

CANADA / JUDGMENT

R. v. B.J.

2020 BCSC 2225

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.J.,

2020 BCSC 2225

Date: 20201001

Docket: 28298

Registry: Vancouver

Regina

v.

B.J.

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Before: The Honourable Madam Justice Matthews

Oral Reasons for Judgment on Voir Dire #4 (Part 2)

Counsel for the Crown:

M. Myhre

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Place and Date of Trial/Hearing:

Vancouver, B.C.

August 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 1, 2020

Overview

- [1] The accused, B.J., is charged with sexual assault, sexual interference, invitation to sexual touching, and incest in relation to his daughter R.J. After his arrest on January 18, 2018, B.J. was taken to the Vancouver Police Department, where he was interviewed at length by Sergeant Lee. The Crown seeks to use B.J.'s statement in its cross-examination of him--provided he does testify--but does not otherwise seek to introduce it into evidence at trial. After a blended voir dire on voluntariness and alleged breaches of ss. 10(a) and 10(b) of the Charter of Rights and Freedoms, I ruled that the Crown had proved beyond a reasonable doubt that B.J.'s statements to the police during and after his arrest were made voluntarily. I also ruled that the defence had proved, on the balance of probabilities, that the statement had been given in breach of B.J.'s ss. 10(a) and s. 10(b) Charter rights.
- [2] Subsequent to that ruling, counsel appeared before me to make submissions on the s. 24(2) aspect of the defence application to exclude the statement due to the Charter breaches. These reasons for judgment address that aspect of the voir dire. I gave these reasons orally; I have edited them without changing the substance.
- [3] Two of the counts on the indictment pertain to events when R.J. was under the age of 14 and are alleged to have occurred between January 1, 1999 and March 3, 2003. The other two counts are alleged to have occurred between January 1, 1999 and December 31, 2005. I refer to the accused as B.J. and the complainant as R.J. because of the publication bans in this proceeding.
- [4] The Crown argues that the evidence should not be excluded because the Charter breaches were inadvertent. First, the Crown argues that the police were acting in good faith by relying on jurisprudence that established that upon arrest, they did not need to advise the accused of the particulars of the subject matter or the reasons for the arrest; rather, they only needed to advise the accused of the provisions under the Criminal Code, R.S.C. 1986, c. C-46 for

which he was under arrest and the description of those offences. In this case, the particulars were that his daughter was the complainant and that there were multiple offences that were alleged to have taken place over six years and to have occurred several years prior to the arrest. The Crown submits that the law that I applied to find that the police breached his ss. 10(a) and 10(b) rights developed after the time of the arrest. In those circumstances, the Crown argues that the police conduct is not the type of conduct from which the Court ought to distance itself. Second, the Crown argues that the breaches did not have a significant impact on the accused's Charter-protected rights because B.J. agreed to be interviewed so he could satisfy the police that he had done nothing wrong. Finally, the Crown says that society's interest in adjudicating the case on the merits is extremely high, given the subject matter of the charges and the vulnerability of the complainant.

- [5] The defence argues that the accused's right to silence is undermined as a result of the breaches to his ss. 10(a) and 10(b) rights. Accordingly, the circumstances of the breaches are extremely serious and the evidence should be excluded. The defence argues that society's interest in adjudication of the case on the merits includes an interest in the adjudication of cases in a manner that respects the accused's Charter rights. The defence argues that the information that was withheld from B.J. was deliberately withheld as part of a strategy to see if he would disclose that information and thereby implicate himself. Lastly, the defence argues that while it was not a deliberate breach of his Charter rights, it was a deliberate tactic and the Court should distance itself from that tactic and not permit evidence obtained using that tactic to be used in the trial.
- [6] I find that the Charter breaches were extremely serious. While I do not conclude that the police intended to violate B.J.'s ss. 10(a) and 10(b) rights, I find that the police deliberately developed a strategy that complied with the form of information required, but did not respect the substance of the accused's rights to be informed of the reasons for his arrest and how that relates to the accused's right to counsel and right to silence. No confession was made during the police interview, so society's interest in having a case adjudicated on its merits where there is a confession given voluntarily does not weigh in favour of the admissibility of this evidence. The purpose for which the Crown seeks to use it to undermine the accused's credibility will likely play an important role in this case and does weigh in favour of admissibility of the evidence, but it also makes it important that statements obtained when the accused did not understand why he was arrested not be used to undermine his credibility.
- [7] These reasons for judgment should be read with my reasons for judgment delivered on August 26, 2020, finding that the statement was given voluntarily but in breach of ss. 10(a) and 10(b) of the Charter.

Issues and Legal Principles

- [8] The issues that the court must address to determine the admissibility of evidence obtained in breach of an accused's Charter rights is addressed in the test for exclusion under s. 24(2) developed by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32.
- [9] The court must consider the following three lines of inquiry in determining whether, on balance, the evidence obtained in breach of Charter rights would bring the administration of justice into disrepute, viewed in the long term and from the point of view of a reasonable person (*Grant* at paras. 68, 85-86):
- a) the seriousness of the Charter-infringing state conduct;
 - b) the impact of the breach of the Charter-protected interests of the accused; and
 - c) society's interest in the adjudication of the case on the merits.
- [10] The *Grant* analysis was summarized by Madam Justice Ker in *R. v. Hendrickson*, 2018 BCSC 343 and *R. v. Lance*, 2018 BCSC 1695. In *Lance*, she found that although the statement was voluntary, it was inadmissible due to breaches of the accused's ss. 10(a) and 10(b) rights.

Analysis of the Grant Factors

The Seriousness of the Charter Infringing State Conduct

- [11] As I described in my reasons on voluntariness and the Charter breaches, on arrest, the police advised B.J. of the title and provision number of the Criminal Code offences, but did not inform him of the name of the complainant or the timeframe of the alleged offences. B.J. repeatedly asked for details about why he had been arrested. The police repeatedly told him that he would understand more once he spoke to the lead investigator. Before the substantive portion of the interview and after having spoken with counsel, B.J. made it clear that the reason he was agreeing to be interviewed was to find out the reasons for his arrest, because he still did not know them. As the interview proceeded, B.J. was attempting to guess who the complainant was and was provided incorrect information as to when the offences were alleged to have commenced.
- [12] Although the police advised B.J. of his right to counsel and ensured that he had exercised it, they deliberately did not permit him to exercise it with the information he was asking for. This was done to see if B.J. would implicate himself when they took his statement.
- [13] The Crown argues that the evidence as a whole shows that the police were meticulous in attempting to respect B.J.'s Charter rights, including ensuring that he understood the reasons for his arrest and his right to counsel before the substantive interview with Sergeant Lee. The Crown argues that considering the development of the jurisprudence on ss. 10(a) and 10(b) of the Charter, the police reasonably believed that their obligation was simply to advise B.J. of the name and section number of the offences for which he was being arrested. The Crown refers specifically to *R. v. Eakin*, [2000] O.J. No. 1670 (C.A.), leave to appeal ref'd

[2000] S.C.C.A. No. 636, in reference to the developing jurisprudence on what the police must advise the arrestee on arrest.

- [14] Uncertainty in the law can attenuate the seriousness of a Charter breach: *R. v. Clarke*, 2017 BCCA 453, at para. 74, leave to appeal ref'd [2018] S.C.C.A. No. 65. On a s. 24(2) analysis, it is important that the court is careful not to overstate clarity in the law or lose sight of the fact that conceptual certainty on a point of law will not always give rise to certainty in the application of the law in the complex and time-sensitive dynamic in which the law enforcement community operates: *R. v. Omar*, 2018 ONCA 975, at paras. 74-97 and 102, per Brown J.A. in dissent, rev'd 2019 SCC 32 (adopting Brown J.A.'s reasons).
- [15] In *Eakin*, the Ontario Court of Appeal held that an accused who was told on his arrest that he was being arrested for sexual assault had adequate information of the reason for his arrest. In that case, the accused was aware of other circumstances that could be taken to provide him with insight about the incident that prompted the arrest, namely, that he had been found prowling a hotel and had been confronted by security personnel. The circumstances were later found by the trial judge to have been the accused looking for a sexual assault victim.
- [16] In my view, *Eakin* belongs in a line of authorities that establishes that contextual factors need to be considered in determining whether a person has sufficient information to understand the seriousness of the offences for which they had been arrested. It does not stand for the proposition that advising the accused of the title of the offence and the provision of the Criminal Code satisfies the accused's ss. 10(a) and 10(b) rights in every circumstance. It is not overstating the law or providing illusory clarity to uncertain law to conclude that it was not reasonable for the police to rely on *Eakin* for the proposition that B.J. need not be told that he was arrested for historical sexual abuse of his daughter, especially given that B.J. repeatedly asked for the factual basis for his arrest.
- [17] However, as B.J. submits, a deliberate breach is not the test for determining the seriousness of police conduct. In *Lance*, Madam Justice Ker held that the breach resulted from a miscommunication and/or misunderstanding between police officers during a handoff of the accused at the time of transportation to a detention centre after arrest. Although she found the breach occurred in circumstances of confusion, she characterized it as a "cavalier" approach to Mr. Lance's understanding of his legal jeopardy, and she held that it was more than a technical or de minimis breach: *Lance* at para. 89. In *Grant*, at para. 75, the Court held that while good faith ignorance of Charter standards will reduce the need for the court to distance itself from state conduct, the court must not reward or encourage such ignorance, negligence, or wilful blindness by equating it with good faith or allowing the evidence to be admitted: see also *R. v. Mohamed*, 2019 ONSC 2366 at para. 3.

- [18] The Court of Appeal recently reviewed the concept of good faith in connection with a s. 24(2) analysis in *R. v. Pawar*, 2020 BCCA 251. Mr. Justice Fitch, writing for the court, held that to find good faith the court must be persuaded that the police's belief in the lawfulness of their conduct was both honestly and reasonably held. He quoted the following from *R. v. Fan*, 2017 BCCA 99, where Madam Justice Dickson explained that a finding of good faith cannot be sourced in negligence or willful blindness:
- [70] Where the police act in good faith, it may attenuate the seriousness of a Charter breach and reduce the court's need to disassociate itself from the conduct. However, ignorance of Charter standards will not be rewarded or encouraged, and good faith will not be found where police conduct is negligent or wilfully blind. For example, while police are not expected to have an immediate understanding of judicial decisions affecting their powers, they do not act in good faith when they know or should know that their actions are unlawful. Deliberate conduct in knowing violation of established Charter standards amounts to bad faith and tends to support exclusion: Grant at para. 75; Caron at para. 41.
- [71] "Good faith" and "bad faith" are terms of art which connote mental states at the opposite poles of a spectrum. As Frankel J.A. stated in Caron, a finding that a police officer acted in good or bad faith is not a factual finding per se but, rather, a legal characterization of the facts: para. 33. Importantly, the absence of bad faith does not equate to good faith, nor does the absence of good faith equate to bad faith: Caron at para. 38. In *R. v. Smith*, 2005 BCCA 334, Ryan J.A. explained:
- [61] good faith connotes an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong.
- [19] Based on Sergeant Lee's evidence, the evidence of the other officers, and the overall circumstances, I find that the strategy of withholding information was deliberate. The police intended to disclose the reasons for B.J.'s arrest to him incrementally. I find that they did so in order to see if B.J. would make statements that demonstrated he knew why he was being arrested and thereby implicate himself. At the same time, I find that the strategy was not exercised in bad faith because it was not undertaken with intention of breaching B.J.'s Charter rights.
- [20] However, based on my conclusion that the jurisprudence on ss. 10(a) and 10(b) could not reasonably be relied upon by the police to deny B.J. the information about the factual basis for his arrest and B.J.'s repeated requests for more information that were ignored in furtherance of the strategy, the police did not act in good faith either. The police conduct falls into the gap between bad faith and good faith.

- [21] I conclude that this strategy was premised on a failure to presume that B.J. was innocent and was inconsistent with his right to silence. It is conduct from which the Court should distance itself that weighs against the admissibility of the statement.

Impact on the Charter-Protected Interests of the Accused

- [22] The Crown argues that because what I have referred to as the deliberate strategy by the police did not work, i.e., B.J. did not confess or guess who the complainant was or the timeframe of the alleged offences, such that he could be taken to have implicated himself, the impact of the breach of his ss. 10(a) and 10(b) rights should be considered to be minimal.
- [23] The defence argues that this sidesteps the issue. There is no confession, yet the Crown seeks to use the statement on cross-examination for purposes that are very wide-ranging and potentially very damaging to B.J., should he decide to testify.
- [24] The Crown submits that in considering the actual impact, it is important to take into account that when B.J. was informed of the name of the complainant and the historical nature of the alleged offences, as well as the multiplicity of the alleged offences, he did not stop talking and state that he wanted to speak to a lawyer. He kept talking, even though he had said he would agree to be interviewed on the basis that he might stop the interview if he considered it in his interest to do so. At the end of the interview, B.J. told Sergeant Lee that he agreed to be interviewed to find out what was really going on (the reasons for his arrest), as well as because he knew that he had not done anything wrong and he might as well clear it up then and there.
- [25] It is clear from the transcript that going into the substantive part of the interview, B.J. was only motivated to obtain information about why he was arrested. Sergeant Lee testified that despite B.J.'s repeated questions about the reasons for his arrest, Sergeant Lee believed that B.J. knew exactly why he was arrested because he had been waiting for years for "the penny to drop". That presumption does not justify the police's conduct in keeping information from him for the purpose of seeing if he would implicate himself. In fact, it exacerbates the breach, because the basis of the strategy was an affront to the presumption of innocence that should have informed the police's conduct when seeking to interview B.J.
- [26] The Crown seeks to use the statement to challenge certain things that B.J. said during the interview, which the Crown suspects he may well testify to differently at trial. The Crown provides the following examples of topics on which B.J. will be able to tailor his evidence without regard to being contradicted by what he previously said if the Crown cannot use the statement to contradict him:
- a) B.J. said that he had never been in R.J.'s bed, but he now knows that the Crown expects that two people will testify that they saw him in R.J.'s bed.

- b) B.J. speculated that R.J. may have made up these accusations because of grievances that she has with regard to B.J.'s parenting style. As a result of the Crown disclosure in these voir dres, B.J. now has a longer list of grievances that R.J. may have and that he may point to at trial.
 - c) During a statement, B.J. addressed an incident described as the "condom wrapper incident." His version of that incident is different from that of R.J. and her mother. B.J. now has the benefit of knowing their versions and may change his evidence and not be called upon to explain the change as a matter of credibility at trial.
- [27] The Crown argues that credibility will be central in this case. R.J. will be extensively cross-examined on her allegations and on any discrepancies between her statements to the police, her testimony on these voir dres, and her evidence at trial. If B.J. is free to change his evidence to tailor it to what he has learned during the time since he made his statement and is not called upon to explain the differences, the exclusion of the evidence is far more serious than the impact on his Charter rights in taking the statement from him.
- [28] I accept this is a significant issue. However, it must be viewed in light of the fact that the Crown would not have any ammunition on which to cross-examine B.J. had it not used the strategy the Court needs to distance itself from. Although it did not produce a confession, it produced fodder for cross-examination in a case which will turn on credibility. That is a serious impact on B.J.'s interests.
- [29] I am of the view that this factor is not as serious as the first factor for excluding the evidence, but weighs in favour of excluding the evidence nonetheless.

Society's Interest in the Adjudication of the Case on its Merits

- [30] Under this factor, the court considers the relationship between the inclusion or exclusion of the evidence and the public interest in the adjudication of the case on its merits.
- [31] In *Lance*, Ker J. found that the exclusion of a statement that Crown intended to use purely for cross-examination would not end the Crown's case and, therefore, cannot be said to significantly affect the adjudication of the case on its merits. Madam Justice Ker also explained that the overarching concern of bringing the administration of justice into disrepute includes maintaining the rule of law and upholding Charter rights. The s. 24(2) inquiry must be informed by the long-term maintenance of the integrity of the justice system and public confidence in it.
- [32] The Crown argues that my findings on voluntariness necessarily lead to the conclusion that the reliability of B.J.'s statement cannot be called into question. My findings on voluntariness were that his will was not overborne to the point where he would say anything just to get out of the situation he was in.

- [33] The Crown also asserts that there is, independent of my reasons on voluntariness, no reason to infer that B.J.'s statement is unreliable, because there can be no suggestion that his lack of knowledge of the identity of the complainant or the dates on which the offences were alleged to have occurred somehow led to him not giving a true or accurate statement to the police.
- [34] For the reasons I have outlined above, the Crown argues that because the central issue at trial will be the credibility of R.J., the inability to cross-examine B.J. on what the police said will significantly impair society's interest to an adjudication of the case on the merits.
- [35] The defence argues that the Crown's position ignores B.J.'s right to silence. B.J. submits that although there are no reliability concerns around his statement to the police in the sense that what he said was truthful, what is sought here is not to put the whole of the reliable statement before the jury. The whole of the reliable statement includes that he maintained his denial throughout the interview. The defence says that because the Crown only wants to use the statement to impeach B.J., the reliability of the statement should not be used absent the reliability of the statement as a whole. The defence argues that in these circumstances, the reliability of the statement is not relevant to the public's interest in the administration of justice because the jury will not know that B.J. maintained his innocence during the entire interview. Moreover, B.J. felt that he had to talk to the police in order to understand the reasons for his arrest and this compelled him to speak in a way that is relevant to society's interest in the adjudication of the case on the merits, such that the evidence should be excluded. The defence says this is not because what he said was unreliable but because it was compelled from him in a way that is inconsistent with his right to silence and his right to not incriminate himself: see *Grant* at paras. 77 and 89.
- [36] In this case, it appears that credibility will be central at the trial distinguishing this case from *Lance*. Although the Crown has evidence to prove the allegations and does not need to rely on the statement for that purpose, the jury is going to have to decide whether to believe R.J. and whether any evidence that B.J. gives raises a reasonable doubt. Accordingly, the ability to cross-examine B.J. on potential inconsistencies between what he told the police and what he testifies to at trial--if he testifies--could be critical. The defence's argument that the jury will not have the benefit of the whole of the reliable statement is a product of the rules of evidence pertaining to prior consistent statements, not the state conduct from which the court should distance itself.
- [37] Given that there are no reliability concerns around what he said to the police and the credibility issues in this case, I am of the view that this factor weighs in favour of allowing the Crown to use the statement for cross-examination purposes.

Balancing

[38] The interplay between the Grant factors was considered in *R. v. McGuffie*, 2016 ONCA 365, at para. 63, where Justice Doherty, writing for the court, expressed the view that if the first and second Grant factors make a strong case for exclusion, the third inquiry will rarely tip the balance in favour of admissibility. This was endorsed in *R. v. Paterson*, 2017 SCC 15 at para. 56 and, more recently, in *R. v. Le*, 2019 SCC 34:

142 The third line of inquiry, society's interest in an adjudication of the case on its merits, typically pulls in the opposite direction -- that is, towards a finding that [the] admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown's case (see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34), we emphasize that the third line of inquiry cannot turn into a rubber stamp where all [the] evidence is deemed reliable and critical to the Crown's case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility (*Paterson*, at para. 56). Conversely, if the first two inquiries together reveal weaker support for [the] exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence.

[Emphasis in original].

[39] Considering my analysis of the foregoing three factors and the circumstances, including the findings I made pertaining to voluntariness and breaches of ss. 10(a) and 10(b), I am of the view that the statement made by B.J. should be excluded from evidence at trial, including for cross-examination purposes. The Charter breaches, the underlying failure to provide him the benefit of the presumption of innocence, and the attendant consequences to his right to silence are serious and part of a deliberate strategy to see if B.J. would incriminate himself. Although he ultimately did not incriminate himself, he only spoke to the police because of that strategy. In my view, these serious considerations outweigh the negative implications of excluding the statement on the truth-finding process.

Conclusion

[40] Although the Crown has established the voluntariness of the statement beyond a reasonable doubt, it was obtained in violation of B.J.'s ss. 10(a) and 10(b) Charter rights. After balancing the Grant factors, I grant the defence's application to exclude the statement from evidence at trial for all purposes, pursuant to s. 24(2) of the Charter.

"Matthews J."

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