

CANADA / JUDGMENT

R. v. Alkhalil

2022 BCSC 299

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 299 R. v. Alkhalil IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alkhalil, 2022 BCSC 299 Date: 20220224 Docket: 27393-111 Registry: Vancouver Regina v. Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and Larry Ronald Amero Restriction on Publication: A publication ban has been mandatorily imposed under s. 648(1) of the Criminal Code of Canada, restricting the publication, broadcasting or transmission in any way of any portion of the trial at which the jury is not present. This publication ban applies until the jury retires to consider its verdict Before: The Honourable Justice Maisonville Ruling re Application No. 111 - Voluntariness of the Statement Given by Larry Amero to Cst. St. Thomas, August 14, 2011 Counsel for the Crown: M. Sheardown S. Dworkin N. Gregoire A. La Bar A. Cochrane S. Wagner D. Darby Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil): R.S. Fowler, Q.C. K. Blok Counsel for the Accused, Dean Michael Wiwchar: S. Buck A. Dorin J. Desbarats Counsel for the Accused, Larry Ronald Amero: M. Rock J. Oppal J. Myers Place and Dates of Trial/ Hearing: Vancouver, B.C. October 27 and November 3, 10, 17 2021 January 20 and February 11, 2022 Place and Date of Ruling: Vancouver, B.C. February 24, 2022

introduction

- [1] The Crown seeks a determination with respect to the voluntariness of a statement made by Larry Amero to Cst. St. Thomas of the RCMP during a brief bedside conversation at Kelowna General Hospital ("KGH") on August 14, 2011.
- [2] The Crown acknowledges that the statement in question was made to a person in authority and must, accordingly, be determined to have been voluntary beyond a reasonable doubt. The Crown further acknowledges that Mr. Amero was under the influence of sedatives and pain medication at the time he made the statement but takes the position that the effects of the medication were not such as to deprive him of the necessary operating mind. Mr. Amero counters that expert toxicology evidence before the Court indicates that his cognitive abilities may have been impaired at the time of his statement, and argues that the evidence of Cst. St. Thomas tendered by the Crown is insufficient to rebut this proposition and establish the voluntariness of the statement beyond a reasonable doubt.

facts

- [3] Two witnesses gave evidence on the voir dire. The facts grounding this application are not in dispute.
- [4] On August 14, 2011, Mr. Amero was seriously wounded during a shooting at the Delta Grand Hotel in Kelowna, BC. He was transported to KGH for treatment, where he was administered fentanyl and propofol as follows: Time Drug Amount 15:45 Fentanyl 50 µg i.v. 16:56 Fentanyl 50 µg i.v. 17:10 Fentanyl 50 µg i.v. 17:20 Propofol 100 mg i.v. 17:21 Propofol 50 mg i.v. 17:23 Propofol 20 mg i.v. 17:25 Propofol 30 mg i.v. 17:26 Propofol 60 mg i.v. 17:28 Propofol 40 mg i.v. 17:52 Fentanyl 50 µg i.v. 18:20 Fentanyl 50 µg i.v. 18:45 Fentanyl 50 µg i.v. Cst. St. Thomas
- [5] Cst. St. Thomas testified that on August 14, 2011 she was called into the Kelowna RCMP detachment as the result of a shooting that had occurred at the Delta Grand Hotel earlier that day. She attended a briefing and was assigned the task of attending at KGH and identifying:
- a) the individuals who had been transported to the hospital from the scene of the crime for treatment;
 - b) the individual who had died at the scene; and
 - c) an unknown male who was believed to have been an occupant of the vehicle and fled the scene.
- [6] On arriving at the hospital, Cst. St. Thomas learnt that three people were being treated for injuries sustained in the shooting, one of whom was identified to her as Mr. Amero. She was told that he was "very drugged from medication" but she did not know what specific medications had been administered. Cst. St. Thomas was not able to speak with Mr. Amero immediately as he was undergoing a CT scan but she took the opportunity to speak to him once the procedure was over.
- [7] Cst. St. Thomas spoke to Mr. Amero in the emergency room. He was laying on a stretcher looking up towards the ceiling when she approached him. Cst. St. Thomas was in plain clothes but was wearing a vest that said "Police" across it. She identified herself to Mr. Amero as a police officer and provided her name. Cst. St. Thomas had a recording device on her but did not switch on it during the course of her conversation with Mr. Amero. She testified that she was seeking a statement from Mr. Amero as the victim of a crime under investigation, and that she would have turned on the recording device had Mr. Amero wished to give a statement, but he did not.
- [8] It appeared to Cst. St. Thomas that Mr. Amero understood that she was a police officer and that he understood her questions. He turned his head towards her a few times during the conversation, and there was no hesitation in any of his responses.

- [9] Cst. St. Thomas told Mr. Amero that she was there to investigate what had happened. He responded that he did not have anything to say because he did not have any information that would be helpful to the investigation.
- [10] Cst. St. Thomas asked Mr. Amero further questions and encouraged conversation in a manner she described as "compassionately pleading" with him to talk even though he thought he might not have useful information as any information he had might be helpful. She told Mr. Amero he was not the only one who had been shot and that he and others would want police to identify the suspects responsible.
- [11] The officer agreed that it was clear to her that Mr. Amero was in pain. He said he was in pain and his answers to her questions were short. Mr. Amero was soft spoken, polite and respectful. The conversation was quick, lasting two to three minutes. It came to an end when Mr. Amero said he was tired.
- [12] The aspect of Mr. Amero's statement that the Crown seeks to lead is the following: Q Okay. So in the course of that brief conversation, I take it you asked some other questions we haven't spoken about, and received some answers we've - we've heard that - something in relation to Lyndsey and Leah, can you tell us again what Mr. Amero said about the passengers, those passengers in the car? A Yes, so in - in the line of questioning that I did ask Mr. Amero, I wanted to know who was in the vehicle, and Mr. Amero did tell me who was in the vehicle, he said that the girls - the two girls in the vehicle had nothing to do with this. As far as the passengers in the vehicle as well, he said that Jonathan Bacon was the front passenger and that James Riach was a back seat passenger. Q And where were the two girls, Lyndsey and Leah located? A They would have been in the back, in the back seat. Q And who was the driver of the vehicle, if any information about that? A Yes, Mr. Amero was the driver of the vehicle. Q Did - did he provide that information to you? A Yes. Yes. Q In relation to the name Mr. - that you've given, James Riach, is that a name that was familiar to you before this conversation? A The first name was familiar to me, it got introduced to me during my conversation with - with Lyndsey. Q And the last name? A The last name was not, no. Q Okay. And did Mr. Amero spell the name for you? A No, he did not, nor did I ask him. Q All right. And - and in notes that you made of this conversation, I gather you spelled it out phonetically, is that correct? A I did, yes.
- [13] Hospital records indicate that the visit occurred at 7:01 p.m., and the Crown accepts the accuracy of this timing of the interaction for the purposes of this application. Wayne Jeffery
- [14] Mr. Amero called Wayne Jeffery, a toxicologist, as a defence witness on the voir dire. Mr. Jeffery was qualified to give expert opinion evidence in the area of toxicology, specifically as it relates to fentanyl and propofol and their effects on the human body.
- [15] Mr. Jeffery gave evidence that fentanyl is a very potent painkiller and that it is used in combination with narcotics to reduce pain in medical procedures. A single standard dose of fentanyl is between 50 and 100 µg. The general effects of fentanyl can include euphoria and exhilaration. Patients also often experience mental confusion and impaired brain functions.

Such impairment can last up to 24 hours, which is why patients are typically prohibited from driving or operating heavy machinery for at least 24 hours following administration of fentanyl.

- [16] Mr. Jeffery testified that propofol is an anaesthetic narcotic often used in combination with fentanyl. Common effects of propofol include anaesthesia, confusion, hallucinations and impaired memory.
- [17] According to Mr. Jeffrey, it is possible for a patient to be suffering cognitive impairment as a result of the administration of fentanyl and propofol without exhibiting outward visible effects. In other words, that person can present as unimpaired but in fact be under the effects of the drugs.
- [18] Mr. Jeffery's opinion with respect the effect of the medications on Mr. Amero's cognitive ability was as follows: Mr. Amero gave a statement to the police approximately 16 minutes after the last dose of fentanyl and 1 hour and 33 minutes after the last dose of propofol. It is my opinion the use of these two drugs may have affected Mr. Amero's cognitive ability while giving his statement.
- [19] The Crown does not dispute that Mr. Amero was under the influence of propofol and fentanyl, and does not challenge Mr. Jeffrey's opinion that administration of the two drugs may have affected Mr. Amero's cognitive abilities. positions of the parties The Crown
- [20] While accepting that Mr. Amero was under the influence of sedatives and pain medication and that such medication might deprive an individual of mental capacity, the Crown contends that, on the evidence, the present circumstances fall well short of showing that Mr. Amero was unable by reason of his mental state to understand what he was saying, to whom or why. Mr. Amero did not appear to have any difficulty understanding the officer's questions as his answers were articulate and responsive. To the contrary, the Crown argues, the evidence demonstrates that Mr. Amero was conscious and capable of deciding whether or not to respond to Cst. St. Thomas's questions. He also gave answers that showed he understood that police were gathering evidence in relation to a potential criminal proceeding; for example, he stressed that the two women he identified as being passengers were not involved in the incident.
- [21] In these circumstances, the Crown submits that it has established the voluntariness of Mr. Amero's statement beyond a reasonable doubt. Mr. Amero
- [22] Mr. Amero disputes that the Crown has discharged its burden of establishing the voluntariness of his statement. Cst. St. Thomas was told prior to attempting to take a statement from Mr. Amero that he was "very drugged" yet there is no evidence she took any steps to assess his mental state or cognitive function, such as by speaking with hospital staff; nor was her questioning of Mr. Amero of sufficient duration to allow for a proper evaluation of his state of mind. The fact that the officer did not record the statement further deprives the Court of an important tool in assessing whether Mr. Amero had an operating mind.

[23] Mr. Amero submits that the opinion of the toxicologist, whose evidence was not seriously challenged, was that his cognitive function may have been impaired at the time he gave his statement. He says that the evidence of Cst. St. Thomas regarding his apparently coherent responses to her questions goes nowhere near rebutting that proposition, especially in light of Mr. Jeffrey's evidence that it is possible for an individual to be suffering cognitive impairment as a result of fentanyl and propofol without exhibiting outward visible effects. Accordingly, Mr. Amero submits, the Crown has failed to establish beyond a reasonable doubt that his statement was the product of an operating mind and therefore voluntary.

Analysis

[24] Mr. Amero's statement was made to a person in authority and thus the Crown must prove its voluntariness in order for it to be admissible at trial. As Wedge J. recently summarized in *R. v. Boucher*, 2021 BCSC 1646, para. 25, the primary (but not only) reason for the requirement of voluntariness is the reliability of the statement at issue:

[25] The confessions rule requires that the Crown prove beyond a reasonable doubt that an accused person's statement to a person in authority is voluntary before it is admissible at trial: *R. v. Oickle*, 2000 SCC 38. The primary reason for the confessions rule is the concern about the reliability of confessions. With the advent of the Charter, courts have also grounded the confessions rule in trial fairness and the principle against self-incrimination: *R. v. Herbert*, [1990] 2 S.C.R. 151.

[25] The assessment of voluntariness is contextual and takes into account whether:

- a) the police used threats or inducement to persuade the accused to speak;
- b) oppressive circumstances overbore the accused's will;
- c) the accused had an operating mind; and
- d) the police used improper trickery to obtain the accused's statement (*Oickle* at paras. 48-67).

[26] There are no allegations of impropriety on the part of the police in regards to Mr. Amero's statement. Rather, the sole issue is with respect to c), whether Mr. Amero was under the influence of sedatives and pain medication at the time of his statement such as to deprive him of an operating mind.

[27] The standard for an operating mind for voluntariness purposes is not high. As explained in *R. v. Whittle*, [1994] 2 S.C.R. 914 at para. 45 (QL version), and affirmed in *Oickle* at para. 63:

[45] The operating mind test, therefore, requires that an 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. Indeed it would be hard to imagine what an operating mind is if it does not possess this limited amount of cognitive ability. In determining the requisite capacity to make an active choice, the relevant test is: Did the accused possess an operating mind? It goes no further and no inquiry is necessary

as to whether the accused is capable of making a good or wise choice or one that is in his or her interest.

[28] By this standard, I am satisfied beyond a reasonable doubt that Mr. Amero had an operating mind at the time he made his statement to Cst. St. Thomas; that is, notwithstanding the presence of propofol and fentanyl in his system in the doses outlined earlier, he had sufficient cognitive capacity to understand what he was saying and what was said to him. This is apparent from his guardedness in responding to Cst. St. Thomas's questions and his more general refusal to cooperate with police, as well as from his concern that the officer appreciate that the two women in the vehicle had not been involved in the incident. The clear inference is that Mr. Amero knew that he was speaking to a police officer and that the information he provided to her could have consequences. Moreover, he was selective in choosing which questions to answer, and he responded appropriately and coherently when he did. In the circumstances, I conclude that Mr. Amero had an operating mind throughout his interaction with Cst. St. Thomas.

[29] Accordingly, despite the very capable argument on behalf of Mr. Amero, I find that Mr. Amero's statement was voluntary and, therefore, admissible. "Maisonville J."

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