
CANADA / JUDGMENT

R. v. Roop

2007 BCSC 2002

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Roop,

2007 BCSC 2002

Date: 20071005

Docket: 62967

Registry: Kelowna

Regina

v.

Paul Donald Roop

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Before: The Honourable Mr. Justice Rogers

Oral Reasons for Ruling on Voir Dire

Re: Admissibility of Statements

October 5, 2007

Counsel for the Crown:

W. Hilderman

Counsel for the Defence:

J. Deuling

Place of Trial/Hearing:

Kelowna, B.C.

- [1] THE COURT: The issues in this voir dire concerning the admissibility of the accused's statements are whether his first statement, which was made to an undercover police officer, was made to a person in authority, and if so whether that statement was made voluntarily, and whether the three additional statements he made to police officers are inadmissible due to a taint from the first.

The Facts

- [2] The police suspected Mr. Poirier, Mr. Fell and Mr. Habib of having been involved in the murder of Mr. Kuntz in Kelowna in February of 2003. The police set up an undercover operation aimed at Mr. Poirier and Mr. Fell. The operation was of the "come join my gang" variety. A.B. acted as the primary undercover operative. He portrayed himself to Mr. Poirier and Mr. Fell as a middle to high level crime boss. A.B. successfully duped Mr. Poirier and Mr. Fell. They made statements to A.B. Those statements incriminated Mr. Poirier and Mr. Fell. Mr. Poirier and Mr. Fell also gave A.B. to understand that the accused was involved in Mr. Kuntz's murder as well.
- [3] The accused was not initially a target of the undercover operation. The police had not, therefore, exerted themselves to inculcate in the accused's feelings of loyalty, trust and dependency towards the crime boss that A.B. was playing. That changed when Mr. Poirier and Mr. Fell started talking. In January 2006, the police decided to send A.B. to Grande Cache, Alberta, to meet with the accused. A.B. was to be in his undercover character. The plan was for A.B. to say that he was running a criminal crew; that Mr. Poirier and Mr. Fell were part of that crew; that the police suspected their involvement, along with the accused, in Mr. Kuntz's murder; that this suspicion was negatively affecting A.B.'s ability to make money; and that if the accused told A.B. about his involvement in the murder, then A.B. could make use of that information to pin blame for the murder on Mr. Habib, thus lifting the cloud of suspicion from the accused. It was, according to A.B.'s evidence, to be put to the accused as a win/win proposition for him and the accused, with the loser being Mr. Habib.
- [4] On January 3, 2006, A.B. travelled with Mr. Poirier to Grande Cache. A.B. had a brief meeting with the accused. During that meeting, the accused said words to the effect that although A.B. had introduced himself as having done business with the accused in Kelowna, he did not know or recognize A.B. Further, the accused challenged A.B. He asked if he was a police officer. A.B. said, no, he was not. The two men then retired to the hotel bar where they sat and had a conversation. A.B. began his pitch to the accused.
- [5] The accused was noncommittal during this conversation. He did not admit to involvement in Kuntz's murder, but he did admit to knowing Mr. Poirier and Mr. Fell. He said words to the effect that if A.B. was the kind of criminal he made himself out to be, then he was surprised that he would associate with two individuals as dim as Messrs. Poirier and Fell. A.B. told the

accused that he knew that the police had been talking to the accused's girlfriend in Calgary, and A.B. described to the accused some details of the Kelowna homicide. The accused again said to A.B. words to the effect, "You are a cop. Only cops would know about that." The accused maintains that A.B. made no reply to that challenge. A.B. says the accused never made the second challenge.

- [6] I find that it is more likely than not that the accused did make the second challenge. It would have been consistent with the level of suspicion that the accused had maintained throughout the conversation to that point. I also find that A.B. did not respond to it, but that rather he continued to behave in a way consistent with his persona as a crime boss. The accused then made as if to leave the table. A.B. then said words to the accused to the effect that he just wanted to deal with the situation, that he wanted to nail Mr. Habib with the murder, that if the accused helped him in that effort, then the accused would not have to go to jail, and that if the accused helped him, then he would help the accused. A.B. then asked the accused to meet with him again the following day. The accused agreed to that meeting on one condition, that A.B. bring Mr. Poirier along to the meeting. I accept the accused's explanation for stipulating that condition. He wanted to know whether Mr. Poirier had already implicated him in the Kelowna murder.
- [7] In the afternoon of January 4, 2006, A.B. and Mr. Poirier went to the hotel where the accused was staying and met with him in the bar there. Mr. Poirier was still duped by A.B.'s act. He thought that A.B. was a mid-level crime boss who was interested in repositioning police interest in the Kuntz murder from Mr. Poirier and Mr. Fell, and who thought that with help from the accused in the form of additional information about the murder, A.B. might get Habib alone to take the fall for the crime. That was the scenario A.B. laid out to the accused during the meeting in the bar on January 4th. A.B. managed to make an audio recording of that meeting. Unfortunately, the recording is of marginal quality. On listening to the recording and reading a transcript of what was said, it is possible to discern that in general terms A.B. made out to the accused that he thought that Mr. Habib was or should be held responsible for the Kuntz murder, and that he would work towards organizing Mr. Habib's downfall on that score. Mr. Poirier made it clear by what he said that he had already said enough to A.B. to implicate the accused in the murder.
- [8] A.B. elicited information from the accused. He offered the accused an opportunity to come work for his criminal gang in the Calgary area. The accused's response to A.B.'s entreaties was lukewarm. He told A.B. that he was working a legitimate job now and he was earning money with a view to paying off his debts. He did not say anything positive about going to join A.B.'s putative gang. The accused did, however, tell A.B. certain things about his involvement in the murder, including about his having driven the actual killer to the victim's house and then away again, and about his having dismantled and disposed of the murder weapon, and about Mr. Habib having promised to give him \$30,000 and a new pickup truck for his part in the episode, but that Mr. Habib only gave him \$9,000 and no truck, and that Mr. Habib told him to share the \$9,000 with Messrs. Fell and Poirier.

- [9] According to A.B.'s evidence, he developed the impression that the accused was a street savvy criminal and was appropriately cautious about sharing confidences with a new acquaintance. Nevertheless, A.B. left both meetings with the accused secure in the belief that although the accused had challenged him about being a policeman, he had successfully deflected the accused's suspicions. The accused, on the other hand, testified that he believed from the start that A.B. was an undercover policeman. The accused testified that he incriminated himself during the January 4th conversation because he felt that he had made a deal with A.B. to the effect that if he gave up all he knew about the crime, then he would do less jail time than the other perpetrators. He testified that it appeared during the January 4th conversation that Mr. Poirier believed that A.B. was a crime boss and that he did not disabuse Mr. Poirier of that belief. The accused said that during that conversation he played along with A.B.'s undercover act while at the same time giving real information as his part of the bargain that he had struck with A.B. on the day before.
- [10] On January 6th, 2006, the police felt that they had enough information to arrest the accused for murder and conspiracy to commit murder. The accused was quiet and cooperative when the police arrived at his hotel room in Grande Cache. He was arrested and warned that whatever he said could be held against him, and he was told of his right to counsel. The arresting officer did not warn the accused that he should disregard any promise of favour or threat that may have been made to him by any persons in authority. The arresting officers transported the accused from Grande Cache to Kelowna during the late evening hours of January 6th. The accused was booked into cells in Kelowna. He received legal advice.
- [11] In the afternoon of January 7th, 2006, Sergeant Skrine conducted a lengthy interview of the accused. During that interview, Sergeant Skrine said words to the effect that the fellow who met with the accused and Mr. Poirier in Grande Cache a few days earlier was an undercover police officer. The accused said words to the effect that he knew that. He said that he had "pegged" the fellow for a cop the first time they spoke and that he had still thought that the fellow was a policeman when they met again the next day. Sergeant Skrine asked why the accused had opened up to A.B. and why he appeared that day to be willing to make a statement about his involvement in the murder. The accused responded that back in Grande Cache, and again that day, that is to say January 7th, with words to the effect that he was tired of the life of a criminal and that he wanted to go straight. The accused then made a fulsome statement describing his role in the Kuntz murder. That statement was thoroughly inculpatory.
- [12] The next day, the accused and the police travelled around in a car while the accused re-enacted his role in the murder. And the day after that, the accused and the police attended at the place where the accused said he disposed of the murder weapon, and he re-enacted that event as well. Those latter two statements were inculpatory as well.

Discussion

- [13] In order to be admissible as evidence against him, the accused must show that his statements were made to a person in authority, and if they were then the Crown must prove beyond a reasonable doubt that the accused made the statements voluntarily. In the present case, the Crown says that A.B. was not a person in authority vis-à-vis the accused. That is because A.B. was undercover when he heard what the accused had to say about the murder. The accused, on the other hand, maintains that he knew that A.B. was a policeman, despite A.B.'s attempt at deception, and so he knew throughout that he was speaking to a person in authority. As for voluntariness, the accused argues that A.B.'s proposal that whatever information the accused offered up about the Kuntz murder would be used against Mr. Habib alone, constituted a promise of a sort of immunity. He says that he acted on the strength of that promise and that since A.B. was in no position to make good on it, his statements should not be allowed into evidence.
- [14] The Crown argues to the contrary. According to the Crown, if the accused knew or suspected that A.B. was a policeman, then the accused had to have also known that A.B. did not have a criminal organization to protect. If he had no criminal organization to foster, then the accused would also have to have known that A.B. would have had no motivation to get Messrs. Fell and Poirier off the hook for the Kuntz murder. The Crown says that any reasonable person in that situation, knowing or suspecting that A.B. was an undercover operative, would have understood that A.B. was intent on tricking everyone involved into making statements which would lead to successful prosecutions of the perpetrators of the murder. There could not, therefore, according to the Crown, have been a promise of favour upon which the accused could reasonably have relied when he decided to make partial disclosure to A.B. during the meeting in the bar in Grande Cache on January 4, 2006.

Person in Authority

- [15] Normally, an undercover police officer cannot be a person in authority, *R. v. Grandinette*, 2005 SCC 5. That general proposition is, however, predicated upon the assumption that the police have successfully duped their target. According to the accused, the present case is the exception to the general rule, and that is because A.B. did not fool him at all. The accused says that he knew that A.B. was a policeman right from the start. According to *Grandinette*, whether a confessor's interlocutor was a person in authority is determined by a twofold test. First, the confessor must show that he subjectively believed that he was dealing with a person in authority, and second, that belief must be objectively reasonable.
- [16] In my view, the accused's position has a ring of truth to it. After all, A.B. described the accused as a street smart savvy criminal who was cautious but curious upon their first meeting, and that one of his first reactions to meeting A.B. in disguise was to challenge A.B. with being a policeman. Further, A.B. himself testified that the police force have found themselves reading about their "come join our gang" and "Mr. Big" undercover operations in the newspaper reports. It is not difficult to imagine that a streetwise criminal like the

accused would be slow to be taken in by that very same technique. Further, three days later, the accused himself said that he had "made" A.B. as an undercover operative.

- [17] I find, therefore, that the accused subjectively believed that he was speaking to an undercover police officer on January 3rd and 4th, 2006. As for an objective basis for that belief, I find that existed as well. That is because A.B. approached the accused "out of the blue" and with no introduction by mutual acquaintances. An approach like that would certainly raise the suspicions of the sort of habitual criminal that the accused was made out and made himself out to be. Also, given the accused's opinion that Mr. Poirier was one of a dumb and dumber pair (Mr. Fell being the other) his appearance at the meeting with A.B. the next day would not likely have lent, in his mind, much credibility to A.B.'s ruse. Accordingly, I find that this is one of those rare occasions where the undercover operative's effort to disguise himself failed. The accused subjectively believed that he was dealing with a police officer, and given the circumstances of their meeting, that belief was in my view reasonable.

Voluntary Statement

- [18] In order to be admissible into evidence, an accused's statement must be given voluntarily. Voluntariness means that the accused was operating with an independent mind and will. That is to say his ability to choose to give a statement or to stay silent remained intact and had not been compromised so that whatever choice he made could still legitimately be said to have been his own. The approach to this question must be broad and contextual. As Iacobucci J. wrote in *R. v. Oickle*, [2000] 2 S.C.R. 3, at paragraph 68:

While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow Ibrahim rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.

- [19] In the present case, the only vitiating inducement to which the accused points are the January 3 and 4 expressions of interest by A.B. in getting information from the accused so as to have Mr. Habib convicted of the murder, thus freeing the accused from police attention or resulting in his receiving less jail time than the other perpetrators. Given that the accused actually and reasonably believed that on January 3 and 4 he was talking to a police officer, the question then becomes whether that inducement was of such weight and import as to raise a reasonable doubt that the accused's will was overcome. In *Oickle*, Iacobucci J. said, at paragraph 57:

In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, 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...

The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise.

[20] It is not every promise or threat that will raise a reasonable doubt about voluntariness. In *R. v. Spencer*, [2007] S.C.J. No. 11, the Supreme Court of Canada dealt with the nature of the inducement necessary to exclude a statement. There, Deschamps J. wrote at paragraph 15:

Therefore, while a quid pro quo is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement.

[21] The evidence on this voir dire established that on January 3 and 4 the accused was not in detention or under arrest. He was on his own territory in the hotel where he lived. No one interfered with his right to terminate either meeting at any time. He could simply have gotten up from the table and walked away whenever he wished. The accused's mental state appeared to be completely intact throughout. It cannot, therefore, be said that the accused was at any disadvantage in terms of the personal resources that he had available to fend off A.B.'s request to share information about the murder. In the midst of various other untruths regarding A.B.'s criminal gang and its activities, A.B. did say to the accused that if the accused gave information about his involvement in the murder, then A.B., acting in his criminal persona, could fix it so that Mr. Habib would be the only person to pay and the accused would escape liability. The accused says this promise comprised an inducement to him to confess at the January 4 meeting.

[22] The accused's position raises an interesting question, and it is this: Could the accused, knowing that A.B. was lying to him about every other aspect of his presence and presentation, have genuinely believed that A.B. was making a real, i.e. not part of the cover story lie, promise to help the accused escape or reduce his liability for his role in the Kuntz murder? Is it believable that the accused would reject everything in A.B.'s story except this one thing? And that begs this question: On what basis could the accused have teased this promise of leniency or absolution from A.B.'s closely woven fabric of lies and have perceived it as the one kernel of truth in what was otherwise a pool of deception? And the answer is that there was no such basis, and that the accused could not and did not in fact believe A.B.'s promise of aid in return for cooperation was a genuine promise of assistance from the police.

[23] There are two items of evidence which in my view militate very strongly against the proposition that this promise actually motivated the accused to confess. The first item of evidence is found in the January 7, 2007 interview during this exchange between Sergeant Skrine and the accused:

Skrine: All right, so, Paul, I mean, you know, and I don't know how you feel about that. It's a sensitive area for me, because I don't like tricking people. I don't like to be tricked. But I guess you should know that this was not easy, this investigation, and we had to do a lot of things, all right, in order to secure the evidence we needed, okay? But, yes, he was a police officer.

Roop: Oh, I figured as much.

Skrine: Did you?

Roop: I asked him right to his face.

Skrine: Yeah, you -- you almost pegged him. Why did you end up talking to him? Hard.

Roop: Had enough.

Skrine: You've had enough? Okay, I hope so.

Roop: Phht.

Skrine: I hope so. You -

Roop: [said something inaudible]

Skrine: Know what? I hope so, because you know what? At the end of the day, I have sat across from guys involved, uh -- facing far worse stuff, doing far worse stuff than what you've done, uh, and that have had enough. It's time to -- to -- to turn over a new leaf, and until you put that behind you, until you take responsibility and deal with that, they realize it's you -- until you take a responsibility and deal with that, they realize it's always going to haunt them. And I hope that's what we have here, too.

Roop: Well, that's why I said come back and bring Dave the next day and talk to me.

So, according to the accused, his motivation for meeting A.B. on January 4 was to "turn over a new leaf."

[24] And the second item of evidence could more accurately be called a lack of evidence, and that is the accused's apparent complete lack of desire to rely on the deal he says he made with A.B. during his dealings with the police in Kelowna from January 6th on. The court cannot ignore the fact that from the outset the accused knew that he, as the driver of the car involved in the murder, was subject to the same penalty as the man who pulled the trigger. He knew, therefore, that his jeopardy was severe. He knew that he faced the stiffest conventional prison sentence that the court can deliver. If, as he says, he believed that A.B. had made a deal with him at the end of the meeting on January 3rd, and if, as he says, he genuinely believed that deal would preserve him from that jeopardy, why on earth did the

accused not do or say something to the police in Kelowna to ensure that he would receive the benefit of that deal in return for the incriminating evidence he was about to deliver to them? It was not, in my view, rational for the accused, being in a position where his liberty for a long time was on the line, to not have taken the opportunity to reiterate, confirm or refer to the deal that he thought would save him from the longest conventional prison sentence possible.

- [25] It was not as though he was not offered an opportunity to assert his right to leniency. As noted in the excerpted quote of the conversation between Sergeant Skrine and the accused, Sergeant Skrine specifically asked the accused why he opened up to the undercover officer despite knowing that he was a policeman. The accused did not respond, "Because he told me I would get off or get a lighter sentence" or, "He said that it would all fall on Habib and I would be free to go." Any person in the accused's position genuinely believing that he had a deal to save him from the consequences of his involvement in the murder would have done something to assert the deal he says was made several days earlier before giving the police more inculpatory statements, but the accused did nothing. In fact, when offered an opportunity to assert the protection of the deal, the accused said something entirely different motivated him to confess. And I would say as an aside that I have no doubt that at this moment in time, that is the present, the accused has convinced himself that he acted on this promise. However, the evidence of the events contemporaneous with the accused's confession do not create in my mind a reasonable doubt that his lately adopted belief was true.
- [26] In summary, then, while I find that the accused was speaking to a person in authority on January 3, 2006, I do not have a reasonable doubt that the accused knew that A.B. was lying from the first word spoken, and that the accused knew that any suggestion A.B. made about working to get him off the hook for the murder or reducing his penalty for it were simply a part and parcel of the whole fabric of A.B.'s undercover story. It follows that the promise could not have motivated the accused to confess. I therefore reject the accused's submission that he acted on that promise and that his confessions were its product. The statements from January 4, 7, 8 and 9 are therefore admissible into evidence against the accused.

Rogers J.

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