

Regina, and M.A.A.

"Assault charges dismissed based on police treatment of accused after arrest" [COMMENTS BY RICHARD NEARY]

R. v. M.A.A.

Between
Regina, and
M.A.A.

[2009] B.C.J. No. 198

2009 BCPC 37

File No: 4506

Registry: Victoria

British Columbia Provincial Court
Victoria, British Columbia

R.A. Higinbotham Prov. Ct. J.

Heard: December 8-11, 2008.

Judgment: January 26, 2009.

(21 paras.)

Counsel:

Counsel for the Crown: Catherine Murray, Q.C.

Counsel for the Defendant: Richard Neary.

RULING ON APPLICATION

1 R.A. HIGINBOTHAM PROV. CT. J.:— M.A.A. is a person charged as a young person with three offences of assault. One of those charges has now been stayed. This decision is in respect of an application to stay the proceedings on the remaining charges by reason of breaches of the constitutional rights of M.A.A. recognized in sections 7, 9 and 10(b) of the Charter of Rights and Freedoms.

2 The accused was arrested in the early hours of the morning after police were called to the scene of a violent disturbance outside a karaoke bar in downtown Victoria. The incident took place on a particularly busy night for the police, right around bar and club closing time, with groups of club goers wandering the streets. M.A.A. was part of a small group that had been in and out of the karaoke bar, and that had apparently decided to accost first one, then two more individuals walking down the street.

3 The police officers attending the scene arrested the accused and another associate for assault, and took very brief statements from some of the bystanders, but apparently came to the view at the police station that the information received to that point was insufficient upon which to base any charge. Instead, they decided to detain the accused in cells for breach of the peace under s. 31(1) of the Criminal Code, which reads as follows:

- 31(1) Every peace officer who witnesses a breach of the peace ... is justified in arresting any person who he finds committing the breach of the peace, or who, on reasonable grounds, he believes is about to join in or renew the breach of

the peace.

4 This decision was made after the officer who transported him to the police cells at 2:46 a.m. had advised him he could call a lawyer. Despite his indication to the officer that he wished to call a lawyer, he was given no opportunity to do so. I infer that the reason for this is that the arresting officers, who were likely unaware that the transporting officer had given M.A.A. the advice, decided to detain the accused temporarily without charges. The policy in these circumstances is to ignore the requirements of section 10(b) of the Charter.

5 In a case involving an arrest of an adult for breach of the peace, the policy of the Victoria Police Department is to release the detainee once the police were satisfied that the peace would not be breached again. This commonly occurs after a detention of about two hours, at the most.

6 The fact that M.A.A. was a youth raised other issues for the police officers and jailers involved in this case. They felt it would be negligent of them to release a youth back onto the streets of Victoria without explicit authorization from the youth's parent. As it happened, no parent could be reached until well into the daylight hours. On cross-examination shift supervisor Sgt. Randhawa testified that in the case of a youth there will be no release from custody, even if there is no likelihood of another breach, unless authorized by a responsible adult. In accordance with this practice, M.A.A. was, I find, kept in custody several hours longer than would have been the case had he been an adult. He was finally released to his father at 10:55 a.m.

7 The "Prisoner Booking Policy" of the Victoria Police Department contains the following provisions respecting youth:

- 3.27 Young Persons will only be booked in to cells in the event the Youth Detention Centre will not, or cannot accommodate them, and acceptance is authorized by the Administrative Sergeant. This includes youths arrested for State of Intoxication in a Public Place.

This section does not specifically mention young persons arrested for breach of the peace, but it is clear by inference that this policy is meant to cover them as well.

8 The police department's Operations Manual has a section devoted to the treatment of young persons. It commits the police department to treating young persons in a manner that complies fully with legal requirements and the provisions of the Young Offenders Act. It specifically provides in section 3.8 that a young person who has been detained will be transferred to the Youth Detention Centre as soon as is reasonably practicable. Such a transfer was not made in this case, nor was it contemplated by those overseeing the detention of the accused. I find that the intention of the police and jailers was to detain this youth until such time as a parent could be contacted.

9 In summary, this detainee was treated differently from the treatment he would have been accorded had he been eighteen years old. This difference in treatment was either because it is assumed that the safety of the youth himself would be endangered if he was released at a dangerous hour, or because M.A.A. himself could cause trouble once again. Both reasons were advanced, but ultimately it is beyond dispute that the authorities intended to continue his detention until such time as a responsible adult authorized his release. Clearly, liability issues were at play.

10 In my view, if the police were keeping custody of him for his own protection, then they had a duty to contact child protection authorities. If they were keeping him in custody because they feared a continuation of the breach of the peace, there is no doubt upon the evidence that this ought not to have been a concern an hour or two after his arrest.

11 In continuing the detention of this youth for the length of time that occurred, the detention became unlawful. It was contrary to the department's stated policy to release a prisoner unconditionally when his continued detention was no longer required to prevent a breach of the peace, and no charges were contemplated. Insofar as the continued detention of the youth was driven by a conflicting policy directed solely at young persons, it was also arbitrary. No lawful justification existed for a policy such as this, and since the policy is universally applied to all persons under the age of eighteen, regardless of other circumstances, the policy itself is arbitrary.

12 During the course of submissions, a great deal of attention was given to the issue of whether this youth was less than forthcoming with his parent's contact number. This may well have been the case, although I note that when the police told M.A.A. he was being detained for a breach of the peace, they also told him he would be released as soon as he calmed down. Although this was not to be, it might explain any lack of cooperation in providing them his parental contact information. Having said that, I am of the opinion it does not matter. This youth was under no legal obligation to communicate such information, and any failure to give up his right to silence cannot be used to justify an arbitrary detention. It should not be necessary to waive one right in order to exercise another.

13 I have found that the accused was arbitrarily detained for several hours. This violation is not trivial, but one of consequence. It followed an earlier violation of the right to contact counsel, a right that this young person wished to exercise. It is conceivable, but by no means certain, that if M.A.A. had been afforded his right to counsel, he would have been released. The reason I say it is not certain is that one of the police witnesses confirmed that it makes no difference if counsel is called on a breach matter because the detainee is not going to be released until the police deem it appropriate in any event.

14 The deprivation of the right to counsel in the case of an arrest and detention for breach of the peace is serious, particularly so because it is a policy based practice that has nothing to do with the particular circumstances of the case. It is not peculiar to this case, but happens routinely.

15 As I said earlier, the detention of young persons beyond that period of time when an eighteen year old would be released is a violation of the right of that young person to be protected against arbitrary detention. Again, it is based upon policy. This means that countless other young persons not yet arrested will be detained until such time as a parent authorizes their release.

16 It is the fact that these violations are policy driven that makes them particularly serious. That part of the policy utilized in the case at bar is in direct contravention of sections 9 and 10(b) of the Charter. This is not a case of a police officer violating the rights of a detainee in a vacuum. This is a case where the police officers would be violating orders, and thereby subject to discipline, if they did not infringe the rights of the young person in custody.

17 The criticism I make of the police officers directly involved in the arbitrary detention of M.A.A. is limited to this; if they are going to go by the book, go by the whole book. Other provisions of their policy manual provide for transport to the Youth Detention Centre, certainly a more appropriate environment than the city jail; yet another provides for contacting child protection workers if the issue is one of a young person being in need of protection. I recognize that the police officers were very busy that morning, and for that reason I am reluctant to be critical of them personally, but none of the options I have referred to were even contemplated.

18 The real villain of the piece is not the police officer or officers involved, but the policy itself. The finding that these breaches were policy driven has important implications when the appropriateness of a possible remedy is considered. Clearly, the policy itself needs to be reconsidered. Not only does the Charter need to be taken into account, but so does the Youth Criminal Justice Act, which provides even more guidance for the appropriate treatment of young persons in trouble. These statutes are endlessly criticized, but remain the law of the land, and must be obeyed.

19 It is perhaps unnecessary to say that the only reason this matter has come to light is that the accused was subsequently charged. Had he not been charged with assault this issue would never have come before this court, yet the violation would still have taken place.

20 The combination of the breach of M.A.A.'s rights under both s. 9 and s. 10(b) for police policy reasons involves the integrity of the justice system itself and the need to comply with the rule of law. In my opinion, this takes the breach in this case to the highest levels of seriousness. Given that finding, there is no remedy other than a judicial stay of proceedings that will suffice.

21 I direct that in the matter of the remaining charges set out in this information that proceedings be stayed.

R.A. HIGINBOTHAM PROV. CT. J.