

Court of Queen's Bench of Alberta

Citation: R v AEC, 2021 ABQB 512

Date: 20210706
Docket: 161042031Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

AEC

Accused

Identification Ban - See the *Criminal Code*, section 486.4.
By Court Order, information that could identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published. This is an edited version of the decision that was delivered orally. I reserved the right to complete statutory references, citations, and quotations, and to make minor stylistic and grammatical changes.

***Voir Dire* Decision
of the
Honourable Justice J.R. Ashcroft**

[1] Mr. C. argues that his s. 10(b) *Charter* right to counsel was breached and applies for the exclusion of evidence, specifically a statement provided to the police by Mr. C. on September 7, 2016 (the Statement).

[2] Mr. C. has been charged with one count of sexually assaulting his step daughter under s. 271 of the *Code*, and one count under s. 246(b) of unlawfully administering, a stupefying or overpowering drug with the intent to enable himself to commit an indictable offence.

[3] The events leading to the criminal charges allegedly took place on or between January 1 to 10, 2016. The accused was previously separated from his wife but was alleged to have returned to the house where his wife and step daughter resided. Mr. C. is then alleged to have offered the complainant two pills when she was in her bed, and then later, in the early hours in the morning, going to her bedroom and sexually assaulting her.

[4] Detective Stabler gave evidence at the *voir dire*, both direct and in the form of the Statement with Mr. C. which was audio and video recorded. The defence has conceded that the Statement was voluntary.

[5] The defence submits that the police did not comply with their informational duty to ensure that Mr. C. understood his right to counsel, and without understanding this right Mr. C. could not be expected to assert it.

[6] The defence argues that the transcript and video reveal that English is not Mr. C.'s first language and more significantly that he did not understand that he could contact a free lawyer. The defence emphasizes that at no time during the interview was an interpreter offered or provided to the Applicant, nor did Mr. C. contact a lawyer. Further, Mr. C. never waived his right to counsel. Mr. C. never signed his name on the form waiving his right to counsel.

[7] The Crown argues that the onus is on the defence to establish a breach of the *Charter* right. Detective Stabler asked Mr. C. if he wanted a lawyer numerous times, including information about legal aid. Detective Stabler also advised that the lawyer was "free". Further, the Crown emphasizes that Mr. C. was interviewed for approximately 2 hours and it is clear from the interview that Mr. C. understood English as demonstrated by his nuanced replies to different questions and his ability to ask questions of Detective Stabler when he did not understand.

Was the Informational Component of s. 10(b) Complied With by the Police?

[8] There are both informational and implementational duties on authorities who arrest or detain a person: *R v Luong*, 2000 ABCA 301. Further, the informational component must "be comprehensive in scope and be presented by police authorities in a "timely and comprehensible" manner": *R v. Dubois*, [1990] RJQ. 681 (CA), (1990), 54 CCC (3d) 166, at 195 and 196 as cited in *R v. Bartle* [1994] 3 SCR 173 at 192 and 193.

[9] Both the Crown and the defence agree that, as set out in *R v. Vanstaceghem* (1987), 36 CCC (3d) 142 at para 20 (Ont.CA):

...

It is not sufficient for a police officer upon the arrest or detention of a person to merely recite the rights guaranteed by s. 10 of the *Charter*. As section 10(b) stipulates, the accused or detainee must be informed. This means that the accused or detainee must understand what is being said to him or her by the police officer. Otherwise, he or she is not able to make an informed choice with respect to the exercise or waiver of the guaranteed rights.

If the rights are read in English only, and the accused's or detainee's knowledge of the English language does not allow sufficient comprehension of the matter, those are "special circumstances" which alert the officer and oblige him to act reasonably in the circumstances.

[10] Detective Stabler testified that he telephoned Mr. C., advised him of the allegations and asked him to come down to the police station. Although Mr. C. initially went to the wrong building on the campus, which Detective Stabler said was common, given that the East building is larger and looks more like it would be the entrance, Mr. C. eventually made his way to the proper meeting place in the West building. Detective Stabler testified that he knew Mr. C. was from El Salvador but the detective felt, after his telephone call, that Mr. C. understood him and that the language barrier was not an issue. Detective Stabler also testified that he did not have any concerns about Mr. C.'s ability to understand as the interview progressed.

[11] In cross examination Detective Stabler indicated that he did not obtain Mr. C.'s signature on the waiver of Mr. C.'s right to counsel. Instead Detective Stabler had written "No number, Call after". Detective Stabler indicated that he did not attempt to have a Spanish interpreter present or use Language Line, a free interpretative service, as he did not feel there was a need.

[12] At the beginning of the interview, the detective appeared to read Mr. C. a standard *Charter* caution:

Detective Stabler: Okay, so charter.

I am arresting you for sexual assault and overcoming resistance. You have the right to retain and instruct a lawyer without delay. This means that before we proceed with your veg'... investigation you may call any lawyer you wish or a lawyer for-from a free legal advice service immediately. If you want to call a lawyer from a free legal advice service, we will provide you with a telephone, and you can call a toll-free number for immediate legal advice. If you wish to wou---contact any other lawyer, a telephone and telephone books will be provided. If you are charged with an offence, you may apply for legal aid for assistance. Do you understand?

Mr. C.: Yes. Yeah. Hmm-hmm Okay.

Detective Stabler: Do you want to call a lawyer or---a free lawyer or any other lawyer?

Mr. C.: No because right now I don't have the money because I start working this weekend, this week---

Detective Stabler: Okay, so-

Mr. C.: --this week, and--

Detective Stabler: Do you wanna talk-you can call free legal aid-you can call legal aid.

Mr. C.: I was, ah, using the legal aid because I once have a ---a---a criminal record.

Detective Stabler: Hmm-hmm

Mr. C.: And I don't think so, the-can using again? I don't know.

Detective Stabler: Do you want to?

Mr. C.: 'Cause I'm no I'm not working. And the guy's ah-

Detective Stabler: Yeah you can use them again.

Mr. C.: And the guys asked me if he-when I using the first time, the guy, he asked me, "If you are working show the"-the pay and stuff and, --

Detective Stabler: Hmm.

Mr. C.: ---everything, stuff like that. That's just-

Detective Stabler: Hmm.

Mr. C.: And I don't have any paper like that.

Detective Stabler: Okay, so do you want to call the legal aid? Yes or no?

Mr. C.: Well right now I can't.

Detective Stabler: Okay.

Mr. C.: Yeah.

Detective Stabler: So that's a no.

Mr. C.: Yeah, no.

Detective Stabler: Kay, could you just put your-your initials there? Can you sign your name? The-not saying anything, that's just-your answer's no, and you're signing this saying you said no. Okay? At any time you can change your mind.

Mr. C.: But, ah-okay, the other thing is, ah-

Detective Stabler: Okay, I'm gonna keep reading to you-I got some-

Mr. C.: Oh.

Detective Stabler: -more reading to you, okay?

Mr. C.: Okay.

...

[13] The comments made by Mr. C. indicate that he had previous dealings with Legal Aid and was asked in those interactions to provide some sort of pay information. Mr. C. appears to be under the impression that he would have to pay for a lawyer in order to access legal advice, relying on his previous experience with legal aid where he was asked to show some pay confirmation.

[14] Detective Stabler's response to Mr. C.'s comments, "Okay, so do you want to call the legal aid? Yes or no?" do not further Mr. C.'s understanding of his right to free legal counsel. I also note that Detective Stabler was speaking quite fast and in a directive manner.

[15] While I acknowledge Detective Stabler's evidence that he did not believe Mr. C. needed an interpreter, an assessment of whether special circumstances exists "contains an objective element which can be applied by a court viewing the circumstances after the fact, and is not

dependent only on the bona fides of the opinion formed by the officers on the spot, or the credibility of the accused which is assessed against the officer's opinion": *R v Lukavecki*, [1992] OJ no 2123 (Ont Ct Just) para 22.

[16] I find that Mr. C.'s comments give rise to circumstances that positively indicate a lack of comprehension. As such, "special circumstances" existed which required Detective Stabler to ensure that Mr. C. fully understood his rights: *Bartle* ; *R v Willier*, 2010 SCC 37.

[17] The conversation continues with Detective Stabler reading about detainees and that Mr. C. can change his mind:

....

Detective Stabler: So you said no, but ah, w'-"*Where detainee indicates a desire to contact a lawyer changes their mind*"-so you can change your mind anytime, okay? Do you understand? If you wanna call, ah legal aid---

Mr. C.: Yeah, okay.

Detective Stabler: --uhm, for advice, you can call.

Mr. C.: Okay.

Detective Stabler: So, you know, you don't have to show today that you have no money, but if you wanna call-like, I'd rather you call than--and then later after the fact you say, "Oh, I wish I would have called, " so-

Detective Stabler: If you wanna call, you can call. Uhm, just so you know, though, uhm--

You have the right to a reasonable opportunity to consult a lawyer. I'm not obliged to take a statement from you or ask you to participate in any promise a'-ah, process that might provide evidence against you until you are certain about whether you want to exercise this right.¹ Do you understand?

*So anything you say can be used as evidence. Do you understand?
Yes or no?*

Mr. C.: Yeah.

Detective Stabler: Yeah? (filling out document).

Detective Stabler: Do you wanna waive your right to contact a lawyer, would you like to call a lawyer?

Mr. C.: Well, right now, I don't have any number from lawyers in Edmonton. I don't.

Detective Stabler: Okay. (filling out document).

¹ Detective Stabler is reading from an exhibit, VD 7, which is a one page document with headings Charter, Formal Waiver, Adult Caution (before taking a statement) and Secondary Caution. Detective Stabler has, written, in his own hand, responses from Mr.C on this document, with the exception of a signature line under Adult Caution which was signed by Mr. C.

Detective Stabler: There's-there's telephone books and everything.

Mr. C.: Oh, okay.

Detective Stabler: So do you wanna call?

Mr. C.: Ah, can I do after everything that ah?

Detective Stabler: Yeah, if you-you can call a lawyer whenever you want.

Mr. C.: Okay.

Detective Stabler: So if you want-if you'd rather hear what I have to say, then-

Mr. C.: Okay.

Detective Stabler: --you can call after if you want, okay?

Mr. C.: Okay, okay.

Detective Stabler: So because you said that-

You may be charged with sexual assault (filling out document) – uhm, and overcoming resistance. And I'll explain that one to you.

Detective Stabler: (reading portion of written paper titled "Adult Caution") *Do you wish to say or write anything? You are not o'obliged to say or write anything unless you wish to do so, but whatever you say or write may be given in evidence. Do you understand?*

Mr. C.: Yeah.

Detective Stabler: Do you wanna sign to say that you understand? [receiving pen, Mr. C. writes and places pen on table]²

Detective Stabler: Okay. So-put that aside now. So if-do you have any questions for me right now? I know this is a lot.

Mr. C.: Okay, uhm, the first question is, uhm, now, ah, for now long I take arrest?

Detective Stabler: Take a risk?³

Mr. A C.: Yeah, ah arrest in the jails.

[18] Notably, when Detective Stabler asks Mr. C. if he would like to call a lawyer, Mr. C. says that he does not have any numbers for Edmonton lawyers. I agree with the defence position on this point, that this comment indicates that Mr. C. is thinking about the private legal bar, but still does not demonstrate that Mr. C. understands that he can have access to free legal advice. At this point in the conversation, Mr. C. still does not appear to understand that he can call for free legal advice.

² This is the only part of VD7 that Mr. C. signs. It is the middle of the page titled "**Adult Caution (before taking a statement)**"

³ As per the transcript, however, he is saying "arrest" with a heavy accent.

[19] I acknowledge that, as argued by the Crown, Detective Stabler makes several references to Mr. C. regarding his right to counsel. Mr. C is also told by Detective Stabler that he does not have to "show today that you have no money".

[20] I find, however, Detective Stabler refers to the right to counsel several times, including reading various excerpts from the written reference sheet (VD 7) during the interview, because he himself is not sure if Mr. C. clearly understands his right to free legal counsel. Further, given the obvious confusion near the beginning of the interview, I find that Detective Stabler was required to do more than to keep reciting the right to counsel to Mr. C. He was also required to do more than say "you don't have to show today that you have no money". Detective Stabler needed to ask questions of Mr. C. regarding his understanding of the right to free and timely counsel or use the services of Language Line or an interpreter to ensure Mr. C. understood these rights. None of these options was undertaken.

[21] Mr. C. also asks if he can call a lawyer after "everything that ah?". Detective Stabler responds that he can call a lawyer whenever he wants, however, the detective continues the discussion about calling a lawyer by concluding "—if you'd rather hear what I have to say, then—you can call after if you want, okay?" In other words, Detective Stabler has still not ensured that Mr. C. has understood that he has a right to timely and free legal assistance.

[22] I also do not accept that Detective Stabler's open ended question as to whether Mr. C. wanted to ask him anything, was sufficient to prompt Mr. C. to remedy the earlier confusion about legal aid and whether it was "free".

[23] The Crown points to Mr. C. arriving at the Westwinds campus in response to a telephone call from Detective Stabler as evidence that Mr. C. understands English. The Crown also emphasizes that Mr. C. understood English sufficiently to bring an ATM receipt from an Edmonton bank in an effort to show an alibi. Both of these examples are neutral evidence in terms of Mr. C's level of understanding of English. Mr. C. initially went to the wrong building at Westwinds campus and I note that the ATM receipt indicated a date in January that was not in issue.

[24] The Crown also argues that a consideration of the entire statement confirms that Mr. C. has not just basic English but uses the language in a nuanced, more complex manner. For example, Mr. C. effectively communicated how his ex wife directed him to go to the hospital and sign as the father for one of her children because Mr. C. did not have a work permit and felt he had to sign the birth certificate. Mr. C. then communicated how, a few years later, another man came to the door, and there was a test ordered through the Court which showed another man to be the biological father of the child. Mr. C. concludes in the interview "—he's not mine. Well I'm stupid".

[25] Another example the Crown referred to as supportive of Mr. C.'s ability to understand the English language was Mr. C.'s communication regarding his vehicle, saying initially it was broken and in the Pick'n Pull. When challenged on this point that the vehicle is not broken but rather was taken by the police because it was involved in a hit and run and did not have insurance, he was able to continue with and develop a further narrative regarding the vehicle. He explains that "Well, my friend told me...see the car in the Pick-n-Pull".

[26] The above examples do demonstrate that Mr. C. has some facility with the English language. However, the distinction which Mr. C. does not appear to understand is whether he can

access “free” legal advice. This advice, while repeated, is not clarified sufficiently in the interview despite Mr. C.’s initial confusion voiced on this point. There is a difference between being able to continue a conversation with the detective, even on nuanced points, and understanding a *Charter* right to free legal counsel. The question here is not one of linguistic ability, but one of understanding the legal right to free counsel.

[27] As set out in *R v Evans*, [1991] 1 SCR 869 at 891, recitation of the right to counsel in the face of a positive indication that the accused does not understand this right does not assist in communicating the right to counsel: “A person who does not understand his or her right cannot be expected to assert it”.

[28] There is no signature of Mr. C. with respect to the written *Charter* caution regarding Mr. C.’s right to retain and instruct a lawyer for free. However, Detective Stabler writes “Yes” to the question as to whether Mr. C. understands and “No” to the question as to whether Mr. C. wants to call a free lawyer or any other lawyer. I place no weight on these written representations by Detective Stabler as they took place right after Mr. C. had indicated confusion as to whether he could access legal aid for free, and in response to Detective Stabler’s directive, “Yes or no”.

[29] Mr. C.’s signature is underneath the written heading “Adult Caution” (on the same form as above). This “Adult Caution” indicates the charges and says “Do you wish to say or write anything? You are not obliged to say or write anything unless you wish to do so, but whatever you say or write may be given in evidence. The word “Ya” is written, in response to quote Do you understand?”, and is consistent with the other responses written in Detective Stabler’s hand. Mr. C. has then signed beside the word “Signature”.

[30] Mr. C. did not read the Caution and there was no further clear explanation given by the Detective to Mr. C. regarding his *Charter* right to free legal counsel, even though, as I have found, special circumstances existed. In other words, and as is evident from a review of the recorded Statement, Mr. C. provided his signature without fully understanding and comprehending his legal right to free counsel.

[31] With respect to the heading Formal Waiver, again written on the same form as above, the word “Ya” is beside “Do you understand?” Beside the question “Do you want to waive your right to contact a lawyer?” the words “No number” and “Call after” are written.

[32] The Crown states that the failure to obtain Mr. C.’s signature on the waiver has limited relevance in that a waiver only arises when the accused wants a lawyer, then changes his mind. In any event, I find that Mr. C. did not fully understand his right to free legal counsel and did not waive his right to free legal counsel.

[33] The Crown also relies on *R v. Magalong*, 2013 BCCA 478, 2013 CarswellBC 3446. Mr. Magalong indicated that he only responded “yes” to police questions about his right to remain silent and understanding the lawyer, “just to end it” and he did not understand that he had the right to contact another lawyer. The trial judge held that there was no breach of section 10(b) and this conclusion was upheld on appeal.

[34] The Court of Appeal in *Magalong* reviewed the relevant authorities indicating that even though a detainee has better facility in a first language other than English, this does not mean that the detainee does not understand the information provided. However, the Court also stated that the jurisprudence indicates that police are required to do more when there is “objectively, something about the circumstances that positively indicate a lack of comprehension” (at para 28).

[35] I agree that simply because Mr. C. does not speak English as a first language does not mean that he does not understand the information provided. Mr. C. does have a grasp of the English language as his ability to follow the conversation demonstrates. However, Mr. C. clearly did not understand, at the beginning of his interview, that he had a right to free legal counsel. This misunderstanding was never sufficiently clarified for him.

[36] The defence has met their onus to show that police did not ensure that Mr. C. understood his right to counsel. I find that the police have not met its informational duty to ensure Mr. C. knew that he had a right to free legal counsel.

Should the Evidence, Specifically the Statement, Be Excluded?

[37] Mr. C. argues that the appropriate and just remedy is the exclusion of the Statement given to the police by Mr. C. on September 7, 2016.

[38] In considering whether the evidence should be excluded, *R v Grant*, 2009 SCC 32 at para 71 provides that the Court must consider the following three factors:

- 1) The seriousness of the *Charter* infringement
- 2) The impact of the breach on the *Charter* protected interests of the accused;
and
- 3) Society's interest in the adjudication of the matter on its merits.

[39] Regarding the first factor, it is clear from the recording that the officer did not have an intention of breaching Mr. C.'s rights *per se*. The officer recited all the options and mentioned that there was the option of free legal advice. However, it is also clear that Mr. C was confused and preoccupied about the cost and that he did not understand that it was possible to access free legal advice with no charge, now or later. The accused did not understand his choice, not in a linguistic sense, but with respect to his legal right. Given the circumstances, the officer needed to proactively ascertain that Mr. C understood. Detective Stabler could have easily complied with his obligations under s. 10(b) by clarifying and responding to that concern so that Mr. C could meaningfully exercise his right to counsel or waive it. This is not a technical breach. I find that this factor weighs towards exclusion.

[40] The second inquiry relates to the impact of the breach on Mr. C. Considering that Mr. C did not understand that he could consult a lawyer for free, he could not meaningfully make a decision whether to consult counsel or not. Mr. C then provided a Statement without having spoken to counsel. There is no evidence in this case that Mr. C would have provided his Statement in any event (and not exercise his right to silence). This factor also militates in favour of excluding the evidence of Mr. C's Statement to the police.

[41] Finally, considering the third line of inquiry, society's interest in the adjudication on its merits is obvious in this case considering the seriousness of the charge. This factor favours admitting Mr. C's Statement.

[42] When balancing all three factors, I find that the Statement should be excluded. This evidence obtained following the breach is inadmissible as it would bring the administration of justice into disrepute.

Heard on the 17th day of June, 2021.

Oral decision rendered on the 5th of July, 2021.

Dated at the City of Calgary, Alberta this 6th day of July, 2021.

J.R. Ashcroft
J.C.Q.B.A.

Appearances:

R. Jenkins
for the Crown

M. Walton and K. Przepiorka
for the Accused