Indexed as:
R. v. C[redacted]

Between
Her Majesty the Queen, and
Jason C[redacted]

[2001] O.J. No. 1455

[2001] O.T.C. 277

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Court File No. 9498/00

Ontario Superior Court of Justice

Howden J.

Heard: February 27, 2001.
Judgment: March 30, 2001.

(25 paras.)

Civil rights -- Protection against self-incrimination -- Right to remain silent -- Self-incriminating statements -- Canadian Charter of Rights and Freedoms -- Denial of rights -- Remedies, exclusion of evidence.

Application by the accused C[redacted] to exclude statements made to a police officer during a casual conversation. C[redacted] was arrested for the robbery of a restaurant. At the time of his arrest, he stated that he would say nothing about his case until the trial. Three months later, C[redacted] and another prisoner were transported to court by two police officers to attend a preliminary hearing. One of the officers talked to C[redacted] during the trip. After various topics were discussed the officer raised the

subject of C[redacted]s criminal charges. He did not warn C[redacted] that his words would be recorded. C[redacted] made certain admissions that the officer recorded after the drive was finished. There was no other evidence to link C[redacted] the robbery.

HELD: Application allowed. The statements were excluded. C[redacted]'s right to make an informed and effective choice, whether or not to speak, was breached. The officer used the trick of a friendly conversation to collect evidence and to elicit potentially incriminating statements. The admission of these statements would bring the administration of justice into disrepute.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 10(b), 24(2).

Counsel:

J. Kim, for the Crown.
A. Page, for the accused.

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1 HOWDEN J.:-- This ruling deals with the right to silence of an accused person detained in custody pending trial and whether it was subverted during a casual conversation with a police officer months after his arrest.

2 On February 7, 2000, officers of the Durham Regional Police Service arrested Jason C[redacted] in Peterborough, Ontario. His arrest arose from a robbery at a Swiss Chalet restaurant in Ajax, Ontario in the early morning hours of August 22, 1999. Two participants were apprehended that night near the scene. The victims had reported that there were three persons involved.

3 The charges against Jason C[redacted] include robbery, confinement, car theft, and mischief to property, all arising from the same chain of events. The two persons arrested near the scene have been convicted and are serving their sentences. In this trial, the chief issue before the jury is whether there is evidence sufficient to prove beyond a reasonable doubt that Mr. C[redacted] was the third participant, a party to the August 1999 robbery and related charges. Counsel agreed to a blended voir dire to address both voluntariness and Charter issues arising out of statements attributed to the accused. The evidence and argument focused and identified the central issue as the conduct of the officer in eliciting a statement from the accused and whether his section 7 Charter right to silence was breached.

4 The right to silence has been interpreted by the Supreme Court of Canada in R. v. Hebert (1990), 57 C.C.C. (3d) 1 as the right of a detained suspect to make a free and meaningful choice whether to speak to the authorities about his or her case. This right, as so interpreted, is one of the

principles of fundamental justice within the Charter. Section 7 of the Charter reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

5 There is no issue that on arrest, as required by subsections 10(a) and (b) of the Charter, he was advised promptly of the reason for his arrest and of his right to obtain legal assistance. On being asked by the arresting officer, Staff Sgt. Christopher Ostler, whether he wished to say anything, Jason C[redacted] clearly took the position that he would not talk about the case until trial. Staff Sgt. Ostler stated that on February 7, 2000, C[redacted] answered Ostler's invitation to speak with, "you'll hear about my alibi at trial, that's all I've got to say". There is no evidence that Mr. C[redacted] ever resiled from that position throughout the ensuing months of his pretrial detention, at least until the month of November 2000.

6 The evidence before me is that on the morning of November 14, 2000, Jason C[redacted] was driven to Whitby to appear in Court. As commonly occurs outside Toronto, he was housed a considerable distance from the Court where he had to appear from time to time. Personnel of the arresting police service are used to transport prisoners in Mr. C[redacted]'s position between the custodial institution and the Court having jurisdiction.

7 On Tuesday, November 14, 2000, Constable David Loughlin and Constable Alexander Mendes were assigned to transport two prisoners to Court in Whitby. One was Jason C[redacted]. They had not met before. The trip took approximately 50 minutes. Carey was to attend the ongoing preliminary hearing regarding charges against himself and the other two accused. Mendes was driving. He could hear only scraps of conversation due to the barrier-effect of the plastic divider between the front and rear of the cruiser being solidly lodged between him and C[redacted]. Mendes was also listening at times to music on the car radio which was on quietly.

8 Constable Loughlin carried on a conversation with Carey throughout the trip, the other prisoner not being communicative. Both prisoners were handcuffed. Constable Loughlin made no notes at the time, and both officers did not put down what they remembered of it until about 9:45 a.m. They could only estimate that this was some fifteen to forty five minutes after the particular statement attributed to the accused and proffered as evidence by the Crown was made. Neither officer could say any more than that the statement in question was uttered sometime after 9:00 a.m. and before arrival at Whitby at 9:30 a.m. Their notes contain virtually no detail of the forty five minute conversation other than subjects discussed and two statements of the accused regarding the robbery.

9 Constable Loughlin described what was a pleasant, friendly conversation over most of the fifty minute trip covering several subjects. In-chief, he gave the impression that the conversation unfolded spontaneously. Under cross-examination, Constable Loughlin agreed that C[redacted] became "very at ease" with him as they talked. Loughlin agreed that he established a kind of cordial relationship with C[redacted] by talking about subjects of mutual interest. C[redacted] is a young man, then

twenty two years of age, and Loughlin engaged him first on the subject of contemporary music, a topic which is of powerful interest to most youth in their teens and early twenties. Constable Loughlin and Jason C[redacted]oved on to other subjects including radio stations and Loughlin's pop magazine which was lying in the car. By the time they had discussed the various subjects mentioned, Mr. C[redacted]was described by Constable Loughlin as friendly and relaxed; he appeared to enjoy what was apparently a tranquil time and a cordial conversation with a police officer before a Court hearing. On cross-examination, Constable Loughlin stated that when he raised the subject of C[redacted]'s criminal charges, he did nothing to indicate to C[redacted] or to remind him that his words were about to be recorded. In fact, Loughlin agreed that C[redacted] would have no reason to suspect that he was about to give a statement to the authorities for use against him.

> Q. While you were driving in the car with Mr. C[redacted], did you give any indication during the whole time you were in his presence that you were taking notes or you were going to be recording what he was saying?
> A. No I did not.
> Q. So he would have no reason then to suspect that what effectively he was doing when he was speaking to you is giving a statement to the authorities?
> A. That is correct, and up until that utterance I had not planned on treating it as a statement, it was conversation.
> Q. And I'm going to suggest to you, as soon as he made the statement which you're deeming as being an admission, as soon as he said that you knew right away that you were planning on recording that and reporting it to the authorities?
> A. That would be fair, yes.

10 The utterance of which Constable Loughlin is speaking follows - it is not verbatim; after first saying that this was a word for word record, Loughlin admitted that his notes were not verbatim. He and Mendes noted their memories of it all as best they could later, though Loughlin said it was close to verbatim. He then said that there was no mistaking what C[redacted] meant. Constable Loughlin stated in-chief:

> Q. And did you have occasion to ask him about his charges or his case?
> A. Yes I did.
> Q. What was his response?
> A. I asked Mr. C[redacted] if he was co-accused with Mr. Soto, as they were both charged with robbery, and he replied "No".
> Q. Did he indicate to you what his charges involved?
> A. I asked him about his charges and he said that he had been charged with robbing a Swiss Chalet.
> Q. Did he indicate to you whether or not he was involved with other people in respect of that incident?
> A. He further advised that there were two co-accused, and that both co-accused had already pled guilty, one to two years less, which I took to mean two years less a

day, and one to two and a half years.

Q. And did he give you any information about when he was arrested in relation to the alleged incident?

A. He mentioned that he had been wanted for five months. I'm assuming the incident was quite prior to this.

Q. Okay.

A. There was never conversation about when it actually took place.

Q. Okay. And did he give you any other information about evidentiary matters in relation to his case?

A. There were several things during the conversation we talked about. He commented about - I believe I asked him what he would be looking at, and he thought three to four years.

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THE WITNESS: I asked if he thought he could beat it, and his reply was "maybe" ... And he told me at that point the trial was continuing because of a video statement that a co-accused had given, and that it appeared on the video statement that the co-accused had been forced to give the statement. He made a comment about having his head down during the video statement.

Q. Okay. Did he make any comments about the person in that video statement and what he had said there?

A. He did. I asked, I made a comment, it wasn't so much a question. I commented about it being nice that his friend gave up a statement on him, and he replied, "Oh, I don't care, but he says I did more than I did, and he did less than he did".

Q. Now this comment, would this be verbatim?

A. To the best of my recollection it was. Up until that point it was general, it was very idle, it was general conversation, but at that point to me it was an admission and it was something that stuck in my mind.

11 Constable Loughlin maintained that he was doing nothing more throughout the trip than making conversation to pass the time. Yet it was apparent to me from the way he orchestrated the conversation, his decision not to make notes in front of Mr. C[redacted], his failure to try and have C[redacted] clarify what he meant in saying "he says I did more than I did", and his raising of the charges only after he had achieved a certain degree of conviviality in the conversation, that he was hoping to catch any fruit from the conversational tree that might fall his way and to report it to the investigators. I do not accept Constable Loughlin's evidence that there was no design to what he was doing. He struck me as an intelligent, articulate person who quite consciously developed a rapport first before he questioned C[redacted] about his charges.

12 Counsel for Mr. C[redacted] submitted that this case represented a grey area in the law regarding a detainee's right to silence. Unlike most other cases, the statement occurred months after the initial interrogation, exercise by the accused of his right to counsel and his choice not to speak about the charges facing him. She submitted that because of the conduct of Constable Loughlin, C[redacted]s choice to speak about the case was neither an informed nor a meaningful one. Ms. Page argued that the officer established a friendly relationship involving a degree of trust and an 'off-the-record' level of cordial conversation with a man in institutional custody for months, before sliding into the facts of C[redacted]s case. A false sense of security was first built by the officer which induced C[redacted] to speak just as casually about his case. In so doing, she submitted that Mr. C[redacted] spoke about the robbery because of this ploy and the elicitation of the officer; he spoke without any sense that his statements were more than idle conversation passing the time, and due to this subterfuge, he made no informed or meaningful choice and his right to silence was breached.

13 Mr. Kim submitted on the Crown's behalf that the accused had failed to meet the onus upon him of establishing a breach of his right to silence and therefore no infringement of section 7 had been proven. Mr. Carey's preliminary hearing was to continue on November 14, 2000 on the same charges for which he had been arrested. His jeopardy had not changed, and thus no new trigger to his section 10(b) right had occurred. Mr. Kim further submitted that Hebert allows police to question detained suspects after exercise of their right to counsel, in the absence of their defence counsel. The position of the Crown was that Mr. C[redacted] had simply chosen to engage in conversation, unlike his fellow prisoner, and chose not to remain silent in the process.

14 In this case, following the principles enunciated in Regina v. Hebert and Regina v. Broyles (1992), 68 C.C.C. (3d) 308 (S.C.C.), the issue is whether the accused's right to silence was subverted by the conduct of the officer in these circumstances. The majority judgment in Hebert explained (at page 38):

> The scope of the right to silence must be defined broadly enough to preserve for the detained person the right to choose whether to speak to the authorities or to remain silent, notwithstanding the fact that he or she is in the superior power of the state. On this view, the scope of the right must extend to exclude tricks which would effectively deprive the suspect of this choice.

15 The Supreme Court looked at the right to silence and how it is to work in an inter-related manner together with other Charter rights including the right to counsel, and the privilege against self-incrimination at trial (Hebert, pp. 33-36). The guarantee of the right to counsel under section 10(b) of the Charter leads to the conclusion that, though state officials may use legitimate means to persuade a detainee to make a statement, there is an obligation fundamental to our system of justice under section 7 to allow the detainee to make an informed choice. The privilege against self-incrimination at trial underlying sections 11(c) and 13 of the Charter supplies the need for the content of the right to choose to speak before trial to be as clear and effective as the choice to testify or not at trial. In other words, the right to choose to remain silent or not must be an effective,

informed and meaningful one.

16 The Hebert analysis has provoked comment of varying kinds over the years. The allowance of continued police questioning in the absence of counsel after the accused has received legal advice, has been described by one commentator as abandoning "the actuality of the constitutional right to silence to the intestinal fortitude of the accused" (A. Gold, Continued Police Questioning, ADGM 2000-1520). Its allowance of some police stratagems and not others has left some degree of uncertainty no doubt for both state authorities and defence lawyers. The Law of Evidence in Canada, Sopinka, Lederman and Bryant, (2nd ed.) at page 357 concludes:

> The question arises as to what strategies or tricks used by authorities will render a confession inadmissible. Some police stratagems or trickery may not deprive a detainee of making an effective choice, for example, a trick which allows police or their agents to conduct passive surveillance while he or she is in custody. But if the agent of the state elicits information from an accused in custody, then the right to remain silent is contravened.

17 Further, at pages 357-8:

> It is difficult, however, to predict which tricks or stratagems will contravene the reformulated voluntariness rule. The English case of R. v. Payne illustrates where a trick was used by the authorities to unfairly conscript the accused to provide self incriminatory evidence. The defendant, who was charged with drunk driving, was induced to undergo a medical examination to determine if he was ill, on the understanding that the doctor would not test his fitness to drive. The doctor gave evidence that the accused was unfit to drive based on his examination of the accused. The court of criminal appeal quashed the conviction on the grounds that the evidence had been unfairly obtained by a trick. In the pre-charter case of R. v. Clott (No. 1), the police obtained a confession by posing as a psychologist and priest. Landry, J. signaled the need for courts to develop admissibility rules in order to protect the integrity of the judicial system. Canadian courts will identify, on a case by case basis, those tricks which unacceptably contravene Charter values or violate the underlying principles of the administration of justice. (emphasis added)

18 Unlike the other cases cited to me, the case before me involves neither a statement to an undercover officer nor an accused being approached very shortly after arrest and shortly after receipt of legal advice regarding the right to silence. As well, in the case before me, Mr. C[redacted]was being transported as required by the Court in order to continue a preliminary hearing. He was not in an interview setting but on his way as part of a process of appearing before an impartial Court of justice.

19 In this case it is an important fact that the accused had been in custody for many months after

his arrest. He had made clear his position shortly after his arrest that he intended to say nothing about his case until the trial. The officers transporting him nine months later were not aware of this and had not inquired as to whether he had asserted his right not to make a statement However, after R. v. Liew (1999), 137 C.C.C. (3d) 353 (S.C.C.), the law imposes no duty on an accused to assert the right to silence as a condition precedent to its activation. Nothing was said to Mr. C[redacted] when the conversation turned from one subject to another that might have indicated that it was turning into a process of evidence-collection. In this situation, Sopinka J. pointed out in Hebert at pages 14-15 (on a point not disagreed with in the majority judgment written by McLachlan J. as she then was), one cannot subtract the fact of custody in this situation. Citing a United States Supreme Court authority approvingly, Sopinka J. adopted the following words:

> The mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover government agents.

20 The officer in this case was not undercover. Neither was the officer in R. v. Ford (1995), 25 C.R.R. (2d) 304 (Ont. C.A.) who, in answer to an accused's request to speak off the record, told him to go ahead; it was held that the statement was induced by the "implicit misrepresentation" by the officer and was excluded as a breach of his right to silence. In using the guise of a friendly authority figure who understood C[redacted]s music and established a light cordial relationship prior to questioning him about his case, I find that the officer lulled C[redacted] into a false sense of security which induced a casual remark indicating or implying presence at the scene of the crime. The statement was never sought to be clarified, lest C[redacted] realize the conversation had become an interrogation. In fact, another statement made later by C[redacted] carried a conflicting implication that C[redacted] had given one of the others the rented car a day before the robbery and therefore had played no part in it. That excerpt from the officer's evidence reads:

> Q. Did Mr. C[redacted] discuss with you any other aspects about the charges?
> A. There was conversation about how he had rented a car with another guy for two weeks. He said that he had split the cost, and that he gave the car to the other guy for his turn, and that's when the robbery happened.
> Q. O.K.
> A. But since the car was in his name, that the cops thought he did it. And he further commented that the cop's knew him from before.

21 Constable Loughlin admitted under cross-examination that he realized this statement was exculpatory but again made no effort to clarify it or the prior statement. Furthermore, he could not recall if this was said very shortly after the other statement, in which case the inculpatory implication of the first statement would seem to be removed.

22 I find that the accused's right to make an informed and effective choice to speak or not to speak about his case was breached in these circumstances. The officer used the trick of a friendly

and cordial conversation on the way to Court to engage in collecting evidence and to elicit a potentially incriminating statement. The statement is conscriptive evidence; it would not have existed but for the breach of the accused's right to silence. R. v. Stillman (1997), 113 C.C.C. (3d) 321 at 352. Furthermore, because of the unofficial manner in which it occurred and the circumstances of the case, admission of the statement would render the trial unfair. There is no evidence to link the accused to the robbery, apart from the accused's driver's licence found in the rented car at the scene (a car he had rented days before and apparently had given over to a co-accused before the robbery). This statement could be taken as a decisive piece of evidence against the accused. Yet it was made in circumstances which deprived him of the effective right to choose to incriminate himself or not.

23 I further find that the use of a Court attendance to elicit evidence is a practice which should not be encouraged and is serious. It is similar in principle to the situation in R. v. Gordon (1999), 133 C.C.C. (3d) 349 (Ont. Gen. Div.) where the police used the accused's obligation to attend Court for a pretrial in order to elicit voice evidence against him. And in R. v. Lee (Ont. Gen. Div. May 29, 1996), use against an accused of his testimony in Court during a voir dire in order to identify him was excluded, in part, as unfair and a violation of the accused's right to silence. It is important that the Courts and their processes form, and be seen to form, an impartial sanctuary of justice. This is not a case where the officer was merely observing or listening to an accused who had chosen to say things which could incriminate himself. Nor is it a situation where he was reminded that the conversation had changed to an on-the-record interrogation, given that his arrest and right to counsel were exercised many months before and he had maintained silence about his case throughout that time.

24 I find that the onus upon the applicant accused to establish a Charter breach has been met. I find that admission into evidence of the statement made in this case and statements made in circumstances similar to this would tend to bring the administration of justice into disrepute.

25 The statements to Constable Loughlin are not admissible at the trial, pursuant to section 24(2) of the Charter.

HOWDEN J.

cp/d/qlhcc