

1993 CarswellOnt 5416  
Ontario Court of Justice (Provincial Division)

R. v. C. (K.)

1993 CarswellOnt 5416, 19 W.C.B. (2d) 364

**In the Matter of the Young Offenders Act S.C. 1980-83, c.110**

Her Majesty the Queen against K. C.

E.A. Ready Prov. J.

Judgment: March 23, 1993

Docket: None given.

Counsel: L. Sheriff, for Crown  
D. Midanik, Esq., for Accused

Subject: Criminal

**Headnote**

**Criminal law**

***E.A. Ready Prov. J., (Orally):***

1 The issue on the voir dire has been a joint concern of the rights to counsel under Section 10 and also in respect to the voluntariness issue, there is the additional concern, has Section 56 which is mandatory and strictly construed in respect to young offenders. Has it been carried out in this case prior to the time that the verbal statement that was written down by the officers was obtained.

2 I am concerned having heard the evidence of both officers that the total lack of recollection of actually what occurred in there, things that were not written down by the officer who was in the room with the first constable. He has said well the caution was read, but we have not heard what that was all about. We have not heard what was said, and he assured the court that, in fact, he had been arrested but he did not have that written down, and so much was lacking in that officer's notes to leave this court with a great deal of concern about actually what transpired and in what order in that interview room.

3 First of all to deal with Section 56. The first officer, Harnden, and it is clear from his testimony as well as that of Constable Hawes, that he never did verbally explain in a language that is appropriate to this young offender of his rights under Section 56 before a statement was taken. He preferred to put down a form in front of him and say here is a waiver, read it, and he prefers that to compliance with Section 56. Based upon the case law, that is not sufficient compliance with Section 56 for an officer to put a form down in front of a young offender and tell him to read it and that is compliance. The officer in no way assured himself of the rights. He never advised the accused of his rights under Section 56, and he never ensured that he understood what he was, in fact, reading on that form.

4 In addition, that concern that this court has is bolstered by the words that I have in the bench notes here that Constable Harnden indicated:

"I am going to explain all your rights to you and this sheet will explain everything, okay? Because you are a young offender, this is a form..." and I will just note that, "this is a form to say you can have your uncle and mother present here. Do you read all right?" And the accused says yes to that.

5 Now, here is an indication, not of a form explaining all of the rights, the various options available under Section 56 as well as the mandatory rights to counsel under the charter, this is a form that the officer indicates is to have your uncle and mother present. Well, they were both present and that is what he said the form was all about.

6 In addition, what concerns this court as well in respect to compliance with Section 56, and this young offender's understanding of what he was doing, what his rights were, and obligations and what he was actually waiving and giving up.

7 Officer Hawes indicated as the accused read the waiver form he asked me and this is when Hawes and the mother were out of the room discussing something, he says: "As the accused read the waiver form he asked me 'what is this all about?' And I informed him that I did not know." This is an officer that knew that this accused was going to be arrested for a break and enter because his fingerprints were found at the scene. For him to say he did not know leads this court to grave concern, and it also leads this court to believe that there was some confusion about what this form was, what this proceeding was all about that hadn't adequately been explained to this young offender. And nor was this issue of his concern that he did not know brought up to Constable Harnden when he reattended at the room. In fact, what happens when Harnden reattends the room is not that this young offender's concerns or questions are addressed by Constable Harnden, Constable Harnden and the mother reattended or these are the notes on the bench note, at which time the accused was asked if he wished to sign, and this is when Harnden has the form back in his hand, but the accused asked for the document back as he had not finished reading it. The accused continued to read with his mother leaning over his shoulder reading as well. Well, I do not know if in fact she was reading, but she did indicate that she did read on her testimony, and upon completion the conversation continued and Harnden indicated: "Anything you do not understand?" and the accused said no.

8 Notwithstanding that, this court is of the concern that, in fact, the accused was not aware of what he was waiving. He was not even advised of what his rights were under Section 56. And that Section is very clear. No oral or written statement given by a young person to a peace officer or other person who is in law a person in authority is admissible against a young person unless the statement is voluntary. I have no concerns about the voluntary nature of the statement from the evidence that I have heard; however, the person to whom the statement was given has before the statement was made clearly explained to the young person in a language appropriate to his age and understanding that that young person is under no obligation to give a statement. Any statement given by him may be used as evidence in proceedings against him and the young person has the right to consult another person accordance with paragraph (c), and any statement made by that person is required to be made in the presence of the person consulted unless the young person desires otherwise. I do not even see that referred to in the waiver, and the full implications in accordance with paragraph (c) are not clearly addressed in that waiver. In fact, the waiver talks about rights that have been clearly explained and this accused is now confirming that understanding those rights that have been explained to him, he is giving up those rights under Section 56 in writing to these police officers. That is not what that form says, and, in fact, the evidence we have is that this form was never explained by the police officer, nor were his rights under Section 56 explained to him by this police officer.

9 As I have indicated before, the officer chose to put this form down in front of him and let the form explain itself to this accused. That is not compliance and the case law indicates that is not compliance with Section 56. Also, I note on this form that a number is put in here, a 24-hour toll-free number, 1-800-265-0451 with the initials R.W. H. I do not know how that number got in there. I do not know when it got in there, and I do not know that in fact it was there at the time the accused signed the form. None of those additions or deletions have been at all initialled by K. C., and I am not certain from that and from that paragraph three that the accused would be advised of his rights to counsel. In any event, prior to the time, at the time that he was arrested and supposedly cautioned, he should have been advised by this police officer of his rights to counsel of the toll-free duty free number of 1-800-265-0451. And I am not satisfied just seeing this placed in front of this court or in front of the accused that he would be aware of his rights to counsel, nor do I find that there is compliance with the charter rights to counsel because, in fact, this accused says I have been advised of my right and a toll-free number is added there. I do not

find that sufficient compliance and I am not at all satisfied as to whether or not that existed at the time that this accused signed this form or when, in fact, that was added and by whom it was added or if the accused was aware of that addition and, in fact, acknowledged that addition by his initials on that form.

10 As I have indicated before what occurred on this occasion in respect to compliance with Section 56 is not appropriate for dealings with young offenders and it has left this court with a number of concerns and I could not rely upon the evidence that I have heard in any regards to say that there was any form of compliance with Section 56 or with the rights to counsel under the charter of rights.

11 Accordingly, because I have found noncompliance with Section 56, and as I have also indicated at no point was the accused advised that he could speak with his mother and with the uncle who he wished to have present in private before this statement started, and I am also concerned with that, that there was no privacy given to consult or no indication that they could consult together in private before this statement commenced. Because of that as well, there is noncompliance with Section 56 and the statement is not in compliance and will not be part of the evidence on this trial. Also as I have indicated I have concerns about noncompliance with the charter; that he should have been clearly advised in an appropriate language prior to the time that this waiver was placed in front of him of his rights to retain and instruct counsel and of the duty counsel number that he could consult in private if he so wished without just placing it on a table and asking him to sign it with the officers present and around him and with his uncle present and his mother. It is not due compliance with the charter and the spirit of the charter, and in addition, the statement would be excluded under the charter as well as under Section 56. Yes?

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