

Case Name:
R. v. M.A.

Between
Her Majesty the Queen, and
M.A., (a Young Person under the Youth Criminal
Justice Act)

[2007] O.J. No. 5444

Ontario Court of Justice
Newmarket, Ontario

P. Tetley J.

Heard: October 1, 2007.
Judgment: October 1, 2007.

(60 paras.)

Counsel:

A. Ghosh, Esq.: for the Crown.

K. Wells: for the Young Person.

REASONS FOR RULING

1 P. TETLEY J.:-- This is a ruling on a blended voir dire to determine the admissibility of a videotaped statement that was made by M.A., a young person to officers of the York Regional Police Service, hold-up unit following his arrest on the charge of robbery on June the 6th 2006.

Factual background

2 On May 29th, 2006 the Hasty Market Convenience Store located at 9699 Jane Street in the City of Vaughan was the site of a robbery perpetrated by two, then unknown, individuals.

3 Subsequently, one of the suspects in this robbery, another young person, M.I. was arrested by officers from the Metropolitan Toronto Police Service. Information provided by M.I. identifying the accused as his co-participant in the Hasty Market robbery was conveyed to the York Regional Police Service. Acting on this information Detective Patrick Walsh and Constable Ryan Hogan attended at the accused's residence in Markham on June the 6th, 2006 at approximately 7:40 p.m. for the purpose of effecting the arrest of M.A.

4 On arrival at the A. residence Detective Walsh initially spoke to the accused's brother A. In due course the accused and his father were summoned to the front door by A., whereupon M.A. Was arrested for the offence of robbery. He would subsequently be charged with that offence and possession of an imitation firearm with the firearm offence withdrawn at the outset of this trial.

5 Detective Walsh read the accused the right to counsel and caution pursuant to Section 146 of the Youth Criminal Justice Act from the preprinted summary of that section located in his police notebook.

6 The accused's father whose first language is not English was provided with Detective Constable Hogan's business card. On the back of that card Detective Walsh noted his name and badge number. On the front of that card the officer wrote the address of the Newmarket Courthouse and the courtroom where the accused would appear the following day for a bail hearing and the court start time.

7 Detective Walsh indicated he advised the accused's father that his son would be taken to 5 District Headquarters in Markham for processing. He recollected providing directions to that station in the event the accused's father wished to attend at the police station with his son. M.A.'s father indicated he did not wish to attend the police station and was informed the officers would contact him with any further information.

8 Neither Detective Walsh or Detective Constable Hogan reported any difficulty in communicating with the accused's father B.A., a native of Pakistan who had been in Canada for a period of six years as of that date. Detective Constable Hogan confirmed B.A. conversed in Urdu on at least one occasion during the arrest procedure.

9 Detective Walsh acknowledged the business card provided to B.A. did not specifically reference the address or telephone number for 5 Division of the York Regional Police Service. The card provided the address for police headquarters, that being 17250 Yonge Street Newmarket, together with Detective Constable Hogan's direct telephone number, pager number and a general toll free police number for the York Regional Police Service.

10 On arrival at 5 District headquarters the accused was paraded before the acting supervising officer, Staff Sgt. Joanne Randall Pagnotta. Detective Walsh recalled reading the accused the right to counsel and caution from the posted notice in the booking area. He acknowledged the adult version of the right to counsel may well have been read to the accused at that time without reference to the additional entitlements afforded by Section 146 of the Youth Criminal Justice Act, including the right to consult a parent, or other adult relative, or to have a lawyer, parent or adult relative present.

11 Staff Sergeant Pagnotta Randall completed a booking form which was entered as an exhibit in this proceeding.

12 The Staff Sergeant made no additional notes relating to her interviews with the accused beyond the entries in the computerized booking form. She advised, however, that her normal practice is to advise any arrested young person in age appropriate language, of their specific legal entitlements under the Youth Criminal Justice Act.

13 Detective Walsh made no note, or expressed any recollection, of a separate review of the accused's s. 146 rights by Staff Sergeant Pagnotta Randall.

14 Following the booking procedure the accused expressed a desire to speak to duty counsel. This request was facilitated.

15 Following consultation with duty counsel by telephone, the accused was placed in an interview room. There certain background information was secured by Detective Constable Hogan and Detective Walsh in order to enable the officers to complete a show cause hearing report.

16 The related exchange between the accused and the two officers was not subject to audio or video recording and was not proceeded by a caution or reiteration of the accused's s. 146 statutory entitlements.

17 Following this unrecorded interview during which the accused purportedly indicated a willingness to provide a statement, M.A. was placed in a video recording room whereupon Detective Walsh proceeded to review and complete the York Regional Police Service "Young Person Voluntary Statement Form."

18 This pre-printed form, filed as Exhibit 3 in these proceedings, includes directions to the investigating officer in circumstances where a young person wishes to provide a voluntary statement to the police. Officers are specifically directed to advise the young person "that they do not have to say anything about the charges until after their rights have been fully explained and understood."

19 The form includes reference to the possibility of transfer of the prosecution to adult court and reiteration of the right to silence and right to counsel, as well as the right to consult a parent, adult relative or other appropriate adult.

20 The form includes specific reference to the fact that a consulted lawyer or adult, must be present if the young person wishes to make a statement unless the accused provides specific directions to the contrary.

21 The concluding portion of the form includes a delineated summary of the waived rights and entitlements by the young person.

22 Detective Walsh reviewed the content of this form with the accused over the course of approximately 23 minutes and the accused completed certain portions of the form in his own handwriting signifying his understanding of the consequences of his decision to provide a statement to the police.

23 In a subsequent inculpatory statement the accused acknowledged his role as a party to the robbery allegation.

The issues:

24 On behalf of M.A., Ms. Wells submits the arresting officers failed to comply with Section 146 of the Youth Criminal Justice Act.

25 In support of this contention the following deficiencies in the procedures employed by the police in securing the accused's statement are noted:

1. The failure of the arresting officer to provide detailed information to the young person's father at the time of the accused's arrest in order to facilitate the attendance of the accused's father at the police station.

2. The impropriety of unrecorded, uncautioned questioning of the young person in an interview room prior to the securing of a formal recorded inculpatory statement.

3. The absence of a meaningful and age appropriate explanation to the accused, in advance of the securing of the accused's statement, of his Section 146 legal entitlements and the consequences of the waiver of those rights.

26 In response, the Crown, Ms. Kulpers submits the accused knowingly waived his right to remain silent following the receipt of legal advice from duty counsel. The Crown contends the accused was fully apprised of the rights he was waiving by Detective Walsh and was similarly aware of the potential consequences of the waiver of these rights as indicated by the recorded responses on the young person's voluntary statement form.

27 The non-recording of the initial dialogue between the arresting officers and the accused and the circumstances of the accused's arrest and alleged deficiencies in the information provided to the accused's father at the time of M.A.'s arrest, are viewed as inconsequential as far as a determination of admissibility of the accused's statement is concerned. The Applicable Law: Section 146 of the Criminal Youth Justice Act provides in part as follows:

(2) No oral or written statement made by a young person who is less than 18 years old to a peace officer or to any other person who is, in law, a person of authority on arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against a young person unless:

(a) the statement is voluntary;

(b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person in language appropriate to his or her age and understanding that;

(i) the young person is under no obligation or was under no obligation to make a statement;

(ii) any statement made by the young person may be used as evidence in proceedings against him or her;

(iii) the young person has a right to consult counsel and a parent or other person in accordance with paragraph (c) and

(iv) any statement made by a young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c) if any, unless the young person desires otherwise;

(c) The young person has, before the statement was made, been given a reasonable opportunity to consult;

(i) with counsel, and

(ii) with a parent or, in the absence of a parent, an adult relative or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as the person is not a co-accused or under investigation in respect of the same offence; and

(iii) if the young person consults a person in accordance with paragraph (c) the young person has been given a reasonable opportunity to make the statement in the presence of that person.

28 Section 146(4)(a)(b) authorizes a young person to waive his rights under paragraph 2(c)(d) provided the waiver is recorded on either video or audio tape (Section 146(4)(a)) or, is reduced to writing, signed by the young person in which an informed waiver of the right being waived is acknowledged.

29 Section 146(6) permits a youth justice court to admit statements into evidence, in circumstances where technical irregularities have been found to have occurred in complying with paragraphs 2(b) to (d) if the judge is satisfied the statement's admission would not bring into disrepute the principle that young persons are entitled to enhanced procedural protection in order to ensure fair treatment and protection of their rights.

30 Section 3(i)(b)(iii) of the Youth Criminal Justice Act expresses much the same sentiment and sets out, as one of the fundamental declarations of principle of the Act, the fact that the criminal justice system for young persons must be separate from that of adults and must emphasize enhanced procedural protection to ensure young persons are treated fairly and their rights are protected.

31 The court's insistence on strict procedural compliance in the affording of enhanced procedural protection in circumstances where young people have provided inculpatory or incriminating statement is reflected in the reported authorities.

32 For instance, in *R. v. J.(J.T.)*, [1990] 2 S.C.R. 755, 1990 CarswellMan at paras. 82 through 84 (S.C.C.) Justice Cory recognized the fact that the extension of certain procedural safeguards and protections to young persons, when dealing with the police, as a source of frustration to both the police and society, noting the statutory preconditions for admission of a young person's statement under Section 56 of what was then the Young Offender's Act, a precursor to Section 146 of the Youth Criminal Justice Act, applied regardless "whether the authorities are dealing with a nervous and naive or street smart and a worldly wise youth." Justice Cory concludes:

"The statutory preconditions of admission of a statement made by a young person cannot be bent or relaxed because the authorities are convinced on the basis of what they believed to be cogent evidence of the guilt of the suspect. As soon as the requirements are relaxed because of a belief in the almost certain guilt of the young person, they will next be relaxed in the case of those who the authorities believe are probably guilty and thereafter in the case of a suspect who might possibly be guilty, but whose past conduct, in the opinion of those in authority, is such that he or she should be found guilty for the general protection of society. Principles of fairness require that the

section be applied uniformly to all without regard to the characteristics of a particular young person."

33 The practical application of these principles places a significant and continuing obligation on the police and others in positions of authority to a detained young person. Strict procedural compliance with the obligations imposed by Section 146, in accordance with the principles of the Youth Criminal Justice Act, must be respected and maintained. As a consequence, as noted by Justice Cory in *R. v. J.(J.T.)*, effective law enforcement may be viewed by some as being compromised in the exchange.

34 Parliament has decided that young people generally have a lesser understanding of their legal rights than do adults and consequently are less likely to fully assert and exercise those rights when confronted by the police or other authority figures. (see Sopinka, J. for a unanimous court in *R. v. I.(L.R.)*, [1993] 4 S.C.R. 504 (S.C.C.))

35 In view of this underlying assumption and the statutory and common law emphasis on the enhanced preservation and protection of the rights of our youth, the courts must be vigilant that the right to silence is not relinquished by the young person "except in the exercise of free will in the context of a full understanding and appreciation of his or her rights." (see Sopinka *J.R. v. I.(L.R.)* supra at paragraph 35.)

36 While many of the authorities relied on by the accused were decided under the Young Offenders Act, I conclude Section 146 of the Youth Criminal Justice Act presents similar procedural guidelines to those afforded young people under Section 56 of the former act, subject to the addition of Section 146(5) and (6). These subsections as noted previously permit the statements of young people to be admitted into evidence in circumstances where there has been non-compliance with Section 146(2)(b) as a result of a technical irregularity.

37 A recent Court of Appeal decision, *R. v. S.S.*, [2007] O.J. No. 2552, 2007 ONCA 481 decision confirms that deprivation of "a substantial informational component of Section 146(2)(b)(iv) - the right to have a consulted third party present during the giving of a statement by a young person unless the young person decides otherwise, is not a "technical irregularity" of a kind to invoke the curative proviso of Section 146(6)."

38 In *R. v. V.Z.*, [2004] O.J. No. 1307 Justice Spence of the Ontario Court of Justice expresses the importance of age appropriate and informatively responsive language in the explanation of Section 146 by the police to questioned or detained youth. I note, specifically, paragraph 25 and 26 of that decision.

39 The importance and desirability of recording youth statements in their entirety is also canvassed in detail by Justice Spence in that decision. I note paras. 30 to 46, in particular. Authorities cited by Justice Spence include *E.T. v. The Queen*, [1993] 4 S.C.R. 504, 86 C.C.C. (3d) 289 another Supreme Court of Canada decision where an initial statement given by a youth to the police, without the benefit of legal counsel, was held to be inadmissible as the young person was held not to fully appreciate the consequences of making such a statement. The first statement was also held to taint and render inadmissible the subsequent statement, even though the youth spoke to legal counsel and completed a new waiver form following the making of the first statement. Justice Sopinka, noting at p. 306 of the Canadian Criminal Cases report of the decision as follows:

"A previous statement may operate to compel a further statement notwithstanding explanations and advice belatedly proffered. If therefore, the successor statement is simply a continuation of the first, or if the first statement is a substantial factor contributing to the making of the second, the condition envisioned by Section 56 (Young Offenders Act) has not been attained and the statement is inadmissible.

40 In *R. v. D.M. and J.P.*, 58 C.C.C. (2d) 373, a decision of Justice Abella, then of this court; now of the Supreme Court of Canada, emphasized the need for the reviewing justice to be, in her words:

"Scrupulously aware" ... "of the fact we are dealing with an individual who is legally and biologically a child. This means, for example, that an imbalance of power exists when an accused child is interviewed by the police in a police station after being arrested. Great care should be taken to reduce the intimidating disparity of the scales by ensuring that the child has an adult present if he wishes."

Analysis and conclusion

41 It is apparent from consideration of Section 146 of the Youth Criminal Justice Act and the authorities relating to the admissibility of young person's statements that a young person must be fully informed and aware of their rights and procedural safeguards before those legal entitlements can be waived.

42 Unless specifically waived a young person subject to police detention following arrest is entitled to have any consultative third party present during the giving of a statement.

43 The police are under a legal obligation to ensure the detained youth is provided with accurate and complete information regarding his legal rights and the procedural safeguards mandated by Section 146 of the Youth Criminal Justice Act and the consequences of waiving those rights and entitlements.

44 It is preferable that all exchanges between the young person and the questioning officer be subject to audio or audio/video recording to avoid the possibility that any subsequent waiver of the right to remain silent may have been influenced during a previous unrecorded interaction between the detainee and the police.

45 While there is no absolute prohibition requiring the recording of all verbal interactions between the police and the detainee, when recording facilities are readily available and the police engage in questioning a subject in the absence of proper recording procedures, the court is deprived of the ability to independently review the exchange and to assess if it may have had the effect of tainting any subsequent statements. (see *The Queen v. Moore and McFarland et al.* (O.C.A) (2001) 56 O.R. (3d) 737, 152 O.A.C. 120, 160 C.C.C. (3d) 493, 47 C.R. (5th) 203, [2001] O.J. No. 4646 per Charron, J. at paras. 64, 65, 67 and *R. v. Ahmed* (2002) 166 O.A.C. 254, 170 C.C.C. (3d) 27, 7 C.R. (6th) 308, [2002] O.J. No. 4597 where Justice Feldman for the court notes at paragraph 19 of that decision as follows:

"the failure to record will generally preclude a finding of voluntariness, except in the circumstances where the police officer did not set out to interrogate the suspect."

46 Applying these considerations to the facts here I conclude as follows:

1. With the benefit of hindsight the contact information provided to the accused's father following the accused's arrest may have been insufficient to enable or facilitate meaningful subsequent contact between M.A. and his father B.A.

47 While I am satisfied B.A.'s facility with English was sufficient to comprehend the information conveyed by the arresting officers the provision of a business card referencing a different police attachment other than the location where the accused had been taken may have been confusing. In my view specific contact information including the address of the Five District police division and a direct telephone number ought to have been provided to the young person's father at this time of the arrest.

48 It is acknowledged that the provision of this information is not specifically mandated by Section 146 of the Youth Criminal Justice Act. What is required by that section is the facilitation of meaningful contact with a designated adult should the young person express such a desire. With the accused's father effectively excluded from the consultative process on arrest, the entitlement of a young person to consult the father, in the event he chose to do so, may well have been compromised at the outset.

49 I accept the testimony of the arresting officers regarding the fact the accused was read his rights pursuant to the Criminal Youth Justice Act and was appropriately cautioned. This conflicts with the recollection of the accused's father who testified the right to counsel and caution were not read to his son at the time of the arrest. It may well be that B.A. failed to recollect the reading of the youth's rights as a consequence of the fact he was dealing with the disquieting impact of having been advised that his son was a robbery suspect.

50 The provision of these rights and the facilitation of these rights are, however, two different matters and concern is expressed with respect to the fact that the accused's father was not specifically invited to attend Five District Headquarters. Attendance at the station by the father would have ensured ready access to his parent had the accused subsequently decided to consult his father. As events unfolded during the course of questioning the benefit of having an adult relative at the station might have assisted the accused with certain questions he raised during the statement process.

2. A concern exists regarding the fact the show cause form was completed by the accused, in the company of the two investigators, off camera. This interaction took place after the accused

had spoken to duty counsel, but prior to his giving of the formal statement. During this unrecorded interaction the accused reportedly agreed to provide the statement in issue in these proceedings.

51 As these discussions took place in private the interaction between the officers, I note both Detective Constable Hogan and Detective Walsh were apparently in the interview room at the time, are not subject to independent judicial review. When a video room is readily available and an individual, particularly a young person is charged with a serious criminal offence it is preferable that any direct interaction between the accused and the investigating officers relating to the investigation in issue be recorded.

52 The possibility that any unrecorded interaction may have influenced the accused's conduct and/or served to taint any subsequently received waiver of the right to silence arises particularly when the express waiver follows immediately after the receipt of advice from duty counsel.

3. On the facts here deficiencies in the explanation offered to the accused regarding certain of his legal rights and entitlements and the potential consequences of the waiving these rights, may have influenced the accused to provide an inculpatory statement without a complete understanding of the consequences of that decision.

53 In my opinion the information conveyed to the accused regarding the possible imposition of an adult sentence is confusing. This confusion stems in large measure from the fact the questioning officer appears to have read what amounts to directions to a police officer in verbatim form to the accused as follows:

"OFFICER: You've been told what charges you are being charged with. Okay, I'm gonna read you this. It's a possibility of transfer to adult court, youth age 14 years or older, okay, if the young person committed the offence after he or she turned 14, and if the offence is one for which an adult could be sentenced to more than two years in jail, then a young person could receive an adult sentence, okay, and they should be cautioned accordingly. Officers should provide the following caution only when it is possible for the youth to receive an adult sentence because of the seriousness of the above offence you are being warned that, if convicted, you could receive a more severe adult sentence. The most severe adult sentence is life in prison. Do you understand?,

ACCUSED: Yup.

OFFICER: You have to say yes or no.

ACCUSED: Yeah.

OFFICER: What does this mean to you?"

54 It is at this stage that the accused's uncertainty, in my view, is manifest in his response.

"ACCUSED: That if I'm convicted I'll be tried as an adult and I may receive a life sentence.

OFFICER: Okay, basically just so you're aware okay, if you are convicted you would receive an adult sentence not a -

ACCUSED: Oh, tried as an adult, okay.

OFFICER: You would be tried as an adult and receive an adult sentence.

ACCUSED: And receive an adult sentence.

OFFICER: Do you understand that?

ACCUSED: Yeah."

55 In my view, what was required was a brief reference in layman's terms to the applicable provisions of the Youth Criminal Justice Act, Section 62 and 64 specifically, and the potential application, albeit remote in the circumstances of this case, of these provisions to the accused's situation. The recitation of the instruction to the officer, which occurred on more than one occasion during the completion of the Young Person's Voluntary Statement Form, served to confuse rather than illuminate the young person's rights in my estimation.

56 The functions and benefits of consulting an adult were never fully explained to the accused. It is acknowledged the accused had spoken to duty counsel and agreed thereafter to give a statement. During the completion of the Young Person Voluntary Statement Form the young person was advised he would appear in court the following day, he asks: "But then how is this -" referencing the statement "- going to help me then?" This prompted the interviewing officer to respond as follows: "That's up to you to determine, how this is going to help you or not. That's your decision."

57 Based on this interaction I conclude there existed considerable uncertainty in the accused as to the potential consequences of his decision to provide a statement. This exchange ought to have alerted the questioner of the need for the accused to further consult with an adult or to revisit the issue with duty counsel.

58 The intent of the Youth Criminal Justice Act and, the protections inherent therein, is to ensure decisions like this are not left up to the sole determination of the young person. Despite the previous consultation with duty counsel it is evident that there continued to be doubts in the mind of the accused as to the consequences of his decision and those doubts ought to have been removed by someone other than the investigating officer.

59 While no singular factor noted above may have constituted noncompliance with Section 146 I conclude in totality, the noted concerns constituted a breach of the young person's rights under the Youth Criminal Justice Act. These collective breaches cannot be considered to be technical irregularities of the kind to invoke consideration of the curative proviso referenced in Section 146.

60 As a consequence, the accused's statement is ruled inadmissible.

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