

CANADA / JUDGMENT

R. v. Evans

2002 BCSC 1675

COURT

Supreme Court of British Columbia

DECIDED

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2002BCSC1675

Citation:

R. v. Evans

Date:

20021202

2002 BCSC 1675

Docket:

118672DKC

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

Against

DELME JOHN EVANS

RULING ON VOIR DIRE (NO. 1)

OF THE

HONOURABLE MR. JUSTICE E.R.A. EDWARDS

Counsel for the Crown:

Stan T. Lowe

Counsel for the Defence:

D. Mayland McKimm, Q.C.

and Susan E. Wishart

Date and Place of Hearing/Trial:

November 18-22, 2002 and

November 25-28, 2002

Victoria, BC

- [1] The accused, Delme John Evans, is charged with the second degree murder of Phoebe Mack on January 7, 2002.
- [2] The accused was stopped at around 23:30 that day by customs officers at the Douglas border crossing. Routine questioning aroused their suspicions and they discovered there were outstanding warrants for his arrest.
- [3] The accused gave a number of statements to customs officers and police including Corporal Hodgson, RCMP. The admissibility of four statements to Corporal Hodgson, four on video and one on audio, is the main issue on this voir dire.
- [4] At the time of his initial arrest at 23:55 the accused was told he was being arrested in connection with the outstanding warrants and did not comment or seem surprised. He was put in a cell and his hat, belt and shoes removed.
- [5] The accused had requested that he not be arrested in the presence of his 27 month old son, Dylan. Customs Inspector Mattis discovered that he did not have his caution card and asked Customs Inspector Vatic for his. This resulted in a delay of a minute or two between arrest and the reading of the Charter warning.
- [6] Before the accused was given a Charter warning, advised of his right to counsel or the availability of legal aid duty counsel, he stated, according to Customs Inspector Vatic, "There is something bigger going on here I need to speak to a lawyer" and according to Customs Inspector Mattis "I need to talk to a lawyer now, I need one now. There are things I need to talk to someone about right now. There is stuff going on that you guys don't know about yet."
- [7] Customs Inspector Mattis then read this Charter warning to the accused:

You are not obliged to say anything. You have nothing to hope from any promise of favour and nothing to fear from any threat, whether or not you say anything. Anything you do say, may be used as evidence.

You have the right to retain and instruct counsel without delay.

You have the right to obtain legal advice without charge from duty counsel. Duty counsel is available at:

(604) 631-0566

during the following hours: 24 hours

You have the right to apply for legal assistance without charge through the Provincial Legal Aid Program. The Legal Aid telephone number in this area is: (604) 585-6575

Their office is located at: 201-9180 King George Hwy, Surrey, B.C.

and office hours are from M-T 8:30 am - 1600 pm

Fri 8:30 am - 12 noon

Do you understand what has been said to you?

Do you wish to call a lawyer now?

If you have spoken to any police officer or to anyone, or if any such person has spoken to you in connection with this case, I want it clearly understood that I do not want it to influence you in making any statement.

- [8] In light of his statement quoted at paragraph 6, when he asked "Do you want to speak to a lawyer now?" Customs Inspector Mattis assumed the accused wanted to talk to duty counsel, without asking if he wanted to talk to a specific lawyer or to legal aid duty counsel. The accused did not provide the name of counsel he wished to contact.
- [9] At 00:02 January 8, 2002, Customs Inspector Mattis called the legal aid duty counsel number and left a message that the accused had been arrested on two warrants and asked for a call back.
- [10] Legal aid duty counsel David Malicki called back to Customs Inspector Mattis at 00:17. The accused conversed with counsel in private for about ten minutes and then returned the telephone to Customs Inspector Mattis. Mr. Malicki told Customs Inspector Mattis he would call back in ten minutes to speak to the accused again.
- [11] At 00:44 Mr. Malicki called back and again spoke privately to the accused until 00:59.
- [12] After speaking to Mr. Malicki for a total of about 25 minutes on two occasions, the accused then stated to Customs Inspector Vatic, without questioning or prompting, "The address of Phoebe Mack is 9875 Resthaven Drive. That's it."
- [13] Customs officers had earlier learned from the accused during routine questioning that Phoebe Mack was the mother of the 27 month old son of the accused, Dylan, who was with him when he was stopped and that she was the registered owner of the vehicle he was driving.
- [14] Customs Inspector Vatic testified that when the accused said "That's it" it was "as if he was getting something off his chest" and implied "someone should get there".

- [15] Constables Gill and Williams, RCMP, arrived at 00:55 to take the accused into custody on the warrants. After arriving, they did CPIC checks and found the address of 9875 Resthaven, Sidney, B.C., was the accused's address on one warrant and that the vehicle was registered in the name of Phoebe Mack at that address.
- [16] Constable Williams was told by customs officers that the accused had spoken to a lawyer on two occasions and had told one of them "he was told only to say '9875 Resthaven'". From the context it is clear that the customs officers understood the lawyer had advised the accused to say only that.
- [17] Constable Gill was told by Customs Inspector Vatic that the accused had said the police should attend at 9875 Resthaven "according to his lawyer".
- [18] Some time before 01:18 Constable Williams asked Constable Erb of the Sidney RCMP to check at the Resthaven address.
- [19] Constable Williams then spoke to the accused who told him that his lawyer had told him not to talk to the police and to give them the address 9875 Resthaven. Constable Williams replied that he was only going to ask names and dates of birth. The accused then gave him the accused's full name and date of birth, the same information regarding his son Dylan and Phoebe Mack, as well as her address and telephone number. All these details had already been disclosed to or discovered by the customs officers before they arrested the accused.
- [20] At around 01:40 Constable Boynton took photographs of the accused's injuries which included scratches to his face and neck, nicks to his swollen hands and a cut on his right tricept which he pulled up his own sleeve to reveal. Constable Gill asked the accused where he sustained the injuries and he accused did not answer.
- [21] While the photos were being taken, the accused stated "I'm not supposed to give any tissue samples". Constable Williams testified he thought this strange in the context of an arrest on outstanding warrants.
- [22] Around 01:40 Constable Gill told he accused that he was being arrested on the warrants and read the standard Charter warning, including the following:

I am arresting you for [outstanding warrants].

It is my duty to inform you that you have the right to retain and instruct counsel in private without delay. You may call any lawyer you want.

There is a 24 hour telephone service available which provides a legal aid duty lawyer who can give you legal advice in private. This advice is given without charge and the lawyer can explain the legal aid plan to you.

If you wish to contact a legal duty lawyer I can provide you with a telephone number.

Do you understand?

Do you want to call a lawyer?

You have the right to a reasonable opportunity to contact counsel. I am obliged not to take a statement from you or to ask you to participate in any process which could provide incriminating evidence until you are certain about whether you want to exercise this right.

Do you understand?

What do you wish to do?

The accused nodded affirmatively.

[23] Constable Williams then read the following secondary warning:

..., you are detained with respect to: [outstanding warrants]. If you have spoken to any police officer (including myself) with respect to this matter, who has offered to you any hope of advantage or suggested any fear of prejudice should you speak or refuse to speak with me (us) at this time, it is my duty to warn you that no such offer or suggestion can be of any effect and must not influence you or make you feel compelled to say anything to me (us) for any reason, but anything you do say may be used in evidence.

[24] There is a conflict between the evidence of Constable Gill and Constable Williams as to whether the Charter warning was given before or after the photos were taken.

[25] After the warning was given, the constables seized the accused's clothing and vehicle and transported the accused to cells at the South Surrey RCMP detachment arriving at 02:03. The accused was "booked in" and then Constable Gill called the legal aid number. The call was returned and the accused spoke in private to someone at 02:32 for four minutes and then hung up.

[26] At 02:11 Constable Williams was advised a badly beaten woman's body had been found at the Resthaven address and the ambulance was on the way there.

[27] At 04:15 Constable Williams received a call advising him that the woman was dead. A subsequent call at 04:54 from Sergeant Conley of the Sidney RCMP instructed him to arrest the accused for the homicide of Phoebe Mack, which he did at 04:56.

[28] When advised he was under arrest for the homicide of Phoebe Mack and asked if he understood, the accused stated according to Constable Williams "I was told by (sic) lawyer not to say anything. His name is Richard Peck. He said, if I was going to be charged with anything else, I was supposed to be in contact with him as soon as possible."

[29] Constable Williams again gave the Charter warning and secondary warning quoted above. When asked at 05:02 if he would like to contact a lawyer, the accused replied "yes".

[30] After stating he understood the secondary warning the accused stated "I really don't want to talk to anyone until I get some advice from my lawyer."

- [331] In response to that, Constable Williams conveyed the accused to the telephone room and at 05:07 called the legal aid duty counsel number leaving a message that the accused had been charged with homicide and asking for a call back. It was Constable Williams' experience that the return call was usually received within 15 to 20 minutes so he left the accused near the telephone with instructions to answer it since it would be for him.
- [332] The call was not returned and at 05:35 Constable Williams called the legal aid number again. He then responded to the accused's request for a band aid for the cut on his arm and a cigarette by taking him to a sally port where he applied two band aids and gave the accused a cigarette.
- [333] At 06:09 Constable Williams called the legal aid number again, leaving a message that it was his third call. At 06:15 he paged a legal aid emergency number. At 06:29 he called the legal aid number again. At 06:34 someone from legal aid called back. Constable Williams put the accused in a private room to speak on the telephone and observed him do so until he hung up after about three minutes.
- [334] Constable Williams testified that Richard Peck's name did not mean anything to him and he did not try to place a call to Richard Peck but was thinking "get him to legal counsel" when the accused replied "yes" to the question "Do you want to talk to a lawyer?" He admitted that he "just sort of forgot" about the accused telling him he wanted to speak to Richard Peck.
- [335] After the accused completed the call he did not indicate to Constable Williams who he had spoken to or that he was unhappy with the advice he received. The accused was returned to a cell.
- [336] Around 09:00 Corporal Hodgson arrived from Sidney and was briefed. At 10:03 he began a video taped interview with the accused which lasted until 12:05. Towards the end of the interview, the accused was advised that he would be taken to Sidney. The following exchange ensued between the accused and Corporal Hodgson:

A: That lawyer that I talked to on this side, when I get to the other side will he (sic), the guy I talk to again, or?

Q: Well, if you talked to ah,

A: I remember his name.

Q: You do or don't?

A: Last name was PECK, Rob PECK, maybe?

Q: Well, if you want to talk to him ...

A: I'll talk to him on the other side?

Q: Yeah, and you're gonna be talking to ...

A: (indecipherable)

Q: And you'll be talking to a lawyer by phone, so that will be the plan. So you got any questions? You got a million questions, eh?

- [37] Corporal Hodgson then took the accused to Sidney by ferry, arriving at the Sidney RCMP detachment at about 15:24. Corporal Hodgson asked the accused the name of the lawyer he had mentioned during the interview in Surrey and the accused said he wasn't sure stating, "Jim Peck".
- [38] Corporal Hodgson then called the legal aid number and asked for a call back from Jim Peck. Around 15:45 Corporal Hodgson was advised the call had been returned and he put the accused in a private room to take the call. The call lasted about 5 minutes until 15:55. The accused did not advise Corporal Hodgson he had not spoken to Mr. Peck.
- [39] Between 19:25 and 19:40 Corporal Hodgson conducted a second video taped interview of the accused.
- [40] Between 21:03 and 21:53 Corporal Hodgson conducted a third video taped interview of the accused.
- [41] On January 9, 2002, at 10:34 Corporal Hodgson conducted a forth video taped interview of the accused. On that day the accused appeared in court and was remanded in custody.
- [42] On January 16, 2002, at 16:11 Corporal Hodgson conducted an audio taped interview with the accused.
- [43] Two issues arise on this voir dire. The first is whether the accused has proved on a balance of probabilities that his right to instruct counsel without delay was infringed. The second is whether the Crown has proved the voluntariness of the statements made to the customs officers and police beyond a reasonable doubt.

RIGHT TO COUNSEL

- [44] Defence counsel argued that the first statement by the accused to customs officers after his arrest was made prior to any Charter warning that "you are not obliged to say anything" and should therefore be excluded.
- [45] The statement was made by the accused during the course of his assertion of his right to counsel, essentially as an explanation for his assertion of that right. It was not prompted by any question from the officers and amounts to a spontaneous utterance by the accused. It arose as a consequence of the arrest but not as a result of the officers' deliberate delay in reading the Charter warning.
- [46] Implicit in the statement is the accused's understanding that he had a right to speak to a lawyer before being questioned by persons in authority after his arrest.

- [47] Further, the statement reflects the accused's inclination to make incriminating disclosures despite his knowledge of his right to counsel and despite subsequent advice from counsel not to speak to persons in authority, as disclosed in his subsequent statements.
- [48] I find the accused has not proved on a balance of probabilities that this statement was made as a result of a breach of his right to be informed of his right to remain silent and of his right to counsel.
- [49] Defence counsel argued that the fact Customs Inspector Vatic placed a call to legal aid on his on initiative deprived the accused of his right to retain and instruct counsel of his choice.
- [50] At no point before or after he spoke to legal aid counsel, Mr. Malicki, did the accused indicate to the customs officers he wished to contact a specific counsel by name. According to their notes he asked to speak to "a lawyer", implying an lawyer would do. In the circumstances, Customs Inspector Vatic's decision to call legal aid was understandable and reasonable.
- [51] When Mr. Malicki told Customs Inspector Vatic after he had spoken to the accused that he would call back, it was reasonable, in the absence of any complaint from the accused that he was dissatisfied with Mr. Malicki, for the customs officers to conclude the accused was content to take advice from Mr. Malicki.
- [52] That conclusion would have been reinforced by the fact that after the second call with Mr. Malicki the accused apparently told them the Resthaven address on "his lawyer's" advice.
- [53] At no point in his dealing with customs officers did the accused say he was not content with Mr. Malicki. I find that the accused has failed to prove on a balance of probabilities that the customs officers deprived him of his right to instruct counsel of his choice.
- [54] By the time the accused was arrested and given Charter warnings by Constable Gill and Constable Williams, they knew he had already spoken to a lawyer. He told Constable Williams he had been advised by his lawyer not to talk to police and to disclose the Resthaven address. He told them when they were taking the photos that he was "not supposed to" provide any tissue samples, which I infer was advice he had received from his lawyer.
- [55] Assuming that the photos were taken before the police read the accused the Charter warnings and "hold off" requirement, I find the accused has not proved on a balance of probabilities that police deprived him of his right not to participate in any process which could provide incriminating evidence before he exercised his right to counsel.
- [56] The accused had already exercised that right and was apparently heeding the advice his lawyer had provided. The accused was in effect re-arrested by the police on the same warrants that the customs officers had arrested and warned him on less than two hours before. He had spent 25 minutes of the intervening period on the telephone with counsel.

- [57] Accordingly, there is no basis to exclude the photos or the statement made by the accused to Constable Gill while he was being transported to the RCMP detachment. He merely repeated to Constable Gill what he had told the customs officers, that his lawyer had told him to say "you (the authorities) should attend at 9875 Resthaven".
- [58] It cannot be maintained that this statement originally made to Customs Inspector Vatic, according to the accused on the express advice of counsel, was made before he exercised his right to retain and instruct counsel. The accused had spoken to counsel for twenty five minutes. The fact the accused was not afforded another opportunity to contact counsel before repeating the statement does not render it inadmissible. He was in no different or further jeopardy after his re-arrest by police on the warrants. He had not complained of the advice he had received or asked to speak to another lawyer by name.
- [59] On his arrest for homicide at 4:56, the accused told Constable Williams that lawyer Richard Peck had told him if he was going to be charged with anything else he should contact him as soon as possible.
- [60] Because neither the accused nor Richard Peck testified at the voir dire, it is not clear how the accused was put in touch with Richard Peck. The first two calls back from legal aid put him in touch with Mr. Malicki. The call Constable Gill placed for him was to legal aid. It was returned at 02:32. If Mr. Peck returned it, he must have been contacted through legal aid on the initiative of someone at legal aid, because the accused did not ask Constable Gill to ask for Mr. Peck.
- [61] It is therefore understandable that instead of trying to contact Richard Peck, Constable Williams, to whom that name meant nothing, but who knew the accused had already spoken to a lawyer, simply contacted legal aid repeatedly after 04:56 in an effort to put the accused again in contact with the lawyer whose name the accused had mentioned.
- [62] After finally being connected to legal aid again at 06:34, the accused did not advise Constable Williams that he had not spoken to Richard Peck or indicate that he wanted to do so.
- [63] Nor did the accused indicate to Corporal Hodgson at 10:10 that he had not contacted Richard Peck at 06:34 or indicate he wanted to do so again. He merely stated "I spoke to my lawyer once".
- [64] At the end of that interview about an hour later, the accused merely asked if he would again be in touch with "that lawyer I talked to" when he got to Sidney and then gave the name "Rob Peck".
- [65] When he arrived at Sidney, the accused gave Corporal Hodgson the name "Jim Peck" and Corporal Hodgson, to whom the name Peck meant nothing, apparently assuming that legal aid would be aware of that name, left a message requesting a person by that name call back.

- [66] After the accused spoke again with legal aid at around 15:50 as a result of that call, he did not advise Corporal Hodgson that he had not spoken to Richard Peck nor did he indicate that he wanted to do so. It was not until later that Corporal Hodgson realized the accused had not spoken to Mr. Peck. At no time thereafter did the accused request to speak to Mr. Peck.
- [67] I am satisfied on the evidence that neither Constable Williams nor Corporal Hodgson deliberately attempted to frustrate the accused's request to contact Richard Peck. They apparently assumed that by calling legal aid the accused would be put in touch with Mr. Peck, as he apparently was during the call at 02:32. The accused never said anything to either Constable Williams or Corporal Hodgson to the effect that he had not spoken to Mr. Peck and wanted to do so.
- [68] The accused failed on numerous occasions to advise the police that he had not spoken to Mr. Peck after he asked to do so. In the circumstances of this case, I find it is not open to him to now assert that he was deprived of his right to contact counsel of his choice.
- [69] The accused knew before he was arrested by the customs officers he had a right to contact a lawyer. He spoke to a Mr. Malicki for twenty five minutes and told him enough of his predicament to be advised to direct the police to 9875 Resthaven and not to provide tissue samples. I infer from that advice and the fact that Mr. Malicki called back for a second talk with the accused that he was aware the accused faced more than arrest on the outstanding warrants.
- [70] When he was arrested for the homicide, the accused was aware that he could and did in fact ask for a lawyer of his choice, Richard Peck.
- [71] However, he did not advise the police that they had not put him in touch with Mr. Peck when they had reason to believe calling legal aid would have that result.
- [72] Defence counsel argued that the fact the accused was not put in touch with Mr. Peck when he asked to contact Mr. Peck "tainted" everything thereafter and meant he had been deprived of the right to retain and instruct counsel of his choice throughout the interrogation by Corporal Hodgson.
- [73] The accused was not deprived of his right to contact counsel of his choice through the deliberate actions of the police. Rather, he failed to effectively assert that right by indicating to the police in a timely way on a series of occasions that he had not contacted Mr. Peck, leaving them to assume he had.
- [74] When Corporal Hodgson ultimately realized the accused had not spoken to Mr. Peck, he could reasonably assume from the facts that the accused had not complained about that and had reiterated the advice that he had received from counsel, that the accused had waived his right to speak to Mr. Peck and was apparently content with the advice he had received.

[75] If I am wrong about these conclusions, I find that the fact the accused did not contact Mr. Peck after he asked to do so would not result in the exclusion of the statements he made to Corporal Hodgson. That is because the accused had the benefit of advice of counsel including advice, as he put it, "to shut my mouth, basically" and advice not to provide tissue samples. The accused chose to disregard that advice during the course of his interrogation by Corporal Hodgson.

[76] Implicit in the proposition that the accused's position was jeopardized by not contacting Mr. Peck is the hypothesis that had he done so Mr. Peck would have given advice not to talk to the police or provide tissue samples (the same advice he already had) in a more forceful manner which would have persuaded the accused to adhere to that advice. There is no evidence to support that hypothesis.

[77] The evidence is to the contrary. During the course of the interviews, Corporal Hodgson appealed to the accused's conscience and the accused indicated he was responding to that appeal, knowingly rejecting the advice of counsel. For example, after being persuaded to consent to a blood sample contrary to the advice of counsel the accused stated:

Q: Now, okay. Well this ... this form gives me permission to do it and it goes through your rights. So I'll fill it out and we'll ..., I'll read this to you.

A: I got nothing to hide anyways. My lawyer says, "don't give any blood samples, don't give any tissues samples." Like why?

Q: Well the reason why is they're ..., you're asking them what are my rights? He's telling you your rights. You don't have to do any ..., you don't have to talk to me, but you're an unusual person for us to deal with. Is that, this is something that's outside you and you don't know why it happened and you can't keep it inside and you want to tell the truth and ..., it's a refreshing thing to deal with as a policeman, is a guy that does something wrong and goes, 'I'm gonna stand up for it. I know it was wrong. I'm gonna stand up to it'.

A: Also I don't take the advice of a lawyer. Told me just to say nothing to nobody. There's no way, I would still be in there not sleeping at all.

Q: You've got a great big thing inside you called a conscious (sic).

A: Yeah, I know.

[78] I find the accused has not proved on a balance of probabilities that his right to instruct and retain counsel of his choice was infringed. I find further that if it was infringed the infringement is not such as would render the statements made to Corporal Hodgson inadmissible in light of the accused's decision to disregard advice he did receive from counsel.

VOLUNTARINESS

- [79] The approach Corporal Hodgson took to interrogating the accused was to "blame the victim", implicitly and explicitly minimizing the accused's culpability, and to appeal to the accused's conscience.
- [80] According to *R. v. Oickle* [2002] 2 S.C.R. 3 the court must determine whether the circumstances surrounding a confession give rise to a reasonable doubt as to its voluntariness, taking into account all aspects of the "confessions rule" which focuses not just on reliability but on voluntariness.
- [81] To be voluntary a confession or statement must be the product of an "operating mind" and not the product of threats or promises, oppression or trickery.
- [82] In this case the accused was not threatened. Inducements are improper only if alone or in combination with other factors they are strong enough to raise a reasonable doubt as to the voluntariness of the confession.
- [83] An important consideration in every case is whether the interrogator offered a quid pro quo. In this case the whole interrogation proceeded on the assumption the accused had committed the homicide, which is effectively conceded by the defence. The interrogation was aimed at clarifying details of the homicide which bore on the question of intent, that is, precisely how and why it occurred.
- [84] On these points, Corporal Hodgson confronted the accused with evidence which apparently contradicted the accused's version of events and asked him to react to or explain the evidence. There was no offer of a quid pro quo for providing answers the police wanted.
- [85] I find there were no material inducements which alone or with other factors raise a reasonable doubt as to the voluntariness of the statements made by the accused.
- [86] There was no trickery, such as falsely stating the evidence or the accused's legal rights.
- [87] The interrogation was conducted in an almost sympathetic rather than aggressive tone.
- [88] There is no evidence the accused was intoxicated or that he suffers from any cognitive or other disability. The video tapes and transcripts raise no doubt the accused knew what he was saying and that it could be used to his detriment, that is that his statements were the product of an operating mind.
- [89] In assessing oppression, the court must consider whether the accused was deprived of food, water, sleep, medical attention and access to counsel.
- [90] I have already found the accused was not denied access to counsel of his choice. He never disclosed he had not contacted Mr. Peck until it was reasonable to infer he had waived that right by not insisting on it and by referring to legal advice he had received.

- [91] The accused never asked for food or water, nor was any offered to him. He was fed while being transported by ferry from Surrey to Sidney. Defence counsel facetiously suggested the ferry fare might be regarded as oppressive. At one point the accused indicated he had not enjoyed breakfast provided in jail. There is no other evidence of whether he was fed while in cells between interviews.
- [92] The accused asked for and was allowed to smoke cigarettes. He said he was not normally a heavy smoker.
- [93] During all but the final interview the accused was shoeless in a pair of prison overalls because his own clothing had been seized. The accused did not complain of this nor did he express concern or embarrassment about it when he discussed how police would obtain clothes for his court appearance.
- [94] The accused had a dislocated thumb and a cut on his arm for which he was provided band aids. Neither required emergency attention as it turned out and the thumb was not treated until January 16, 2002.
- [95] The accused did not appear in pain or preoccupied with either injury. He used his injured thumb to operate a cigarette lighter. The accused stated at one point one injury was the least of his worries. The accused did not complain about lack of treatment for his injuries. Both he and Corporal Hodgson were rather offhand about them. The accused complained as much of the pin prick for the blood sample as he did of his injuries.
- [96] On several occasions during the interviews by Corporal Hodgson the accused stated he was tired and did not want to continue. There is no direct evidence as to whether he slept while in cells between 06:30 and 09:30, 16:00 and 19:25 or 19:40 and 21:00 on January 8, 2002. The accused had the opportunity to sleep for about 12 hours between the third and forth video taped interviews.
- [97] The point at which the accused was potentially most tired was during the interview between 21:04 and 21:53. In the middle of that interview he stated:
- A: Well, let's just keep it at what ... what I've told you for now. Told you, I don't want to say anything right now. I need some rest before I can do anything. I haven't had any sleep for almost two days. I don't want to be talking if I can't get my facts straight 'cause I can't even think straight right now.
- [98] A few minutes earlier, although given the opportunity by the question quoted below, the accused did not decline to continue on the basis he was too tired when he gave his explanation for forcing the door:
- Q: ... Okay, I know it's been a long day and I know you said that ah you don't want to discuss anything further, but I ... I got to tell you that the guys just finished over at the house and they're just preparing now to take PHOEBE, okay....

- [99] The context in which the accused stated he was too tired to continue was that he was dealing with a contentious matter, his explanation of how a knife was used. He then went on to discuss matters not directly related to the homicide without further complaint of fatigue. This suggests the accused was looking for a bolthole by asserting he was tired so as to avoid answering on a contentious matter, which he did.
- [100] The demeanour of the accused throughout all the video taped interviews, including the portion following this assertion of fatigue, indicates he is alert and engaged and aware that what he is saying could be detrimental to him.
- [101] I find the evidence does not raise a reasonable doubt that lack of sleep deprived the accused of an operating mind and undermined the voluntariness of the statements.
- [102] I find there was no trickery or other police conduct which was, per Oickle, "so appalling as to shock the community" and render the statements inadmissible.
- [103] It is well established that the police may try to persuade an accused to make a statement, even when the accused asserts he has been advised by counsel not to, by appealing to his conscience and sense of decency, as occurred in this case. What the police may not do is provide contradictory or erroneous legal advice undermining the advice an accused has received from counsel or use trickery or oppression to persuade an accused not to heed advice from counsel to exercise the right to remain silent. See R. v. Ekman [2000] 146 C.C.C. (3d) 346.
- [104] In my view, the techniques of interrogation and circumstances of this case are far less oppressive than those approved by the Supreme Court of Canada in Oickle.
- [105] I find the statements made by the accused to customs officers and police were not obtained in breach of his rights under the Charter and were voluntary. They are therefore admissible as evidence to go before the jury.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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