Case Name:

R. v. M.M.

Between
Her Majesty the Queen, and
M.M. [Hereafter referred to as M.M.(1)]

[2002] O.J. No. 3596

55 W.C.B. (2d) 206

Court File No. Goderich YO 1082

Ontario Court of Justice

Brophy J.

Heard: February 25 and August 23, 2002.
Judgment: September 3, 2002.

(30 paras.)

Criminal law -- Evidence and witnesses -- Confessions and voluntary statements -- Admissibility, where accused's rights violated -- Young offenders -- Evidence and proof -- Admissibility of evidence obtained contrary to Young Offenders Act -- Civil rights -- Right to counsel -- Canadian Charter of Rights and Freedoms -- Denial of rights -- Remedies, exclusion of evidence.

This was a Charter application by the accused, M, for exclusion of evidence. M was charged with animal cruelty offences. She had been questioned after a racehorse next to her school was brutally attacked. M claimed that she knew who committed the offence, and had watched, but that she had not participated. M was 14 at the time of the offence, which occurred in May 2000. There were four statements by M which were to be considered. The third and fourth instances of police questioning were the major issues. M was removed to a station and asked to account for the fact that one of the persons whom she had earlier claimed committed the crime had an alibi. M made further inculpatory statements at that time, but was not advised of her right to counsel, or to have her parent present, until after she had made the statement. Counsel for M argued that this statement was obtained by the police in contravention of the Young Offenders Act. M also claimed that this statement was obtained without properly advising her of her right to counsel pursuant to s. 10(b) of the Canadian Charter of Rights and Freedoms.

HELD: Application allowed. The inculpatory statements made by M were not admissible, because the police officers had not properly advised her of her rights to counsel. It was clear that M was detained at the time of the third questioning, and that her statements at that time were not admissible. M believed that she could not leave the station at the time. The fourth statement was not admissible, because of its temporal and causal connection to the third. These inculpatory statements were therefore inadmissible.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, s. 10(b).

Criminal Code, ss. 446(1)(a).

Young Offenders Act, ss. 56.

Counsel:

R. Morris, for the Crown.
D. Reid, for the defendant(s).

SECTION 10(b) CHARTER RULING

1 **BROPHY J.**:-- The defence has a brought this Charter Application arguing that the rights to counsel of the young person M.M.(1) have been violated and that as a result an inculpatory statement made by her should not be admitted in evidence.

2 The procedural history is as follows. M.M.(1) is charged with the offence of cruelty to animals contrary to section 446(1)(a) of the Criminal Code. The trial began on February 25th, 2002. Defence counsel filed this Charter Application before the trial commenced and notwithstanding that the defence has the burden of calling evidence in support of a Charter Application, it was decided, on consent, that the Application would be heard during the course of the trial evidence. As a result a voir dire concerning the Charter application was entered into at the appropriate time during the Crown case.

3 It should be noted that the trial began on February 25th, 2002, and was put over to March 5th, 2002 for conclusion. However the accused failed to appear on March 5th and after several attempts to have her brought back before the court the matter was finally rescheduled for August 23rd, 2002.

4 M.M.(1) is a young person. Her date of birth is June 19th, 1986. The police officers dealing with her knew her to be a young person. At the time of the alleged offences, on or about the 23rd or 24th of April 2000, she was 14. At the time of the complained about inculpatory statement she was 15.

5 The issue is whether the inculpatory statement of May 6th, 2001 was obtained without M.M.(1) having been properly informed of her right to counsel. If her rights to counsel were violated was that violation corrected by an offer of those rights midway through the interview process. Lastly, if there was a breach of her right to counsel, should the statement obtained following that breach be excluded from the evidence.

6 It should be noted that the defence has maintained that there are also issues associated with breaches of section 56 of the Young Offenders Act and also a lack of voluntariness in the giving of the impugned statement. However, in argument defence counsel indicated that the breach under section 56 is in fact the concomitant breach of the Charter Rights under section 10(b). Further, the defence does not strongly press the voluntariness argument.

7 The facts are that:

- Sometime in the night of April 23rd and 24th, 2000, a young racehorse named Jet Set Nana was brutally attacked in its stable at the Goderich Race Track.
- The horse was violated by having a broom handle inserted into its vagina.

- The horse suffered injuries as a result, including some rupturing and bleeding associated with its reproductive organs.
- The horse was withdrawn from racing, placed out to pasture so that it could heal, but unfortunately injured one of its legs while running in the pasture and had to be put down.
- The police conducted an investigation that centred on persons who attended Goderich District Collegiate Institute.
- OPP Constable Christine Martin was the investigating officer.
- Constable Martin interviewed the accused at her home on January 24, 2001 after cautioning her as a young offender and providing her with her rights to counsel. The accused gave an exculpatory statement.
- OPP Constable Gregory Moore interviewed the accused on April 7, 2001, at the police station. The accused was asked to go to the police station in Goderich by Constable Moore after he met her and her boyfriend near Tim Hortons. This statement was taken in the form of a witness statement and no rights to counsel or cautions were given. In this statement the accused said that she was near by when the attack on Jet Set Nana by two of her friends had taken place, but that she had not participated.
- Constable Moore interviewed the accused again on May 6, 2001, which interview resulted in the contested statement. The May 6th interview took place in the following manner.
- At 9:30 a.m. Constable Moore attended the residence of M.M. [hereafter referred to as M.M.(2)], the mother of the accused. He said that he wanted to talk to the accused about her statement from April 7 and that he wanted to do it before he went off shift in the evening. He asked Ms. M.M.(2) to get her daughter M.M.(1) to come home and to bring her to the police station to be interviewed.
- At 2:40 p.m. the mother of the accused produced her daughter after arranging for M.M.(1) to come home from where she had been staying in the country visiting friends.
- The first part of the meeting took place in the presence of M.M.(2). This lasted for approximately 30 minutes. At that point M.M.(2) agreed to step outside the interview room at the request of the accused. This took place at approximately 3:10 p.m. The request followed a suggestion by Constable Moore that M.M.(1) might be more comfortable talking about the race track incident in the absence of her mother.
- The interview continued until 4:22 p.m. During that time period the accused made an oral inculpatory statement. After that statement Constable Moore provided M.M.(1) with her young offender cautions and rights to counsel.
- The interview continued until 5:37 p.m. during which time the written inculpatory statement was taken.

8 Following the taking of the last statement the accused was arrested and charged with the offence before the court.

9 There are in effect four statements, which need to be considered. First, there is the January 24th, 2001 written statement to Constable Martin. Second is the April 7th, 2001 written statement to Constable Moore? Third is the May 6th, 2001 verbal statement given to Constable Moore between 2:40 p.m. to 4:22 p.m. Fourth and last is the May 6th, 2001 written statement taken from 4:22 p.m. to 5:37 p.m. by Constable Moore?

10 The defence concedes that the 1st statement, which was exculpatory, was taken without violating any of the rights of the accused.

11 The defence argues that the 2nd statement was taken in violation of the rights of the accused. It is argued that M.M.(1) was detained by being requested to attend at the police station. While at the police station an interview took place in which the accused gave an exculpatory statement, but within which she now put herself at the scene of the crime as an observer only. She placed the blame on others. In my view, the accused was not detained when she made this second statement. She was invited to attend at the police station and she did so on her own. There is no evidence of

compulsion of either a physical or psychological nature requiring her to attend or keeping her there. During the interview, the questions asked were for the most part open ended and of a general nature concerning the events in question.

12 The defence argues more forcefully that the 3rd and 4th statements were taken in violation of M.M.(1) constitutional rights in that she was clearly detained and that she did not have her rights provided to her as mandated in the Charter and in the Young Offenders Act. The defence says that M.M.(1) was directed to attend at the police station and that her mother was enlisted to ensure that this was accomplished. She was told to come back into town because her mother was led to believe that it was urgent that she be brought into the police station. The questions asked by Constable Moore were pointed and forceful. The accused was told that the person whom she had implicated and who had an alibi was available to come in and have a face to face meeting. M.M.(1) was challenged to tell the truth and come clean, and she was told that she would feel better if she did.

13 The question of whether the accused was detained on May 6th, 2001, is the key issue in this case. The crown argues that Constable Moore did not have to read any of the rights or cautions or use the Young Offender Act form until he had reasonable and probable grounds to believe that M.M.(1) had been involved in the commission of the offence. The crown advances that Constable Moore did not have that state of grace until M.M.(1) confessed to him and then and only then was he required to read to her the various cautions and Charter rights because it was not until then that M.M.(1) was detained.

14 Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes the choice to do otherwise does not exist. See R. v. Therens (1985), 18 C.C.C. (3d) 481 (S.C.C.). In determining whether a person who subsequently is an accused was detained at the time of questioning at a police station by the police, a consideration of the factors, which are not exhaustive and do not all have to be present, outlined in R. v. Moran (1987), 36 C.C.C. (3d) 225 (O.C.A.) is useful. They include the following. What was the language used by a police officer in requesting a person attend at the police station and whether the person was given a choice as to where the interview would take place. Was the person was escorted to the police station or did they came on their own? Did the person leave after the interview or was an arrest made? At what stage was the investigation? Was it still a general investigation or had the police determined that an offence had occurred and the accused was the perpetrator or was involved in its commission and the questioning was conducted for the purpose of obtaining an incriminating statement? Did the police have reasonable and probable grounds to believe that the accused had committed the offence? What were the questions like - were they general in nature or was the person confronted with evidence pointing towards his or her guilt? Did the person have reasonable grounds to believe subjectively that he or she was detained? Did the personal characteristics of the person, such as low intelligence, emotional disturbance, youth or lack of sophistication impact upon the person's subjective belief that he or she was detained?

15 In this case, Constable Moore had already concluded that M.M.(1) was a suspect in the offence he was investigating. Indeed, Constable Martin, the nominal investigating officer, was already concerned about the involvement of the accused when she conducted her interview on January 24th, 2001, to the extent that she cautioned M.M.(1) and provided her with her rights to counsel. Unfortunately, Constable Moore did not keep in touch with Constable Martin as to the status of her investigation. Notwithstanding that failure to communicate, it is interesting to note that both police officers were suspicious of the involvement of M.M.(1) in the incident.

16 On May 6th, 2001, Constable Moore insisted that M.M.(1) meet with him to answer questions about the offence. Ostensibly he wanted her to clear up confusions in her statements. What he really wanted to do was to confront her with the alibi of the person that the accused had said had committed the crime.

17 In this instance, whether Constable Moore had reasonable and probable grounds to make an arrest is not the starting point for determining whether this accused was entitled to be informed of her rights to counsel. Her mother at the strong invitation of Constable Moore had brought her to the interview. She was confronted by a police officer who

told her that her earlier statement was wrong and it was now time to tell the truth. That police officer already thought of her as a suspect. His intention in his questioning was to obtain an incriminating statement. Constable Moore asked M.M.(1) if she would prefer that her mother leave the interview room. M.M.(1) agreed. Most telling, he asked her questions for approximately 1 hour and 40 minutes before she gave an incriminating statement. Only after that incriminating statement did he provide her with her rights to counsel.

18 M.M.(1) believed she was detained. Given her young age and the way in which she was brought into the police station and the manner of the questioning, in my view it was reasonable for her to think that she had no choice except to answer the questions that were being asked and that she could not leave. The language used by Constable Moore was aggressive and he admits that he might have even told the accused to stop bull shitting him, or words to a similar effect.

19 In sum, the accused reasonably believed that she could not leave the police station on May 6th, 2001, and that she had to answer the questions put to her. Constable Moore thought of her as a suspect and he was seeking incriminating evidence from her. In my view M.M.(1) was detained when both the 3rd and 4th statements were taken.

20 The evidence is clear that the accused did not receive her rights to counsel for the 3rd statement. But what about the 4th statement? She did receive her rights to counsel before it was taken. Did the breach of Charter rights associated with the 3rd statement contaminate the 4th statement?

21 The leading case on this question is the decision of the Supreme Court of Canada in R. v. I.(R.) (1993), 86 C.C.C. (3d) 289 (S.C.C.) at 306:

> The final basis for exclusion of the second statement is breach of s. 10(b) of the Charter. If a statement is followed by a further statement, which in and of itself involves no Charter breach, its admissibility will be resolved under s. 24(2) of the Charter. This provides that evidence "obtained in a manner that infringed or denied any rights or freedoms guaranteed" by the Charter is inadmissible if its admission would bring the administration of justice into disrepute. This language has been interpreted to apply irrespective of any causal relationship between the breach and the obtaining of the evidence provided that there is sufficient temporal relationship between the evidence and the breach.

22 The Supreme Court has rejected a strict causal connection and in most cases it will be sufficient if the violation preceded the obtaining of the evidence. See R. v. Strachan (1998), 46 C.C.C. (3d) 479 (S.C.C.).

23 In R. v. Goldhart (1996), 107 C.C.C. (3d) 481 (S.C.C.) at 495, the court commented on circumstances in which the breach and the statement were so remote as not to trigger s. 24(2):

> Accordingly, while a temporal link will often suffice, it is not always determinative. It will not be determinative if the connection between the securing of the evidence and the breach is remote. I take remote to mean that the connection is tenuous. The concept of remoteness relates not only to the temporal connection but to the causal connection as well. It follows that the mere presence of a temporal link is not necessarily sufficient. In obedience to the instruction that the whole relationship between the breach and the evidence be examined, it is appropriate for the court to consider the strength of the causal relationship. If both the temporal connection and the causal connection are tenuous, the court may well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the Charter. On the other hand, the temporal connection may be so strong that the Charter breach is an integral part of a single transaction. In that case, a causal connection that is weak or even absent will be of no importance. Once the principles of law are defined, the strength of the connection between the evidence obtained and the Charter breach is a question of fact.

24 In this case there is a strong temporal connection. It is useful to note that in R. v. I.(R.), supra, Sopinka J. found

the necessary nexus although the second statement was taken the next day and after the young person had consulted with counsel. Here, one statement followed the other without any intervening break.

25 Moreover, there is also a causal connection. The 4th statement was in response to Constable Moore asking that the same information be provided that had just been disclosed in the 3rd statement and which was obtained in breach of the Charter rights of the accused.

26 In my opinion the breach of the Charter rights of M.M.(1) with respect to the 3rd statement extends to the 4th statement. This conclusion is drawn from the close temporal proximity of the two statements. Further, the statements are effectively continuous. After confessing orally to the police officer, it is unlikely that any accused, let alone a 15-year-old, is then going to refuse to say anything further. Nor is that accused likely to recant the statement already given. This would be particularly so when one follows the other so closely. The benefits that would normally accrue to the accused in being provided with the information about the right to seek legal advice would be illusory in these circumstances. In the case at bar, the nexus between the 3rd and 4th statements is so immediate that the breaches relating to the 3rd statement necessarily impact upon the 4th.

27 Should the 3rd and 4th statements be excluded? In R. v. Stillman, (1997) 113 C.C.C. (3d) 321 at p. 360, Cory J. stated that admission of conscriptive evidence would not affect the fairness of the trial where it would have been discovered without the unlawful conscription of the accused. He described the two bases for demonstrating that the evidence would have been discovered:

> The admission of self-incriminating evidence in the form of statements or bodily substances conscripted from the accused in violation of the Charter and evidence derived from unlawfully conscripted statements will, as a general rule, tend to render the trial unfair. Nevertheless, in recent cases it has been held that the admission of conscriptive evidence will not render the trial unfair where the impugned evidence would have been discovered in the absence of the unlawful conscription of the accused. There are two principal bases upon which it could be demonstrated that the evidence would have been discovered. The first is where an independent source of the evidence exists. The second is where the discovery of the evidence was inevitable.

28 In this case there is no suggestion that there is an independent source for the evidence that is contained in the 3rd and 4th statements. As for inevitable discovery, the burden is on the crown to prove that the accused would not have acted differently. See R. v. Bartle (1994), 92 C.C.C. (3d) 289 (S.C.C.). The court will not speculate as to what advice the accused might have been given had her rights not been violated.

29 In Stillman at p. 365, Cory J. held that generally if admission of the evidence would affect the fairness of the trial it would be excluded without considering the other two sets of factors derived from R. v. Collins (1987) 33 C.C.C. (3d) 1. He summarized his conclusion concerning the admission of conscriptive evidence as follows:

> If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission would render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.

30 I see no reason why the general rule would not apply here. Accordingly, since the admission of the 3rd and 4th statements would affect the fairness of the trial they are excluded.

BROPHY J.

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