate recordings from the different cameras. That process did not alter or change any of the footage in any way, and the Compilation Video truly and accurately depicts the scenes recorded at the detachment on July 3, 2020. A true and accurate copy of the Compilation Video was entered as an Exhibit at the voir dire.
- h) There are four periods captured on the Compilation Video where Ms. Alexander was alone in her cell and the images are of limited relevance. The parties agreed that it was unnecessary during the voir dire for those portions to be played in the courtroom; instead the video was fast-forwarded through those periods.
- i) In each portion of the Compilation Video that was fast-forwarded, Ms. Alexander was depicted alone in her cell lying down. The approximate timing of the periods skipped over in the compilation video are from: 18:04 to 18:41; 18:49 to 20:00; 20:09 to 21:51; and 23:12 to 23:39.

B. Audio and Video Evidence

[16] In addition to testimony from the two officers, the Crown introduced the following into evidence:

- a) audio recordings from Officer Walaszczyk's personal recording relating to:
 - i. the arrest of Ms. Alexander at AWAC;
 - ii. Ms. Alexander's transport in a police vehicle to the detachment;
 - iii. Officer Tippe taking a DNA swab of Ms. Alexander's hands;
 - iv. the seizure of Ms. Alexander's clothing;

- v. Ms. Alexander's placement in the lawyer room;
 - vi. Officer Walaszczyk escorting Ms. Alexander's between the lawyer room and her cell on two occasions; and
 - vii. Officer Walaszczyk together with Officer Gardiner releasing her from the cell and the detachment.
- b) audio recordings from Officer Gardiner's personal recording leading up to, conducting, and concluding the interview with Ms. Alexander (those videos lasted approximately 79 minutes); and
 - c) a compilation of video clips that captured the arrival of the police vehicle at the detachment and all subsequent interactions of both officers with Ms. Alexander, as well as short interludes immediately before and after their interactions.

II. LEGAL PRINCIPLES ON VOLUNTARINESS

- [17] At common law, a confession to a person in authority is presumptively inadmissible unless Crown can prove beyond a reasonable doubt that it was voluntary: *R. v. Oickle*, 2000 SCC 38 at paras. 30 and 68; *R. v. Beaver*, 2022 SCC 54 at para. 45. This is sometimes referred to as the "confessions rule".
- [18] Voluntariness is "shorthand for a complex of values engaging policy concerns related to not only the reliability of confessions, but also to respect for individual free will, the need for the police to obey the law, and the fairness and repute of the criminal justice system": *Beaver* at para. 47. The fundamental question is whether a statement was made of the accused's free will or whether the conduct of the police resulted in the will of the accused being overborne.
- [19] A voluntary confession may not be admissible where it is obtained in a manner that breaches the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. A finding with respect to voluntariness is determinative of the s. 7 right to silence regarding a statement made to a person in authority in that the functional test under both is the same: *R. v. Singh*, 2007 SCC 48 at para. 39. That issue does not arise since the Charter application originally filed by Ms. Alexander was not pursued.
- [20] Since *Oickle*, cases have refined the confessions rule. In *R. v. Jongbloets*, 2017 BCSC 740, Madam Justice Devlin summarizes the modern rule at paras. 54-60. Among the principles that emerge from her helpful summary are the following:
- a) The Crown bears the onus to prove voluntariness of an accused's statement to a person in authority beyond a reasonable doubt.
 - b) A confession will not be admissible if made in circumstances that raises a reasonable doubt, whether it was made voluntarily.

- c) The confessions rule is meant to protect the rights of the accused and protect against the admission of false confessions, without unduly limiting society's need to investigate and solve crimes.
- d) A statement will not be voluntary if it was obtained through unacceptable threats or promises, in oppressive circumstances, or if the accused lacked an operating mind. This requires that a detainee know what they are saying and that they are saying it to police officers who can use it to their detriment.
- e) These factors must be considered in a contextual approach, specific to the facts of the case and the particularities of the individual accused.
- f) Police trickery that would shock the community will also render a statement inadmissible.

(see also: *R. v. Spencer*, 2007 SCC 11; *Beaver*).

[21] Ms. Alexander emphasizes the policy reasons for the voluntariness analysis, canvassed in *Oickle*, among other cases. At para. 42, the Supreme Court of Canada highlighted the concern of compliant personalities in relation to false confessions:

From this discussion, several themes emerge. One is the need to be sensitive to the particularities of the individual suspect. For example, *White*, *supra*, at p. 120, notes the following:

False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities, and, in rare instances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.

And indeed, this is consistent with the reasons of Rand J. in *Fitton*, *supra*, at p. 962:

The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.

[22] In this case, Ms. Alexander relies primarily on oppression, which was explained by Devlin J. in *Jongbloets* at para. 58:

Oppression refers to the atmosphere and conditions surrounding the making of a statement. The question is whether the conditions in which the statement was made were so distasteful as to produce a stress-compliant confession, or overbore the will of the detainee in the sense that they believed it was futile to resist questioning, or came to doubt their own memory in the face of relentless accusations: *Oickle* at para. 58. Factors that can create an atmosphere of oppression include depriving the detainee of food, clothing, water, sleep, or medical attention; excessively aggressive, intimidating questioning for a prolonged period; and, significantly for the purposes of this *voir dire*, denying access to counsel: *Oickle* at para. 60.

- [23] Many circumstances in police conduct can lead to an oppressive atmosphere causing a lack of voluntariness. Those circumstances must be assessed in the context of the whole of the evidence.
- [24] The parties before me agree that police conduct need not be perfect, but it must be analyzed in terms of the impact it had on the free will of the accused. I discuss below the legal principles, organized under three main issues raised in this case.

A. Operating Mind and Police Caution

- [25] Ms. Alexander asserts the police caution was absent or incomplete. That circumstance and what impact that may have on the accused's voluntariness has been discussed in several cases.
- [26] In *R. v. Tessier*, 2022 SCC 35, no police caution was given. The police testified that the accused was not a suspect at the time of his statement, although that was rejected by the Supreme Court of Canada. The Court of Appeal found the trial judge committed an error in law by failing to appreciate that the confessions rule requires proof of actual knowledge on the part of the suspect that he did not have to speak. However, the Supreme Court of Canada found the Court of Appeal had gone too far on that point by introducing a level of subjective knowledge into the test.
- [27] Justice Kasirer explained the absence of a caution is *prima facie* evidence that the accused's statement was involuntary, but not determinative. The Crown discharged its burden by proving that the absence of a caution was without consequence, and that statements were voluntary beyond a reasonable doubt and in view of the context as a whole.
- [28] The Supreme Court of Canada stated that requiring proof of actual knowledge to establish voluntariness would amount to overextending the doctrine of the operating mind and upsetting the balance between the individual and societal interests upon which the confessions rule is predicated.
- [29] The Supreme Court of Canada in *Beaver* commented on this analysis from *Tessier* at paras. 50-51:

The role of a police caution in the voluntariness analysis was recently clarified in *Tessier* (SCC), where Kasirer J. affirmed, at para. 5, that "the presence or absence of a police caution is an 'important' factor in answering the question of voluntariness", based on Charron J.'s guidance in *Singh*, at para. 33 (see also *Singh*, at para. 31; *Boudreau v. The King*, 1949 CanLII 26 (SCC), [1949] S.C.R. 262, at p. 267).

In *Tessier* (SCC), Kasirer J. explained that if the accused was a suspect, the absence of a caution is *prima facie* evidence of -- but does not itself establish -- involuntariness (paras. 11 and 89). Neither a caution nor proof of actual knowledge of the right to silence is a necessary condition of voluntariness (*Tessier* (SCC), at paras. 12 and 74; see also *Singh*, at paras. 31 and 33; *Boudreau*, at p. 267). Nevertheless, the absence of a caution "weighs heavily" in the voluntariness analysis

because it is "prima facie evidence that the suspect has been unfairly denied their choice to speak to the police and that, as a consequence, the statement cannot be considered voluntary" (Tessier (SCC), at para. 11).

- [30] With regard to the underlying facts in *Beaver*, two accused called 9-1-1 about the death of their roommate. They were unlawfully detained at the scene and taken to the detachment without lawful authority, in breach of their rights under ss. 9 and 10 of the Charter. However, when the officers realized those errors, about two hours later, they made a "fresh start" by advising the accused of their Charter rights and arresting them. Both co-accused confessed. Mr. *Beaver* had been subjected to a 13-hour-long interview process, which was ultimately found to be voluntary.
- [31] At para. 53, the Supreme Court of Canada provided guidance on factors that can indicate the accused has a subjective awareness of the consequences of speaking to a police officer. Among those factors identified were: (i) a suspect's awareness that they were being recorded; (ii) indications that the suspect is directing the conversation; (iii) the suspect's awareness of what is being investigated and their alleged role in the investigation; (iv) the suspect's exercise of the right to silence by declining to answer questions; and (v) and the suspect's eagerness to talk, although this factor can weigh in either direction, depending on the circumstances.
- [32] On the facts before the court in *Beaver*, there were three main factors that justified the trial judge's conclusion that the statement was voluntary:
- a) he was given the police caution, and understood that he did not have to speak to police and what he said could become evidence;
 - b) he knew exactly why he was being investigated after they arrested him for murder, even though the detective indicated that just because he was arrested, it did not mean he would be charged; and
 - c) he confessed when confronted with his co-accused's taped confession.
- [33] The only mental element required for a statement to be voluntary is that there be an operating mind capable of meaningful choice. Meaningful choice means knowing that one is not required to answer questions and that anything one says could be used as evidence. While the question of voluntariness is objective, the individual characteristics of the accused are relevant in applying the objective test (*Tessier* at para. 56, citing *Singh* at para. 36).
- [34] In *R. v. Whittle*, [1994] 2 SCR 914, 1994 CanLII 55 (SCC), the Supreme Court of Canada addressed the right to silence and stated "[t]he operating mind test, therefore, requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused", but it does not go so far as to inquire whether the accused is capable of making a good or wise choice (*Whittle* at 939).

- [35] Similarly, in *R. v. Den Ouden*, 2023 ABKB 85, the court stated the confessions rule does not protect against people from a "unwise but voluntary decision not to listen to their counsels' advice." (para. 40).

B. Undermining of Legal Advice

- [36] One feature of police conduct that can impact voluntariness is persistent questioning even after an accused asserts the right to silence, but the case law is clear that this is not a separate avenue to the exclusion of the statement. While the number of times an accused asserts the right to silence is relevant, it is not determinative: *Singh*, at para. 53.
- [37] Instead, the focus is on whether the questioning had the effect of depriving the detainee of the right to choose whether to speak or not: *R. v. Batisse*, 2015 ONCA 322 at para. 18, cited with approval in *R. v. Dhaliwal*, 2016 BCSC 2528 at para. 265. Furthermore, once an accused has been advised of their right and exercised the right to counsel, police are not obliged to protect the accused from making a statement, unless it is readily apparent that the accused did not understand the legal advice or it was otherwise inadequate: *Den Ouden*, at para. 36. Furthermore, the law does not protect suspects from a disingenuous attempt to exercise the right to silence or an unwise but voluntary decision not to listen to counsel's advice: *Den Ouden* at para. 40. Similarly, where the accused is using the assertion of the right to silence as a "flag of convenience", for instance by selectively answering some questions and not others, statements have been held to be voluntary: *Singh* at paras. 35-36; *Jongbloets* at para. 93; *Den Ouden* at para. 40.
- [38] Additionally, the courts have commented on the impact of police commentary on advice received from counsel. When an accused has repeatedly raised or asserted a right to counsel, police must not undermine that legal advice in a way that has the effect of distorting or nullifying it. This can happen intentionally or unintentionally if police choose to "tread on dangerous ground" by commenting on legal advice: *Den Ouden* at para. 43. Again, the focus is on the objectively observed effects rather than the conduct itself.
- [39] The *Den Ouden* case provides a helpful summary of a large body of cases. At para. 40, the court starts by noting that courts have found statements to be voluntary, even in the face of repeated assertions of the right to silence, where no other material factors were at play to suggest it was involuntary (see para. 40).
- [40] This is followed by a summary of cases where other factors were at play, sometimes rendering statements involuntary (para. 41). Additional factors rendering statements involuntary include suggesting a lawyer does not care about what happens to an accused, providing an incorrect summary of the right to silence, or suggesting that the accused should make the decision themselves.
- [41] For example, in *R. v. Elkadri*, 56 W.C.B. (2d) 738, 2003 CanLII 13142 (Ont. S.C.J.), the accused asserted his right to silence over 20 times in the first 18 minutes of the interview, on the advice of his lawyer and even requested to leave. The police undermined the advice of his

lawyer by planting a "seed of doubt" in the mind of the accused concerning the advice of his lawyer: para. 43. Additionally, the police stated the accused should provide a statement and give "his side of the story" because it would enhance his credibility, they already had another version of events, and it could be the accused's only opportunity to ensure his version of events would be heard at trial.

- [42] Another example is *R. v. Othman*, 2018 ONCA 1073, where the accused, who was 19 years old, was interviewed by the police after speaking to a lawyer. He repeatedly asserted his right to silence during the four hours he was questioned prior to the confession. The Ontario Court of Appeal ruled the statement was not voluntary, based on a number of problematic factors, some of which include:
- a) The accused said "no comment" in response to the officer's questions on more than 100 occasions.
 - b) The police made assertions that were legally incorrect, including statements indicating that the accused's credibility is at the highest during a police interview and that a trial court will see and take a negative view of a refusal to speak. This undermined the right to silence.
 - c) The police suggested that despite the legal advice, the 19-year-old appellant should make his own decision about whether to speak and that he would not be believed if he did not speak during the police interview.

C. Physical Comforts and Individual Circumstances

- [43] Outside of direct police conduct, an accused's discomfort or basic environmental factors can also form oppressive conditions that call into question the voluntariness of a statement. Ms. Alexander emphasizes that the officers' own perceptions do not control the voluntariness analysis, but rather the focus is on whether objectively, looking at the whole of the evidence, the combination of factors creates a situation where voluntariness was negatively impacted. Specifically, she emphasized *Graat v. R.*, [1982] 2 S.C.R. 819, 1982 CanLII 33, where it was noted that the evidence from police officers does not necessarily carry more weight.
- [44] With regard to environmental conditions, the Crown referred to *R. v. Khaliq*, 2022 BCPC 112 at para. 47, for the proposition that mild discomfort from cold is insufficient without more to render a statement involuntary.
- [45] The issue of fatigue is also relevant. In *Dhaliwal*, the accused was arrested on Friday and interviewed multiple times over the weekend. During the interviews, the accused yawned and repeatedly stated he was tired and asked if he could go to sleep. The accused tried to argue that that created an atmosphere of oppression. The Crown's position was that while the accused demonstrated he was emotional and somewhat tired, he nonetheless was alert and fully engaged with the interview process, given the nature of his answers and how discriminating he was in choosing which questions to answer.

- [46] Despite a number of concerning factors, the court ultimately found the statement was voluntary. Those concerns included that the accused actually was falling asleep while the interview was focused on another individual, he was clearly "very tired" when he was awoken, he felt unwell from the jail food, his cell was uncomfortable, and he was in nicotine withdrawal. Although acknowledging all of these factors, the court found that they did not raise a doubt about whether he was deprived of the ability of whether to choose to speak or not. Rather, the interview was uniformly respectful and low-key: para. 307.
- [47] In *R. v. Willness*, 2023 BCSC 2209, the accused complained about the conditions he was kept in. For the first seven hours he was in a "drunk tank". It had no bunk, mattress, or blanket. He complained about the lack of access to food, and eye issues due to pepper spray and mace, as well as other medical concerns. Despite all of those matters, the statements were ultimately found to be voluntary.

III. DISCUSSION OF RELEVANT EVIDENCE

- [48] Ms. Alexander's position is that viewing the evidence in a contextual manner there are a number of factors when viewed cumulatively that create an oppressive atmosphere. Specifically, she submits when viewed together the following deprived her of her free will, making her statement involuntary and inadmissible: a) the lack of a complete police caution; b) the undermining of legal advice; and c) officer inattentiveness to her physical discomfort and individual characteristics.
- [49] The Crown's position is diametrically opposed. It contends that the police were careful, considerate, and respectful throughout all of their dealings with Ms. Alexander. The Crown's position is that the officers tended to her physical needs, respected her dignity, and conducted an interview that was open-ended and "gentle". The Crown also emphasizes that no defence evidence was led during the voir dire.
- [50] I will analyze the evidence relevant to each of these three categories, but I do emphasize my assessment as to whether the Crown has met its burden is based on the whole of the evidence and a complete analysis, rather than any one factor being determinative or the analysis being done in a piecemeal fashion.

A. Police Caution

- [51] Ms. Alexander submits the officers failed to give a complete police caution. While she acknowledges the officers genuinely believed they fulfilled the appropriate requirements, she submits that the caution was not given or at least it was incomplete based on an objective and contextual analysis.

[52] Two interchanges with the officers are relevant. The first is the caution given by Officer Walaszczyk at arrest, just after the Charter warning was given and Ms. Alexander answered "yes" when she was asked if she understood (Transcript, p. 4, lines 60 to 71). This exchange followed (Transcript, p. 4-5, lines 72 to 82):

KW: 'Kay. Do you want to call a lawyer?

CA: Yes.

KW: 'Kay. Do you have a specific lawyer that you want to speak with?

CA: No

KW: ' Kay. There's one other thing that I want to tell you. Is that you don't have to speak to me but anything you do say to me will be uh

AC: Hold against me.

KW: can be no it can be used as evidence in court.

CA: Yes.

KW: 'Kay. Do you understand that?

CA: Yes.

[53] The second relevant exchange is at the start of the interview conducted by Officer Gardiner. Officer Gardiner first asks and Ms. Alexander confirms that the police had been respectful and polite and had not threatened her or made any promises. There then follows this exchange (Transcript, pp. 2 to 3, lines 19 to 50):

SG: Alright Charlene (chair). So like I said my name's corporal Scott GARDINER. You can call me Scott. Does that sound fair to you?

CA: (yawn)

SG: Everything in this room is (sigh) on video and obviously audio recorder just so you're aware okay?

CA: (makes noise) My lawyer said not to say nothin'.

SG: That's good. And I'm glad you got that advice and I'm gonna letcha (ph) make your decisions. That's totally up to you. But I do wanna discuss something things with you and if you just want listen that's totally fine too okay?

CA: (makes noise)

SG: Um now I know obviously you another officer arrested you. I was there when you got arrested today. But another officer was the one arresting you. Um so I just gotta ask you how have we treat ya so far? Have we been police and respectful?

CA: Yes.

SG: Okay good. Have we threatened ya in any way?

CA (makes noise) (yawn)

SG: Charlene have we threatened ya in anyway?

CA: No.

SG: No. Did we make ya any promises that you should talk to us or not?

CA: No.

SG: Okay good. I just want make sure that you understand. I mean you don't have to say anything to me.

CA: I'm not going to

SG Right?

CA: say anything to you.

SG: And just like your lawyer advised. That's totally fine. Um I did wanna discuss a few things with ya and I know the other officer explained to me that she'd arrested you. Do you remember what

CA: (cough)

SG: You know what the charge is that you're arrest for correct?

CA: Yes.

B. Undermining of Legal Advice

[54] Ms. Alexander submits there was a subtle undermining of legal advice during Officer Gardiner's interactions with her. Specifically, she submits there is a direct correspondence between her assertion of the right to silence, the officer commenting about legal advice, followed closely thereafter by Ms. Alexander volunteering information or making an admission.

[55] The Crown submits a careful overview of the interview reveals the opposite--that Ms. Alexander was responsive, at times asserting her right to silence and at other times choosing to offer additional information. Crown also says there is no indication that police ever came close to the line of undermining that legal advice.

[56] Counsel argued Ms. Alexander positively asserts her right to silence on four occasions, but I group the first two together because they occur close in time. The following exchange occurred (Transcript, p. 2-3, lines 24 to 50):

CA: (makes noise) My lawyer said not to say nothin'.

SG: That's good. And I'm glad you got that advice and I'm gonna letcha (ph) make your decisions. That's totally up to you. But I do wanna discuss something things with you and if you just want listen that's totally fine too okay?

CA: (makes noise)

SG: Um now I know obviously you another officer arrested you. I was there when you got arrested today. But another officer was the one arresting you. Um so I just gotta ask you how have we treat ya so far? Have we been police and respectful?

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CA (makes noise) (yawn)

SG: Charlene have we threatened ya in anyway?

CA: No.

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CA: say anything to you.

SG: And just like your lawyer advised. That's totally fine. Um I did wanna discuss a few things with ya and I know the other officer explained to me that she'd arrested you. Do you remember what

CA: (cough)

SG: You know what the charge is that you're arrest for correct?

CA: Yes.

[57] The second assertion of her right to silence is below (Transcript, p. 17, lines 476 to 485):

CA: Not allowed to say nothin'.

SG: Okay. And that's good advice but that's exactly what it is is advice. We're tryin'a understand if there's if there's a whole lot more to the story we don't know. 'Cause obviously we're gonna hear stories like you're hearing. And we're gonna talk to people and

CA: (coughs)

SG: we'll hear what they have to say. But the only people that can actually tell us what happened are the two people who were there right? Does that make sense?

CA: Mm hm.

[58] Ms. Alexander submits very shortly thereafter she makes a significant admission (Transcript, p. 17, lines 486 to 499):

SG: And one of those people, Jessie-Mae, she's not here anymore.

CA: I know that.

SG: And that's sad isn't it?

CA: Mm hm.

SG: And you didn't know her before?

CA: No.

SG: 'Cause I know she lived down that area too.

CA: Oh I don't know, I don't know who she is. I don't know

SG: Yeah.

CA: (makes noise) It was self-defence.

OG: It was self-defence?

CA: Yeah, She

OG: O

CA: pulled a knife on me.

[59] Ms. Alexander's third assertion is as follows (Transcript, p. 20, lines 568 to 572):

CA: Not allowed to say nothing'. My lawyer said not to say nothing.

SG And that's your [lawyer's] advice, absolutely. I'm just here to to understand what exactly caused all this and what happened. I know you're not someone who wanted this to happen are you?

CA: No.

[60] She then makes statements offering more possible evidence against herself (Transcript, p.p 20 to 22, lines 573-615):

OG: This is last thing you wanted to happen. Like you said you're a survivor, you've lived on the streets all your life right?

CA: (yawn)

OG: And this person got in your face.

CA: Yeah. (coughs)

OG: So how did you two part? Explain that to me. She's flickin' this knife in your face, what happens?

CA: I black out after that (indecipherable) know,

OG: You

CA: I don't remember.

OG: You blacked out after that?

CA: Yes.

OG: Okay. Can you describe this girl to me? Where she is.

CA: No

OG: But she's got the music blarin' and she's bein' rude.

CA: Yeah to everybody.

OG: Yeah. The other people talk to her?

CA: Yeah

OG: Who else?

CA: Well a all the people that were sittin' on the street there said fuck can you turn your fuckin' music down.

OG: Okay.

CA: And she just turned it up more.

OG: That's pretty rude. Did anyone else go talk to her besides you?

CA: No.

OG: Now you've said a couple times this is self defence. Charlene? You still awake here with me?

CA: (makes noise)

OG: (indecipherable) a couple times you've said self defence.

CA: Mm hm.

OG: What what's the self defence side here? You're tellin' me she's she's flashin' you with the knife.

CA: She swung a knife at me so I pulled my knife out.

OG: Okay. So she tried to hit you with it?

CA: Yeah.

OG: And she missed. Are you injured at all? I that's somethin'

CA: No.

OG: I haven't asked you. Okay. You pulled your knife out.

CA: Mm hm.

OG: And what happened then?

CA: (cough) I blacked out I said. I don't know.

OG: Okay. 'Kay tell me about your knife. What's what kinda knife was it?

CA: Switch blade.

C. Physical Comforts and Individual Circumstances

[61] The following circumstances are relied upon by Ms. Alexander together and in combination with all the preceding factors. In other words, these factors are not meant to be relied on singly. Specifically, she submits the officers were inappropriately indifferent or failed to notice or give enough attention to the following:

- a) Sleepiness: Ms. Alexander submits there were many signs that she was very tired and this contributed to the oppressed atmosphere. She points to the numerous times she yawned during the interview. She points out each time she was alone in her cell she lay down and she even lay down on the floor at the end of the interview when the officer walked out. On one occasion she put her head down on the table during the interview.
- b) Temperature: Ms. Alexander submits that she was cold. She asked for a blanket twice when she was first put in her cell, but one was not provided to her for about 46 minutes.
- c) Glasses: Ms. Alexander's glasses were taken away after she changed her clothes. She asked for them back and that request was refused.
- d) Food and drink: Ms. Alexander was only offered something to drink on two occasions and was not offered anything to eat until she was about to be released.

[62] She contends that each of the preceding grounds must be viewed in the proper context of her individual circumstances, including that she is Indigenous, she lives on the street, and she said to the officers that she drinks every day. She also points out that several times during the interactions she presented as someone docile and compliant. She does not suggest these independently become problematic, but in the circumstances of this case she argues the officers failed to take into account in any real way these circumstances. Specifically, she takes issue with the failure of the officers to inquire about the amount she drank that day of the interview in the face of what information she was giving, which she

says represented an indifference to her state of mind.

- [63] The Crown points out the defence did not adduce any evidence on the voir dire. However, there is no dispute that Ms. Alexander is indigenous. With regard to her personal circumstances, the officers arrested her at AWAC and during the interview she confirmed she basically lives there. The Crown also points out that both officers stated they did not perceive her to be impaired.
- [64] Ms. Alexander led no evidence about her alcohol consumption or drug use. Regardless, she submits given the information gleaned from the interview, combined with the knowledge that she lived at AWAC, the police ought to have been prompted to inquire about her state of sobriety. For example, during the interview, Officer Gardiner asked "Can you tell me about your day?", and Ms. Alexander responds, "No,", adding "I don't remember," and "No I was drunk." He asked her to "take me through a normal day," and she replied that she goes out and drinks. She said she had lived on the street "all of her life" and drinks every day. She said every morning she buys beer and drinks all day until bedtime. When asked what she was doing the previous day ,she said, basically drinking and nothing else.
- [65] Finally, she points out that a crack pipe was found in her backpack, but at no point was she directly asked about drug consumption, although Officer Gardiner did ask if there was anything else that she did after she talked about her drinking.

IV. ANALYSIS

- [66] Ms. Alexander submits that viewing the entire interview, in light of the incomplete police caution, makes the statement involuntary. Her position is that the officers' conduct created the oppressive atmosphere because it was rooted in their indifference to Ms. Alexander's particular circumstances, especially the lack of appreciation for her indigenous status, her age, and what she says was her admitted alcohol use. In those circumstances, she argues the failure to ask how much alcohol or drugs she consumed that day was problematic. In combination with what she says were the frequent and obvious indications that she was tired--the yawning and lying down when not being questioned--the officers should have been on alert that she may have been in a vulnerable state.
- [67] The Crown submits it has met its burden to prove the statement is voluntary. The Crown points out that the interview was not lengthy, and Officer Gardiner was respectful and calm throughout by conducting an interview that was largely open in nature. These features stand in stark contrast to the behaviour as exhibited in many of the cases raised by the parties.

- [68] Additionally, the Crown submits Ms. Alexander was selective about what details she wanted to give and what she wanted to talk about. She had little difficulty understanding what was asked of her. Crown points out that a number of times she asked for clarification when she was unsure and that there were times when she was very assertive during the interview. The Crown's position is that those aspects negate her assertion that she was primarily compliant or docile in a way that made her vulnerable.
- [69] As noted, Ms. Alexander argues the first caution given by Officer Walaszczyk was incomplete. Viewed in combination with Officer Gardiner's failure to give a complete caution before the statement, she argues this is a strong indication the statement was not voluntary.
- [70] The Crown disagrees. The Crown submits the fact that Ms. Alexander interrupted Officer Walaszczyk by effectively completing the sentence in saying, "held against me" demonstrated actual knowledge, even though the Crown does not have to prove that.
- [71] Ms. Alexander's position is that her interjection is not determinative as to her state of knowledge. Given that ambiguity, the Court should not be satisfied beyond a reasonable doubt of the effectiveness of the caution at that point, meaning Officer Gardiner's failure to give the complete caution weighs strongly in favour of her position of involuntariness.
- [72] I do not agree. Ms. Alexander's interjection was clear and coherent. I find it is consistent with her having actual knowledge and understanding of her right to silence. Among other things, her interjection is at the very start of her interaction with the officers. She had just confirmed that she understood her right to call a lawyer and she asserted that right. Officer Walaszczyk started the police caution, and unprompted Ms. Alexander interrupted to say, "held against me." It is relevant that the officer was careful to add, "used as evidence in court," removing any doubt as to what "held against me" might mean. That was followed by asking Ms. Alexander if she understood and Ms. Alexander firmly said yes.
- [73] Ms. Alexander's position was that even if the officer's statement was found to constitute a complete and appropriate caution, it barely did so, and combined with the failure to repeat it before the statement was taken raises a reasonable doubt about voluntariness.
- [74] I do not find Officer Walaszczyk only "barely" met the legal standard. I find such an approach would not be consonant with the case law. There are no gradations of compliance with the police caution. It either met the legal requirements or it did not, although that is not necessarily determinative on the issue of voluntariness.
- [75] The issue is whether the Crown has proven beyond a reasonable doubt, on an objective basis, that the accused knew both elements of the caution. There was nothing about the circumstances of Ms. Alexander at the time of the arrest to suggest she did not have the requisite cognitive ability, such that she did not hear or understand the caution. I find that her interjection, followed by confirmation of what it meant by the officer, strengthens, not weakens, the Crown's case.

- [76] For those reasons, I find the caution given was complete and met all the legal requirements and I am left in no doubt about that. However, even if I had agreed that the caution had something missing or just barely met the test, I would not give effect to Ms. Alexander's argument that Officer Gardiner's failure to repeat the caution was fatal to voluntariness.
- [77] The factors in the Beaver case do not favour her position. She was aware the interview was recorded. She knew she was arrested for the murder of Ms. Hayward-Lines. She was clearly aware of her right to silence, because she asserted it more than once.
- [78] At the start of the interview, Officer Gardiner does not repeat the entire caution, but he reminds her of the caution previously given: he said the first part of the warning repeating that she does not have to talk to him, but this is not done in a cursory or isolated manner. Instead, it was said after his introduction, his confirmation that the interview was recorded, and most significantly, after Ms. Alexander asserted her right to silence. Despite that, Officer Gardiner then goes on to confirm that there are no threats or promises, and he repeats that she does not have to say anything, which is followed immediately by her statement that she did intend to speak.
- [79] Ms. Alexander argued that while the first part of the caution was given by Officer Gardiner, the second (knowledge that evidence might be used against her) was not. As noted above, I find only if I had found the first caution was incomplete or otherwise wanting would this be a significant factor, but I did not make that finding. Combined with her assertions two times during that interchange of her right to silence in those introductory moments, I am satisfied the Crown has proven beyond a doubt that Ms. Alexander was aware of the right to stay silent, but that if she spoke it could be used against her.
- [80] However, Ms. Alexander also argues that the next two times she asserted her right to silence it was essentially "batted away" or dismissed. She says this was followed by some indication or demonstration by her of agitation or frustration, in contrast to her otherwise docile appearance, and shortly thereafter a significant admission. Ms. Alexander submits this is a pattern demonstrating that in fact her free choice was overborne. She emphasizes that there need not be a finding that the police intended to undermine the legal advice; rather, the focus is on what the effect of their comments was on the legal advice. Even if the nexus she points out individually or together does not obviate voluntariness, she says combined with all the other factors the Crown has not met its burden to prove voluntariness.
- [81] While there may not have been a large number of assertions of the right to silence, she focused on the comments made at the time and draws an analogy to cases like Elkadri. Specifically, she says that the officers essentially implied that the legal advice was "just advice", and that she somehow needed to give her side of the story.

- [82] Crown submits Ms. Alexander's assertions of the right to silence were qualitatively and quantitatively different than in any other case cited to me, because her assertions were milder or more ambivalent. Specifically, she did not use phrases like, "I don't want to speak to you," or "Leave me alone." She merely repeats the advice that she was told to say nothing.
- [83] The Crown submits that her assertion of a positive defence to murder by saying it was self defence is indicative not only of an operating mind, but of a sophisticated knowledge. The Crown argues it is significant, because she made that admission after a pause. She did not blurt it out. The Crown suggested it could be seen as her directing the conversation because it was not actually responsive to the question at the time, nor was it a simple denial. It was a positive assertion. It followed questions that were open-ended. The Crown submits that her taking the time to think in giving an explanation is consistent only with the exercise of free will or a deliberate choice to speak by a person who was being selective. As the Crown points out, Officer Gardiner himself stated he was surprised by that admission.
- [84] I agree with the Crown's position. There is nothing about Officer Gardiner's demeanour or questioning that could be interpreted as being assertive, aggressive, or intimidating. His manner was open and non-confrontational. It was really more of an open-ended interview than an interrogation before that point.
- [85] I also agree with Crown that the length of the interview, the number of times she asserted her right to silence, and the type of questioning pales in comparison to other cases, where unsophisticated people are subjected to much lengthier, more assertive interviews and yet the statements are found to be voluntary, including *Dhaliwal*; *R. v. Camille*, 2018 BCSC 301; and *R. v. Hernandez*, 2008 BCSC 671.
- [86] Ms. Alexander submits that the exchanges must be viewed in light of factors she claims contributed to her discomfort in a significant way. She argues those factors take on a greater significance when combined with what she says was her presentation of someone who was compliant. She contends that, combined with the officer's failure to be sensitive to her individual circumstances, this significantly contributed to an oppressive atmosphere.
- [87] I agree that she presented as someone who was tired or sleepy at the beginning of the interview, but not in a way that undermined her free will. I note, first of all, that it is not clear to me how relevant it was that when she was alone and not interacting with officers she was lying down, possibly resting or even sleeping. There is no suggestion that she was or should have been continuously monitored as to what she was doing when the officers were not with her. It is her presentation when she was with the officers that is most relevant.
- [88] On that count, having seen the video, I did not perceive her to be someone who is unable to stay awake or obviously and easily falling asleep. The impression at the beginning of the interview is that there is a short period where she yawns frequently. That may be because she had been asleep or at least resting in her cell when she was taken to the interview room, and Officer Gardiner notes that, saying, "I kind of woke you up there. Were you getting a bit of rest?". Shortly thereafter, he states "You're still waking up a little bit", but he immediately

offered a coffee or water. She asked for water and did receive it, but the frequency of her yawns decreases dramatically after that.

- [89] More importantly, she is clearly engaged and responsive to questions at significant points. She sometimes answered very firmly, with a louder and clearer voice during the period when there was little to no yawning. She was able to provide very specific information in response to some questions.
- [90] I do not agree that Ms. Alexander demonstrated agitation or frustration as a result of questioning continuing after her assertion that her lawyer told her not to talk. I do not agree that someone would necessarily conclude from her overall manner presented that she was docile or compliant in a way that suggests vulnerability. For instance, she asked for a blanket on her own on two occasions. During the interview there are times when she is more animated, specifically when she is giving details about her interactions with Ms. Hayward-Lines. In talking about those details, she is assertive and also combative on a few occasions.
- [91] I also find that Officer Gardiner's comments after the assertion of a right to silence are neutral and they actually affirm her advice. His comments are vastly different than comments made in the cases, for instance in the Othman case, where there is a negative connotation about lawyers and there is legally incorrect information given.
- [92] Also, in terms of needing her side of the story, there is no suggestion that she will never be believed or cannot be believed, unlike some of the other cases. Officer Gardiner's conduct was to state they have certain information, telling Ms. Alexander that she was giving him certain information and they would like more information. I do not find that falls in the same category.
- [93] Therefore, I am not satisfied that there is a link between the police conduct or comments on legal advice and the admissions that did come out, or the offering of information by Ms. Alexander.
- [94] As to her physical conditions, rather than being insensitive, I found the officers were attentive. It is unclear why it took so long to get a blanket for her, but it was provided. Moreover, as the Crown notes, when they come to take her back to the lawyer room she had the capacity to ask, "Can I bring the blanket with me," and that request was affirmed. When Officer Gardiner arrived, he actually said to her, "Why don't you bring the blanket with you?". These are not the actions of officers who are indifferent to the conditions she was in.
- [95] She was offered and supplied with water. She was picked up while eating at the dining hall and she was in the detachment for about five to six hours. At no time did she say she was hungry or make an inquiry about food when she was offered water. The timing of the interview was not the usual meal time. The interview itself was not very long, about 79 minutes in total.

- [96] I do agree it is curious why there was no reason given for why she could not have her glasses when she asked for them. The officer did inquire whether she needed them to walk or to see clearly. Although Ms. Alexander said, they were prescription glasses, she did give in easily and say she guessed she did not need them. However, at no point does she ask for them again, suggesting that she did not need them in order to be able to navigate in the hallways or when she was in the interview. Even if withholding her glasses without providing a better reason was imprudent, it is one small incident in the overall context of the entire evidence.
- [97] Overall, I agree with the Crown that the conditions were not oppressive. A helpful comparison is the Dhaliwal case, which had a more severe factual matrix. The accused was interviewed multiple times over the course of a weekend. He repeatedly stated he was tired. This was combined with yawning and specifically asking to go to sleep. He was kept up late to be interviewed two nights in a row. He complained of a headache and a stomach ache. The jail cell was uncomfortable. The court found that he actually experienced symptoms of nicotine withdrawal. The interview was lengthy and persistent.
- [98] Despite all of that, Justice Schultes came to the conclusion that neither singly, nor collectively, had the accused been deprived of his choice to speak and therefore the statement was voluntary. With respect, the circumstances in this case do not even come close to those.
- [99] During their testimony the officers were questioned on whether Ms. Alexander appeared impaired and they said she did not. Ms. Alexander argued that the officers' word on that point has no greater weight than the court's ability to make the observation. While the Crown did not necessarily disagree with that, it did point out the case law that states that lay opinion on sobriety is admissible.
- [100] Either way, I agree there were no visual signs of impairment. She walked steadily, perhaps slowly, but that was consistent with her perhaps being tired. She was able to stand without wavering when she got out of the vehicle and at other points. Her speech was not slurred. I understood both officers confirmed there was no smell of alcohol on her. I agree that there was no reason for them to suspect that she was impaired by drugs or alcohol to the degree that she did not have an operating mind.
- [101] With regard to the drug use, Ms. Alexander said that because they found a crack pipe in her backpack, combined with the knowledge that she lives at a shelter, they should have been alert to drug use or at least made an inquiry. She was asked about alcohol use, and said that she only drank beer. It is true Officer Gardiner did ask, "is there anything else", but did not make a more directed inquiry. However, in my respectful view that is not problematic because Ms. Alexander did not present as someone who was either high or cognitively impaired in any way to make that inquiry necessary.

[102] For all of those reasons, I am satisfied that the evidence does not establish that police conduct created oppressive circumstances so as to deprive Ms. Alexander of her choice on whether to speak.

[103] I specifically find that the police caution given was compliant with the law. I do not find they made any comments that undermined the legal advice, and I find that the officers were in fact sensitive and attentive to her physical needs. For all of those reasons, the statement was voluntary.

"Sharma J."

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