

Citation: *R. v. Allaby*, 2011 YKTC 66

Date: 20111129
Docket: 11-00340
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

REGINA

v.

MATTHEW CARLOS ALLABY

Appearances:
Terri Nguyen
Robert Dick

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] Matthew Carlos Allaby stands charged that he:

On the 10th day of August, 2011, at Whitehorse, Yukon Territory, did carry a weapon to wit a knife, for a purpose dangerous to the public peace contrary to section 88 of the Criminal Code.

[2] In the morning of August 10, 2011, Mr. Allaby was arrested on a warrant issued in respect of charges of assault and breach of recognizance. He was lodged in a cell in the guard room of the R.C.M. Police detachment in Whitehorse to await his first court appearance that afternoon. There was no one else in the cell.

[3] At around 11:15 A.M. a guard room matron served Mr. Allaby a meal in his cell. The meal was served on a tray and Mr. Allaby was provided with a plastic knife and fork to use as utensils.

[4] The knife was made of white plastic, is approximately six inches long, had a serrated edge and would be at once familiar to anyone who has eaten a meal on an airline flight or at any function where disposable cutlery is used. Such knives are, obviously, much less dangerous than a metal knife. None the less, one could use such a knife to stab someone or inflict a cut with the serrated edge.

[5] After Mr. Allaby had eaten, he was taken out of the cell by Cst. Wilds and placed in an interview room with the hope that Mr. Allaby would provide a statement concerning the charges he was facing. Once Mr. Allaby had been taken to the interview room, the matron retrieved the meal tray from Mr. Allaby's cell. She noticed that the plastic knife was missing. The matron searched Mr. Allaby's cell but could not locate the knife.

[6] The matron advised Cst. Hinton that the knife was missing. Cst. Hinton went to the room where Mr. Allaby was being interviewed. Mr. Allaby was confronted about the missing knife. Initially he denied having it, but eventually he told the officers that it was concealed in his sock and the officers retrieved the knife. According to Cst. Wilds, Mr. Allaby stated that he had possession of the knife for the purpose of cutting himself.

[7] For his part, Mr. Allaby claims that he never denied having the knife but immediately admitted that he had it. He further testified that he never told the officer he intended to use the knife to cut himself. Asked why he took the knife and concealed it,

he said that he simply wanted to see if he could successfully smuggle the knife out of the guardroom. It will be recalled that Mr. Allaby was scheduled to be transported to court that afternoon.

[8] I am satisfied that Mr. Allaby told Cst. Wilds that he intended to use the knife to cut himself. There is no reason for Cst. Wilds to fabricate such a comment. More tellingly, Mr. Allaby's entire testimony concerning the incident and his purpose in concealing the knife is simply incredible. He would have the court believe that he was simply engaged in some sort of test to see if he could get the knife out of the guard room.

[9] Thus, I'm satisfied that Mr. Allaby made the statement attributed to him by Cst. Wilds. However, given my complete lack of faith in what Mr. Allaby says, I would not be justified in concluding that Mr. Allaby's claim that he intended to use the knife to cut himself is, in fact, true – especially as Mr. Allaby, himself, expressly disclaims any such plan. I conclude that this statement was also a lie, intended to mask his true intent.¹

[10] In consequence, Mr. Allaby's actual intent and purpose in taking the knife and concealing it in his sock must be inferred from the circumstances.

[11] A "weapon" is defined in s. 2 of the *Criminal Code* as follows:

"weapon" means any thing used, designed to be used or intended for use
(a) in causing death or injury to any person, or
(b) for the purpose of threatening or intimidating any person
and, without restricting the generality of the foregoing, includes a firearm;

¹ Since I do not believe that Mr. Allaby possessed the knife for the purpose of self harm, I need not consider the Crown's submission that possession of a weapon in such circumstances would be for a purpose dangerous to the public peace.

[12] Obviously, a plastic knife is not designed to be used as a weapon. Nor is there any evidence that Mr. Allaby used the plastic knife as a weapon. It only falls within the *Criminal Code* definition of a weapon if the accused intended to use it as such for the purpose of causing death or injury or for the purpose of threatening or intimidating.

[13] In this regard, I have no doubt Mr. Allaby intended to use the plastic knife as a weapon. Even on Mr. Allaby's own evidence, he knew it was contraband and intended to smuggle it out of the lock up. If he intended to use the object only for benign purposes such as eating his meals he didn't need to steal it since cutlery would be provided with each meal. There would be no reason to conceal it in his sock and no reason to attempt to surreptitiously take it with him into the police van, the court house cells or the court room. No hint of any lawful purpose emerged from the evidence.

[14] It goes without saying that prisoners in police lock-ups, gaols or penitentiaries are not permitted to have weapons, much less concealed weapons. Permitting prisoners to arm themselves would pose grave risks to other inmates, police or correctional staff. Obviously, allowing prisoners to smuggle weapons to the courthouse would substantially widen the circle of persons who might be harmed.

[15] At the end of the day (leaving aside the possibility of using weapons for self harm) there are really only two reasons for an inmate to arm himself. He may wish to defend himself against attacks by others or he may wish to use the weapon offensively to either harm or intimidate others. Indeed, as became clear in *R. v. Kerr*, 2004 SCC 44, the inmate may possess weapons with both purposes in view.

[16] The *ratio* in *Kerr* is not necessarily as clear, since there were three concurring judgments which differed on the *mens rea* requirement of s. 88, the meaning of the phrase “dangerous to the public peace” and the effect, in this context, of possessing a weapon for defensive purposes. However, in the case at bar, the differing views in *Kerr* are of little consequence.

[17] On any reading of *Kerr*, possession by a prison inmate of an item he intends to use in causing death or bodily injury to any person or for the purpose of threatening or intimidating any person constitutes possession of a weapon for a purpose dangerous to the public peace. The judgments in *Kerr* differed on what the effect on the inmate’s culpability might be if he possessed the weapon for the purpose of self defence, but those differences of view are of no consequence here for the simple reason that there is not a shred of evidence before me that Mr. Allaby possessed the knife for such a purpose.

[18] In the result, I find the accused guilty as charged.

T.C.J. FAULNER