Case Name:

R. v. Sundman

Between
Regina, and
Darren Caley Daniel Sundman, Kurtis Riley Sundman and Sebastian Blake Martin also known as Sebastian Blake Thomas

[2018] B.C.J. No. 3674

2018 BCSC 2037

Docket: 42212

Registry: Prince George

British Columbia Supreme Court
Prince George, British Columbia

J.W. Williams J.

Heard: March 20-24, 27-31, April 3-7, 10-12, 18-21, 24-27 and May 15-19, 2017.
Judgment: November 19, 2018.

(66 paras.)

Counsel:

Counsel for the Crown: J. Temple, A. Norlund.

Counsel for the Accused, Darren C.D. Sundman: J. Gustafson.

Counsel for the Accused, Kurtis R. Sundman: B. Smith.

Counsel for the Accused, Sebastian B. Martin: J. Heller.

Voir Dire Ruling: Statement of Sebastian Martin

J.W. WILLIAMS J.:--

Introduction

1 Sebastian Martin is charged, along with Darren Sundman and Curtis Sundman, with first-degree murder. In the course of the police investigation leading up to the charge, Mr. Martin had a number of dealings with investigators, culminating in his arrest on August 7, 2015. The following day, August 8, 2015, he was interviewed at length by an RCMP member, Cpl. O'Ruairc. In that interview, Mr. Martin provided a lengthy statement.

2 The Crown applies for a ruling of this Court, holding that the statement is voluntary and admissible. The prosecutor indicates that, in the event the statement is ruled admissible, it is not intended to be adduced as part of the prosecution's case, but will be available for the purpose of cross-examining Mr. Martin if he testifies at trial.

3 Mr. Martin opposes the Crown's application.

Background

4 On the evening of January 16, 2015, Prince George RCMP responded to a call of shots fired in an area east of the city. The subsequent investigation disclosed that a Prince George man, Jordan McLeod, had been shot and killed. His body was recovered in a remote area, off a logging road northwest of Prince George.

5 The investigation was long and complicated. As I understand, within a few days of the commencement of the investigation, police considered the Sundman brothers to be prime suspects in the offence. Ultimately, as more information was developed, police came to believe that three men, the Sundman brothers and Mr. Martin, were responsible for the death of Mr. McLeod.

6 On August 7, 2015, Mr. Martin was arrested at his residence near Vanderhoof. He was then transported to the police cells in Prince George. The Sundman brothers were already in custody in respect of other matters and, on August 8, 2015, they were arrested and charged with the murder of Mr. McLeod. In fact, the Sundmans had been arrested on January 18, 2015 near Quesnel and charged with a number of offences with respect to events that occurred in that area. They had remained in custody from that date forward and, at the time of their arrest on the murder charge, they were detained at the Prince George Regional Correctional Centre.

7 In the initial stages of the investigation, Mr. Martin was not considered a suspect, but it was

believed that he might have information relevant to the investigation. On three separate occasions (January 20, January 27 and February 17, 2015), police spoke with him. The encounters in each instance were brief: he was asked a few questions, and he provided some answers. There was no search, there was no detention, and there was no arrest.

8 On February 25, 2015, police executed a search warrant at Mr. Martin's residence on the Stoney Creek Reserve near Vanderhoof. On this occasion, Mr. Martin was found at another location and transported by police to the search site. There he took some part in the search and was released. That search was also subject of a *Charter* challenge brought by Mr. Martin pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

9 Mr. Martin had two further interactions with police between the time of the search on February 25, 2015 and his arrest on August 7, 2015. The first was on May 21, 2015. At that time, two officers served him with an application to detain items which had been seized in the search of February 25. There were no dealings of any substance between Mr. Martin and the officers on this occasion.

10 The second was in late July 2015. On that occasion, Mr. Martin was arrested by police in Prince George and was subsequently transported to the cells at the city police detachment. He was detained overnight and was released from custody the following morning without charge. These events were entirely unrelated to the murder investigation. At the time of his release, he asked to speak with an officer. One of the members of the detachment met with and interviewed Mr. Martin in respect of concerns that Mr. Martin had that he was being harassed and stalked by unknown persons in the community. At the conclusion of that interview, Mr. Martin went on his way.

11 The arrest of Mr. Martin for the murder was planned and structured. It occurred on August 7, 2015 shortly after 1:00 p.m. Mr. Martin was located by police outside his residence on the Stoney Creek Reserve.

12 Much of the process which ensued was scripted. All of the interactions, that is the advice to Mr. Martin that he was under arrest, the provision of his *Charter* rights and the police warning, as well as the subsequent transfer to the police cells were all audio recorded and those recordings are in evidence on this application.

13 Mr. Martin was taken by officers in a police car and transported to the lock-up in the Prince George RCMP detachment.

14 On that evening, after having been booked into cells, officers from the arrest team and the investigation team made attempts to initiate conversation with Mr. Martin while in custody. He adamantly refused to engage with them. As well, police had arranged for Mr. Martin to share a cell with an undercover police officer, a so-called "cell plant".

15 That effort failed quite pronouncedly. Mr. Martin made clear right at the outset that he

believed his cellmate was a police officer and he demonstrated an overt hostility to that person. The operation was aborted. No statements of any consequence were obtained from Mr. Martin.

16 In short, police efforts to obtain a statement on August 7, 2015 were of no avail.

17 On the morning of August 8, 2015, a member of the interview team had a series of dealings with Mr. Martin, including arranging for him to confer with his lawyer and for him to attend a video hearing with a Justice of the Peace.

18 Shortly after 10:00 a.m., Mr. Martin came into the presence of Cpl. O'Ruairc, the assigned interviewer. The two were together for nearly 12 hours. During that period, time was taken for meals and breaks.

19 In that lengthy interview process, Mr. Martin was questioned about his role in the events of the evening of January 16, 2015 and the hours following, and particularly with respect to the activities surrounding the death of Jordan McLeod.

20 In the course of that interview, Mr. Martin made a series of admissions, describing the events, including things he said were done by the Sundman brothers and his own role in those events.

Positions of the Parties

21 Mr. Martin challenges the admissibility of the statement that he made to Cpl. O'Ruairc. He bases his challenge on a number of different considerations.

22 The Crown, acknowledging that it has the burden of proof and that it is required to establish beyond a reasonable doubt that the statement was voluntary, disputes the objections raised by Mr. Martin and contends that the statement is voluntary.

23 I propose to summarize the particulars of the objections raised by Mr. Martin.

24 While I recognize that in circumstances such as these, the onus rests with the Crown, not the defence, I am going to set out in summary form the issues raised by Mr. Martin. I will then advert to the positions advanced by the Crown in response. I will do it in this sequence because that is the manner in which the matter was argued. I wish it to be clear that, even though I have structured the statement of the positions of the parties in this way, it is not to suggest that I have in any way cast the onus upon Mr. Martin to prove that the statement is not voluntary.

25 In summary, Mr. Martin raises the following objections with respect to the interview and the statement:

1) The manner in which the interviewer related to and dealt with Mr. Martin. Mr. Martin says that the interviewer created an impression that he was acting in something of an "ombudsman" role. He distanced himself from

the police investigators and created the sense that he would act as an advocate for Mr. Martin.

2) One thrust of the interview was to invite Mr. Martin to tell the interviewer why the charge should be first degree murder and to invite him to explain some circumstance that could change that. In other words, the implication was that there would be a benefit to Mr. Martin if he spoke to the officer.

3) Mr. Martin says that some of the ways in which the interviewer spoke were, albeit in a limited way, a denigration of Mr. Martin's legal counsel.

4) In the course of the interview, the officer made reference to statements that a witness, Stacy Stevenson, had given to the police. Even though Mr. Martin's statements to the officer were not in alignment with the version of events related by Ms. Stevenson, the officer never confronted Mr. Martin with those discrepancies. In that respect, it is submitted that the officer misled Mr. Martin and that, in a sense, he provided false information to Mr. Martin.

5) Mr. Martin suffers from back pain. It is submitted that the police pressed on, notwithstanding the discomfort that he experienced. As well, it is contended that the police afforded limited access to medication and, in the totality of events, required Mr. Martin to carry on with the process, although his strength was diminished and he was fatigued.

6) Mr. Martin submits that the interviewer misled him in suggesting that the Sundman brothers were talking to the police and, he says, implying that the Sundmans were providing information that was incriminatory of Mr. Martin. The effect of the argument in this regard is that it imposed a pressure upon Mr. Martin to provide a statement to the interviewer.

7) Mr. Martin submits that the interviewer was plainly and clearly a dominant personality and that his dominance overwhelmed Mr. Martin's will to remain silent. In that regard, Mr. Martin says that there are a number of aspects of the interview interaction which demonstrate that he had become emotionally and psychologically vulnerable to the interviewer.

26 The Crown submits that there is no evidence that Mr. Martin's capacity to choose whether to remain silent or speak to the police was affected in any way by police conduct. The Crown says that there were no threats or improper inducements, that the statements made by Mr. Martin were the product of an operating mind, and that his will was not overborne by an oppressive atmosphere or police trickery.

Analysis

27 The concept of voluntariness in the context of a statement provided by an accused person is multifaceted.

28 The principal authority dealing with voluntariness is the decision of the Supreme Court of Canada in *R. v. Oickle*, 2000 SCC 38. There, the concept was examined in careful detail. In his very thorough discussion, Justice Iacobucci considered a number of the important authorities which have dealt with voluntariness, going back to the *Ibrahim* rule from *Ibrahim v. The King*, [1914] A.C. 599, and also *Boudreau v. The King*, [1949] S.C.R. 262; *R. v. Wray*, [1971] S.C.R. 272; *R. v. Rothman*, [1981] 1 S.C.R. 640; and *R. v. Hebert*, [1990] 2 S.C.R. 151.

29 The principles that I find emerge from the analysis in *Oickle* are as follows:

* The underpinning of the confessions rule are the "twin goals of protecting the rights of the accused person without unduly limiting society's need to investigate and solve crimes": para. 33.

* A real concern in dealing with the admissibility of statements is the fact that false confessions can result from police interrogation, and a proper application of the rule must guard against false confessions: paras. 35-45.

* The common law confessions rule, properly applied, provides appropriate protection against false confessions. The voluntariness examination will necessarily be concerned with reliability: para. 47.

* There are no hard and fast rules, no fixed formula or template, which will provide a proper outcome in every instance. The circumstances surrounding the obtaining of a statement by the police must be examined carefully and specifically. All of the relevant factors must be taken into account, with sensitivity to the particularities of the individual suspect: paras. 42 and 47.

* The examination must scrutinize whether threats or promises have been made. Those can include threats or promises made with respect to third parties, such as to have a coercive effect upon the subject. However, where the court finds that there were threats or inducements, those must be examined carefully and contextually: paras. 48-53.

* In assessing whether a threat or promise will have the effect of vitiating voluntariness, the court must look at what effect that threat or promise had upon the subject. Not all threats or promises will be such as to bring into doubt the voluntariness of the statement. The effect will be understood from the totality of the circumstances: para. 54.

* An important consideration where there is a threat or promise is to look for the presence of a *quid pro quo*. Where that is present, it gives rise to the possibility that the suspect has confessed, not willingly, but in order to gain the benefit offered by the interviewer: para. 57.

* The element of oppression is important in the voluntariness analysis because it can have the effect of producing false confessions. As Iacobucci J. observed:

  [58] If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress compliant confession to escape those conditions. Alternatively, oppressive circumstances could over bear the suspects will to the point he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession.

* An atmosphere of oppression can arise from a number of factors, including deprivation of food, clothing, water, sleep or medical attention; denying access to counsel; or excessively aggressive, intimidating questioning for a prolonged period of time: para. 60.

* Another facet of oppression can arise from the police use of non-existent evidence:

> [61] The use of false evidence is often crucial in convincing the suspect that protestations of innocence, even if true, are futile. I do not mean to suggest in any way that, standing alone, confronting the suspect with inadmissible or even fabricated evidence is necessarily grounds for excluding a statement. However, when combined with other factors, it is certainly a relevant consideration in determining on a voir dire whether a confession was voluntary.

* The concept of "operating mind" is another aspect of the voluntariness analysis. This entails a consideration of the state of mind of the interview subject. The standard was explained by Justice Sopinka in *R v. Whittle*, [1994] 2 S.C.R. 914 where he stated that the operating mind requirement "does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment" (at 936): para. 63.

* The voluntariness analysis will also be concerned with whether the police have used trickery to obtain a confession. In *Oickle*, Iacobucci J. makes clear that this is a distinct inquiry. Although related to voluntariness, it is also concerned with maintaining the integrity of the criminal justice system. In this regard, he made reference to the reasons of Justice Lamer in *Rothman*:

> [66] Lamer J. was also quick to point out that courts should be wary not to unduly limit police discretion (at p. 697):
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> [T]he investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. [Emphasis added.]

As examples of what might "shock the community", Lamer J. suggested a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under the pretense that it was insulin. Lamer J.' s discussion on this point was adopted by the Court in Collins, supra, at pp. 286-87; see also R. v.

Clot (1982), 69 C.C.C. (2d) 349 (Que. sup. ct.).

30 In his summary, Iacobucci J. made clear that, while there are a number of considerations to be examined, the fundamental concept is quite straightforward:

> [68] ... First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow *Ibrahim* rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.
>
> [69] The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J.'s concurrence in *Rothman, supra,* both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process": J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 339. Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.

31 *Oickle* also makes abundantly clear that the court's analysis is to be contextual, and must:

> [71] ... strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule discussed above. Therefore a relatively minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation: see *Hoilett, supra*. On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary. If a trial court properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for

> "some palpable and overriding error which affected [the trial judge's] assessment of the facts": *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at p. 279 (quoting *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808) (emphasis in *Schwartz*).

32 It is critically important that the analysis in each specific case examine the facts of that case, in their totality and in a comprehensive and over-arching way, rather than conducting a mechanical and rote review of the elements. To underscore that approach, in *Oickle*, lacobucci J. referred to the observation of Wigmore that voluntariness is "shorthand for complex of values": *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, para. 826, at p. 351.

33 While *Oickle* sets out the conceptual parameters of the examination and the approach to be taken, there are of course many reported decisions where specific circumstances have been examined, situations with their own unique features. In the matter at hand, I have been referred to a number of those decisions, particularly by Mr. Martin. Those include *R. v. Hammerstrom*, 2006 BCSC 1700; *R. v. Spencer*, 2007 SCC 11; and R. v. Johnny, 2014 BCSC 812.

34 I have reviewed each of those decisions and considered them in my analysis.

Discussion

35 As is fortunately usual in cases where police interviewers seek to obtain statements, all of the dealings between Mr. Martin and the police, from the time of his arrest up to the conclusion of the statement at issue, were recorded. Some of the recordings were by audio; some were by video.

36 The interview conducted by Cpl. O'Ruairc was video recorded. That video was played at the *voir dire* and a transcript was received in evidence.

37 I have subsequently reviewed the statement by viewing much of the video recording again and I have had further reference to the transcript.

38 The effect of listening to and watching the recordings carefully is it enables me to have a clear and vivid sense of what went on in the exchange between Mr. Martin and Cpl. O'Ruairc--both the finer details and the more general tenor of the exchange. In a sense, it afforded me an experience close to having been there and observing what occurred.

39 In my understanding of the authorities, and particularly *Spencer* at paras. 11-15, taking a "macro" contextual perspective, one that is sensitive to the particularities of the individual, is essential in assessing and determining the issue of voluntariness.

40 Certainly details are important, but so too is the larger sense. That view affords real insight into what was actually occurring in the dynamic of the exchange.

41 In the circumstances at bar, it is clear that Mr. Martin had received legal advice. On the evening prior to the interview, apparently acting on what his lawyer had told him, he was clear and

unequivocal in making it known that he suspected that his cellmate was a police officer and that he did not want to speak with or engage with that person in any way. In that sense, Mr. Martin clearly asserted his right to stand silent.

42 The dynamic on the following date was different. In the morning, Mr. Martin spoke with his counsel again, and then he had a televised experience before a Justice of the Peace and was remanded. It was following that that he met with Cpl. O'Ruairc.

43 The tone and tenor of that lengthy exchange between Mr. Martin and Cpl. O'Ruairc is quite striking.

44 The officer's demeanour was low-key, calm and non-confrontational. That continued throughout the entire time they were together. It is obvious that this approach was highly effective in that the officer was able to establish what I am convinced was a genuine rapport with Mr. Martin, which continued throughout the interview.

45 Shortly after the commencement of the interview, Mr. Martin began to discuss events from the night of the murder. At the outset, he professed to have no knowledge of why he was in custody, but soon he began to tell bits and pieces of the incident, although it is apparent that his initial strategy was to deny having been present for any of the events associated to Mr. McLeod's death.

46 Cpl. O'Ruairc continued to move the conversation forward. Mr. Martin followed along.

47 At no point did Cpl. O'Ruairc ever confront Mr. Martin with the proposition that he was being untruthful. He simply continued to move forward and Mr. Martin divulged further details incrementally.

48 In the final analysis, Mr. Martin gave what appears to be a comprehensive confession of having been present and having taken part in the events, although he maintained that he shot Mr. McLeod because he felt that, if he did not participate, he was at risk of harm or worse from the Sundmans.

49 At times during the interview, Mr. Martin made reference to having been advised by his lawyer not to speak to the police.

50 In submissions on the *voir dire*, Mr. Martin now says that the officer denigrated Mr. Martin's counsel. I do not find that to have been the case. The officer acknowledged that Mr. Martin had the right to counsel, but he continued to talk to Mr. Martin. He did not say anything that could be fairly described as demeaning or denigrating of Mr. Martin's lawyer or his advice.

51 One of the bases that Mr. Martin advances to dispute the voluntariness of the statement is that the officer created the impression that he was acting in something of a neutral "ombudsman" role and would act as an advocate for Mr. Martin.

52 In fact, that is not the way I construe the circumstances. The reality is this: Mr. Martin initially took the position that he was not involved in the murder and accordingly he was being charged with an offence for which he was not responsible. In the face of that, the officer indicated to Mr. Martin that, if that were the case, that is, if Mr. Martin was truly not responsible for the murder, that would be important to the police in the course of their investigation and would presumably entitle Mr. Martin to be exonerated from blame.

53 It was on this basis that Mr. Martin continued to offer further details.

54 It seems to me that, where an interview subject elects to provide information to the interviewer denying any responsibility, it is not unreasonable to expect that the interviewer could represent to the interviewee that, if what he says is so, that would impact the proceedings going forward. In my respectful view, that is a natural consequence of the tack that the interview subject, in this case Mr. Martin, elects to follow.

55 I do not see that as constituting a misrepresentation or some form of trick to cause Mr. Martin to speak.

56 It is also evident from the interview that, other than as I have just explained, Cpl. O'Ruairc made clear to Mr. Martin that he would not be able to do Mr. Martin any favours or make these charges go away.

57 As the interview progressed, Mr. Martin continued to give the versions of events that were not consistent with what the police investigation had discovered. Cpl. O'Ruairc elected not to confront or challenge Mr. Martin on those points, but rather he simply continued to move forward, giving him encouragement when he made further disclosures about the events.

58 Again, I do not understand the suggestion that the failure of the police to tell the interview subject that his statements are not in accord with other evidentiary findings is a breach of the duty of fairness.

59 In this case, the officer elected to pursue a strategy that did not entail a confrontational approach. I cannot say that that was wrong or unfair. Cpl. O'Ruairc was not required to put discrepancies between Mr. Martin's account and Ms. Stevenson's account to Mr. Martin, and did not mislead Mr. Martin by not doing so. Cpl. O'Ruairc did not otherwise provide any false information to Mr. Martin.

60 In the interview, Cpl. O'Ruairc told Mr. Martin that the Sundmans were being interviewed, and adverted to the possibility that they might be making statements to Mr. Martin's detriment. The fact is that the Sundmans were being interviewed at the time. Cpl. O'Ruairc did not know what they were saying, if anything, and he did not represent that he did. Such a strategy is not uncommon in the arsenal of interview techniques, and, most significantly, I find no basis to conclude that it meaningfully informed his decision to make his statement in a way that would engage a

voluntariness concern.

61 Another point raised by Mr. Martin is that he was suffering from back pain at the time of the interview and was in need of medication.

62 It is true that Mr. Martin indicated on a number of occasions that he suffered from back pain and he explained the accident that had caused him the injury. He also indicated that he was uncomfortable and the officer took steps to attempt to alleviate some of that pain, notably by permitting him to stand and stretch and finding another chair. As well, the police gave Mr. Martin his medication, but only in accordance with the prescription. At no point was there ever any withholding of the medication or any manipulation of that process to entice him to speak further.

63 The interview was lengthy and so it is reasonable to believe that it was emotionally tiring for both Mr. Martin and Cpl. O'Ruairc. Nevertheless, the reasonable and reasoned demeanor and exchanges continued between the two men to the conclusion. I cannot find that Cpl. O'Rourke dominated Mr. Martin, much less to the point of overwhelming Mr. Martin's will to remain silent.

64 In my view it is quite revealing that, by toward the end of the process, after the statement had been received and Cpl. O'Ruairc was attending to some loose ends, a lunch was provided. Cpl. O'Ruairc offered Mr. Martin the opportunity to eat on his own; Mr. Martin indicated that it was his preference that he would have his meal with Cpl. O'Ruairc. Such a detail is telling and consistent with Mr. Martin having given his confession freely and voluntarily, without undue police pressure, inducement or trickery.

65 There is another point I wish to make. In terms of being mentally capable and competent, I find no basis to think that Mr. Martin was deficient or vulnerable or that he was somehow "snookered" by a much smarter person. Over the course of the interview, he impressed me as being thoughtful and quite able to hold his own in the exchange.

Conclusion

66 In summary, it is my staunch view that the manner in which this statement was obtained did not violate Mr. Martin's right to remain silent. I find that the statement was made voluntarily.

J.W. WILLIAMS J.