

[2007–09 Gib LR 372]

TRIAIY v. R.

SUPREME COURT (Dudley, Ag. C.J.): September 24th, 2009

Police—interrogation of suspects—legal representation—accused’s right of access to lawyer before police interview fundamental and to be protected—police interview conducted in absence of solicitor (unable to be contacted), contrary to wishes of accused, oppressive and confession inadmissible at trial if no good explanation

The applicant was charged with one count of possession and two counts of possession with intent to supply cocaine.

The applicant was arrested and taken to the police station, where after being cautioned—including being told his right to consult a lawyer—he requested the assistance of his solicitor. He was, however, unable to contact him but, nonetheless, the police officers proceeded to interview him.

As a preliminary issue, he applied to exclude the interview as admissible evidence at trial since (a) he had not been afforded legal representation prior to or for the purposes of the interview; and (b) he had been induced to make admissions by threats from the interviewing officer to investigate his family unless he confessed to the charges.

Held, allowing the application to exclude the interview:

The interview would be inadmissible as evidence at trial as the applicant had been wrongly denied the presence of his legal adviser. Access to a lawyer was a fundamental right of an accused person which was to be safeguarded effectively, and not simply by recital of its

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availability. Since the applicant had expressly asked for legal assistance and had not indicated a willingness to be interviewed in his lawyer's absence, and as there was no good reason to restrict his right or why the interview could not have been postponed, the police officers' conduct in continuing to interview him was oppressive and any admissions obtained would therefore be inadmissible (paras. 6–9).

Cases cited:

- (1) *R. v. Prager*, [1972] 1 W.L.R. 260; [1972] 1 All E.R. 1114; (1971), 56 Cr. App. R. 151, referred to.
- (2) *R. v. Priestly* (1966), 50 Cr. App. R. 183; 51 Cr. App. R. 1; [1966] Crim. L.R. 507, *dicta* of Sachs, J. considered.
- (3) *R. v. Samuel*, [1988] Q.B. 615; [1988] 2 W.L.R. 920; [1988] 2 All E.R. 135; [1988] Crim. L.R. 299; (1987), 87 Cr. App. R. 232, referred to.

C. Miles for the applicant;
Ms. G. MacEvilly for the Crown.

1 **DUDLEY, Ag. C.J.:** The applicant stands indicted with one count of possession of a preparation containing 12.23g. of cocaine and two counts of possession with intent to supply. The two intent to supply counts relate to the same cocaine as that of the simple possession count.

2 The preliminary issue before me relates to the admissibility of an interview conducted with the applicant following his arrest. The application is made on two distinct grounds. First, that he was not afforded access to legal representation prior to or for the purposes of the interview and, secondly, that he was induced into making certain admissions by virtue of Det. Const. Hammond's saying to him that if he did not make a confession they would have to investigate further and that this would extend to them investigating his family and that if he confessed the process would move along more smoothly.

3 I can deal with the second ground of the application shortly. I accept the evidence of the officer to the effect that no inducement was given. That conclusion is, in my view, supported by the fact that the applicant refused to answer a number of questions. Had he been induced into making admissions, one would have expected the applicant to have been far more forthcoming during the interview.

4 The more substantive basis upon which the admissibility of the evidence is challenged relates to the applicant, it is said, not having been afforded access to legal representation. It is not in issue that the applicant was arrested on January 18th, 2008 at 7.45 p.m. and arrived at New Mole House police station at 10.15 p.m. The custody record also indicates that the reason for his detention was "to obtain evidence by questioning" and that his rights having been read to him at 10.00 p.m., he requested legal

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advice as soon as was practicable. There is a dispute as to whether he was afforded the opportunity to call a lawyer himself or whether he was told that the lawyer of his choice whose telephone number he provided was called for him. Whilst preferring the officer's evidence in this regard, it is really of little consequence in that neither did he speak to a lawyer nor did one come up to see him.

5 The applicant was interviewed at 1.35 a.m. and, after being cautioned, the following exchange took place:

Det. Const. Hammond: Do you agree to be interviewed without a legal adviser present?

Mr. Triay: Bueno, I cannot contact my lawyer.

Det. Const. Hammond: So do you agree to be interviewed without your legal adviser?

Mr. Triay: If not there isn't any choice, no?

Det. Const. Hammond: Yes, you have tried to you [sic] lawyer haven't you?

Mr. Triay: Yes.

Det. Const. Gonzalez: Okay.

Det. Const. Hammond: I must remind you that you have the right to consult with a legal adviser at any time. This includes the right to consult with a solicitor on the telephone. If you change your mind please say so.

Mr. Triay: Si, pero. I am trying to reach him but I can't reach him.

Det. Const. Hammond: Okay Alex around 7.30 p.m. today . . .”

6 Thereafter, the interview proceeded. It is, I think, self-evident from the transcript that the applicant was desirous of having the benefit of legal advice; that he did not acknowledge a willingness to be interviewed without the benefit of such advice; and that to his inquiry as to whether or not he had a choice, there was no reply. It is not in issue that there was no reason for restricting legal advice and, in my view, no substantive reason has been given as to why the interview could not have been postponed.

7 The issue which falls to be determined is whether in those circumstances, at common law and upon application of the Judges' Rules, the police officers' conduct in continuing with the interview amounted to oppression. "Oppression" was defined by Sachs, J. in *R. v. Priestley* (2) in the following terms (51 Cr. App. R. at 1):

“ . . . [T]his word . . . imports something which tends to sap, and has sapped, that free will which must exist before a confession is

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voluntary . . . Whether or not there is oppression in an individual case depends upon many elements . . . They include such things as . . . the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement.”

8 The definition was subsequently adopted and applied by the English Court of Appeal in *R. v. Prager* (1). The definition which, narrowly viewed, could be seen as not encompassing affording a detained person the opportunity to seek legal advice, must, however, be viewed in the context of present day *mores*. The right of a person detained by the police to have access to a lawyer is a fundamental right of a citizen (see *R. v. Samuel* (3)). It is a right which is to be safeguarded effectively and not by having police officers reciting it as a mantra and then ignoring its purpose. In my view, for the police without good reason to act in a manner which curtails such a fundamental right, can properly be categorized as oppressive conduct and any admissions obtained thereafter must be inadmissible.

9 For these reasons, the interview under caution is to be excluded.

Application allowed.