

CANADA / JUDGMENT

R. v. Nijjer

2022 BCSC 2472

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2472 R. v. Nijjer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nijjer,

2022 BCSC 2472

Date: 20221123

Docket: 33556-1

Registry: Cranbrook

Rex

v.

Varinderpal Singh Nijjer

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Before: The Honourable Madam Justice Forth

Oral Ruling on Voir Dire Number 1

Counsel for the Crown:

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C.K. Coulson

Counsel for the Accused:

I. Donaldson, K.C.

C.A. Armitage

Place and Date of Hearing:

Vancouver, B.C.

November 21-22, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 23, 2022

Introduction

- [1] Varinderpal Nijjer is charged with one count of importing cocaine into Canada and one count of possessing cocaine for the purpose of trafficking arising from a single incident on January 20, 2019, in which Mr. Nijjer is alleged to have driven across the border from Washington to British Columbia with a large amount of cocaine hidden in a Freightliner he was driving.

Admissibility of Accused's statement

- [2] The Crown applies to admit a statement made by Mr. Nijjer to Cst. Cadwallader on January 21, 2019. To do so, the Crown must prove beyond a reasonable doubt that the statement was voluntary.
- [3] The statement was video recorded and the recording was played in court through the evidence of the interviewing officer, Cst. Cadwallader. In addition, there was a transcript prepared of the interview. The entire interview was approximately 52 minutes long, and included two breaks consisting of approximately seven minutes.
- [4] Mr. Nijjer, through his defence counsel Mr. Donaldson, concedes that there is nothing in the course of the interview or the interactions with police leading up to the interview that "pass any doubt" on the voluntariness of Mr. Nijjer's statement in relation to the majority of the factors identified in *R. v. Oickle*, 2000 SCC 38, that outlines the governing test for determining the voluntariness of statements made by an accused to persons in authority. The only Oickle factor that the defence raise a concern with is that some of the statements made by Cst. Cadwallader are in fact inducements.

- [5] Mr. Donaldson argues that the Crown bears the onus of proving beyond a reasonable doubt that the statement was voluntary in light of those inducements and raises a secondary issue of whether the court should exercise its residual discretion to disallow the entirety of the statement on the basis that it is not relevant and its admission would be prejudicial. I will first address the voluntariness of Mr. Nijjer's statement.

Voluntariness

- [6] The parties do not dispute the governing legal principles with respect to the Crown's obligation to establish, beyond a reasonable doubt, that Mr. Nijjer's statement to Cst. Cadwallader on January 21, 2019, was voluntary. As Justice Iacobucci for the majority of the Supreme Court of Canada explained in *Oickle*, voluntariness is to be broadly understood and is to be assessed according to the factual context of the particular case: *Oickle* at paras. 27 and 47.
- [7] Hard and fast rules cannot account for the variety of circumstances that may vitiate the voluntariness of a confession: *Oickle* at para. 47.
- [8] The primary purpose of the common law confessions rule is to ensure the reliability of confessions. However, the rule is also rooted in the criminal justice system's concern with fairness and the overriding concern not to convict the innocent: *Oickle* at para. 36.
- [9] The rule also seeks to protect an accused's right against self-incrimination without unduly limiting society's need to investigate and solve crimes: *Oickle* at para. 33.
- [10] Circumstances that may arise through an involuntary confession include, either alone or in combination, inducements such as improper threats or promises, oppressive conditions, the lack of an operating mind on the part of the accused person, and police trickery. Alone and in combination, they may produce a confession which is false. However, these factors are not a checklist: *R. v. Tessier*, 2022 SCC 25 at para. 68. The application of the confessions rule is contextual. The degree of each factor present and the relation to the surrounding circumstances must be taken into account: *Oickle* at para. 71.
- [11] The trial judge must determine on a "modified" objective standard whether the statements are reliable and whether the conduct of the state unfairly deprived the accused of their choice to speak to a person in authority: *Tessier* at paras. 56 and 68.
- [12] The voluntariness rule reflects a range of concerns that is broader than those relating to the reliability of the statements they produce. Confessions may also be excluded to uphold standards of fairness in the criminal justice system.
- [13] I agree with counsel that the context and circumstances of Mr. Nijjer's videotaped statement to Cst. Cadwallader was, on January 21, 2019, voluntary as that rule is outlined in *Oickle*.

- [14] With respect to the issues of threats and promises, I note that moral inducements, for example, appealing to an accused's sense of well-being, to conscience and morality, religious or spiritual expectations, are not improper inducements in and of themselves. Only improper inducements are prohibited. Those are inducements that "whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne": Oickle at paras. 49 to 57.
- [15] I am not persuaded that any of the statements amount to improper inducements and reject the defence submissions that the statements may come within the category of improper inducements.
- [16] Cst. Cadwallader's statements and questions do not raise a reasonable doubt about whether Mr. Nijjer's will had been overborne.
- [17] In assessing whether an accused's will was overborne by inducement, the most important consideration is whether there was a quid pro quo offered by the interrogator, regardless of whether such an offer comes in the form of a threat or a promise. I am satisfied, on the evidence before me, that no such promises or threats were made in the eliciting of Mr. Nijjer's statement, nor does the context of the statement give rise to the concerns of oppression as conceded by the defence.
- [18] There were no conditions apparent that were "so distasteful that they overbear the suspect's will": R. v. Hosack, 2022 BCCA 226, at para. 20.
- [19] The questioning was not aggressive or overly long. Mr. Nijjer was not deprived of food or water, sleep or medical attention: Oickle at paras. 59 to 61. Mr. Nijjer was asked at the commencement of the interview if he had received food; he had. And whether he needed anything; he did not. Close to the end of the interview, he indicated he was "feeling cold" and a blanket was offered.
- [20] It was also apparent that Mr. Nijjer's statement, during the interview, that he had an operating mind, he knew what he was saying, and he knew he was saying it to a police officer, and he was aware that it could be used against him. In his statement, Mr. Nijjer confirmed he had spoken to a lawyer and understood what the lawyer said. He also repeated that he had nothing to say. Once again, the defence appropriately conceded that Mr. Nijjer had an operating mind throughout.
- [21] Finally, there is no evidence of police conduct that would "shock the community" or the fabrication of evidence: Oickle at paras. 65 to 66.
- [22] An accused has a common law right to remain silent. However, the right to silence does not establish a right not to be questioned by police, even after the right to silence is asserted: R. v. Singh, 2007 SCC 48, at para. 28; Hosack at para. 44.

- [23] Although Mr. Nijjer asserted his right to silence on a number of occasions, the actions of Cst. Cadwallader did not overbear Mr. Nijjer's right to choose whether to speak. It is clear that Mr. Nijjer continued to assert his right to silence by providing no audible response to the majority of the questions posed.
- [24] The questions of Cst. Cadwallader, either alone or in combination with the surrounding circumstances, do not raise a reasonable doubt as to the voluntariness of the statement. I find that the Crown has proved beyond a reasonable doubt that the videotaped statement of Mr. Nijjer made on January 21, 2019, was voluntary.
- [25] I now turn to address the second issue raised; whether I should exercise my residual discretion which exists, even though I found the statement is voluntary, whether the admission of the entire statement would lead to an unfair trial and, as such, the statement should be excluded.

Residual Discretion

- [26] Mr. Donaldson contends that beyond specific rules of evidence, the trial judge maintains a discretion to exclude evidence that would result in an unfair trial: *R. v. Harrer* [1995], 3 S.C.R. 562, at paras. 21 and 23. He argues that admitting the statement Mr. Nijjer made to Cst. Cadwallader would result in an unfair trial, being both irrelevant and prejudicial.
- [27] Justice La Forest, writing for the majority of the Supreme Court in *Harrer*, stated the following, and I am only going to quote specific portions of paras. 23 and 24 of that decision:

23 The law of evidence has developed many specific rules to prevent the admission of evidence that would cause a trial to be unfair, but the general principle that an accused is entitled to a fair trial cannot be entirely reduced to specific rules. In *R. v. Corbett* . . . a majority of this Court made it clear that a judge has a discretion to exclude evidence that would, if admitted, undermine a fair trial; see also *R. v. Potvin* . . . Similarly, Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* . . . conclude that "if the admission of certain evidence would adversely affect the fairness of an accused's trial, the evidence ought to be excluded" . . .

[Underlining in original.]

And I will just drop down now to para. 24, the last part of it:

24 . . . As I noted in *Thomson Newspapers*, at p. 563, judges must, as guardians of the Constitution, exercise this discretion where necessary to give effect to the Charter's guarantee of a fair trial. In a word, there is no need to resort to s. 24(2), or s. 24(1) for that matter. In such circumstances, the evidence is excluded to conform to the constitutional mandate guaranteeing a fair trial, i.e., to prevent a trial from being unfair at the outset.

- [28] I accept that I have the discretion to exclude evidence that jeopardizes a fair trial for the accused.

- [29] In *R. v. Schneider*, 2022 SCC 34, the Supreme Court of Canada confirmed that a trial judge is to exercise this discretion by balancing the probative value of the evidence against its prejudicial effect. As explained by the Court at para. 59, probative value relates to the degree of relevance to trial issues and the strength of inference that can be drawn from evidence. Prejudicial effect relates to the likelihood that a jury will misuse the evidence. However, a trial judge is also to consider whether the prejudicial effect of evidence can be attenuated by appropriate jury instructions that effectively equip juries with an understanding of how to use the evidence: *Schneider* at para. 61.
- [30] Mr. Donaldson accepts that the accused's admission in relation to the tablet is relevant, but claims that the remainder of the statement is not and thus it has very little probative value. He argues that Mr. Nijjer's refusal to answer many of Cst. Cadwallader's questions, as is his right, could be prejudicial since it could lead a jury to make an adverse inference against Mr. Nijjer. I accept that Mr. Nijjer's identification of the tablet is probative and should be put before the jury as it is relevant to the Crown's case and is not prejudicial to Mr. Nijjer. However, I agree with Mr. Donaldson that other portions of Mr. Nijjer's statement are not relevant.
- [31] Aside from the identification of the tablet, the Crown has not convinced me that the statement provides any degree of relevance to the trial issues. I further accept that there is some prejudicial effect in putting the entirety of Mr. Nijjer's statement before the jury.
- [32] As stated in *R. v. Turcotte*, 2005 SCC 50, at para. 58, there may be an "intuitive impulse to conclude that silence is incompatible with innocence" which could undermine the accused's right to silence resulting in an unfair trial. Clear instructions to a jury that silence cannot be used to support an inference of guilt can safeguard against the prejudicial effect in some cases: *Turcotte* at para. 59.
- [33] Given that the Crown submits the only section of the statement pertaining to the identification of the tablet are relevant, I find it is unnecessary to admit the entire statement. The Court of Appeal for British Columbia confirmed in *R. v. Bonisteel*, 2008 BCCA 344, at para. 45 that when a statement of an accused contains evidence that may be irrelevant or unnecessarily prejudicial to the accused, the trial judge has a duty to remove those portions, whilst also ensuring remaining portions retain their proper meaning. If it is impossible to edit the statement, it should not be admitted.
- [34] I find that the portions of the statement made by Mr. Nijjer to Cst. Cadwallader pertaining to the identification of the tablet are highly probative and not prejudicial to Mr. Nijjer and are thus admissible. However, I agree that certain sections of the statement, in particular Mr. Nijjer's repeated refusal to answer questions put to him, are not only irrelevant but could have a prejudicial effect and are therefore inadmissible.

[35] I further find that the statement may easily be edited to remove irrelevant sections without altering the remaining sections' meaning. I note that this finding does not in any way suggest any impropriety in the types of question posed by Cst. Cadwallader. He was entitled to ask questions in the manner he did with the objective of trying to get Mr. Nijjer to tell his story and what happened. To put it in Cst. Cadwallader's words, he was "trying to open conversations."

Conclusion

[36] In conclusion on the voir dire, I find that the accused's videotaped statement of January 21, 2019, is voluntary, but that the majority of it should be excluded.

[37] The portion of the statement pertaining to the identification of the tablet should be admitted, along with the introductory sections to contextualize the police interview. Portions of the statement after Mr. Nijjer identifies the tablet should be removed. I accept the suggested redactions made by the Crown as appropriate.

[38] This concludes my oral reasons on the voir dire.

"Forth J."

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