Citation: *R.* v. *Rutley,* 2012 YKTC 91

Date: 20121010
Docket: 11-11015
Registry: Dawson City
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

DARREN TROY RUTLEY

Appearances:
Jennifer Grandy — Counsel for the Crown
Darren Rutley — Appearing on his own behalf

RULING ON APPLICATION

[1] Darren Rutley is before the Court on a three count information, alleging aggravated assault, break and enter, and breach of an undertaking. Evidence was taken in Dawson City on April 17, 18 and 19, 2012, and, apart from having *amicus* assist in the cross-examination of the complainant and another witness, Mr. Rutley represented himself.

[2] Mr. Rutley gave a statement on August 2, 2011, the day of his arrest. Although the Crown does not seek to tender the statement as evidence in its case, she does wish to use it to cross-examine Mr. Rutley if he takes the stand. Mr. Rutley objects to this use, and says that the statement should be excluded, as it was taken in violation of his

ss. 10(a) and 10(b) *Charter* rights. The proceedings in April were conducted as a *voir dire,* pending a determination of the merits of Mr. Rutley's *Charter* arguments.

Evidence on the *voir dire*

Constable Jordan McIntyre

[3] On August 2, 2011, Cst. McIntyre responded to a radio dispatch alerting him to an assault and break and enter at Angela Rear's residence in Dawson City. On arriving at the residence, he found Patrick McCormick lying on a couch in the living room. Cst. McIntyre noted that Mr. McCormick's face was bloody, and blood appeared to be coming from his mouth and eye. There was blood spatter on the floor and Mr. McCormick was complaining of pain in his arm. Two teeth were found on the floor of the residence. During a brief conversation before Emergency Medical Services arrived, Mr. McCormick indicated that Darren Rutley had punched and choked him.

[4] Cst. McIntyre and another RCMP member, Cpl. Morin, were able to track down Mr. Rutley and drove to his work site to arrest him. Cst. McIntyre exited the police vehicle and called Mr. Rutley over. Cst. McIntyre advised Mr. Rutley that he was being arrested for break and enter and assault causing bodily harm with respect to Mr. McCormick. Mr. Rutley was handcuffed and placed in the back of the vehicle. Cst. McIntyre advised Mr. Rutley of his 10(b) *Charter* right by reading from a card that contained the following standard language:

> You have the right to retain and instruct a lawyer without delay. You may call any lawyer you choose to seek immediate legal advice. A Legal Aid lawyer is available at any time including nights and weekends to provide you with free legal advice. You may speak to a

> lawyer in private at the detachment without the police being present. The police will provide you with the telephone numbers to assist you to contact the lawyer of your choice. In addition to free immediate legal advice if you are charged with an offence you have the right to apply to Legal Aid for free legal assistance. Do you understand?

[5] Mr. Rutley replied 'Yes'. He was then asked if he wanted to use a telephone to contact a Legal Aid or other lawyer, and he responded "Sure". Mr. Rutley was given the additional warning that he did not have to say anything unless he wished to, that he had nothing to hope from any promise or favour and nothing to fear from any threat, and that anything he said could be used as evidence. He was then transported to the RCMP detachment, where he arrived shortly after noon.

[6] Cst. McIntyre testified that, once at the detachment, Mr. Rutley indicated that he was not sure whether he wanted to speak to legal aid or a private lawyer. He was provided with a Yukon telephone directory and placed in a private room with a window that allows people outside to see in but not hear anything being said.

[7] While Mr. Rutley was in that room, Cst. McIntyre left a voicemail message on the Legal Aid voice mail. He testified that he did this pre-emptively, so that should Mr. Rutley be unable to contact a private lawyer, he could speak with Legal Aid when they called back.

[8] A short time later, Cst. McIntyre saw Mr. Rutley hang up the phone in the room. He opened the door and Mr. Rutley indicated that he had not been successful reaching counsel. Cst. McIntyre advised him that a call had been placed to Legal Aid and they would phone back after lunch. Mr. Rutley was placed in a cell. When Legal Aid

returned the phone call, Mr. Rutley was told that Legal Aid was on the phone and he was removed from the cell and placed back in the private room at 1:05 p.m. At 1:30 p.m., Mr. Rutley hung up the phone and Cst. McIntyre let him out of the room. Cst. McIntyre testified that it is his practice to ask accused at this time if they are satisfied with their right to counsel. Mr. Rutley indicated that he was, and a warned statement was subsequently taken.

[9] Over the course of the day the extent of Mr. McCormick's injuries became known. Specifically, Cst. McIntyre learned that Mr. McCormick had a broken arm, missing teeth and was scheduled to be medevaced to Whitehorse. Later in the afternoon Cst. McIntyre had a discussion with Cpl. Morin and a decision was made to charge Mr. Rutley with aggravated assault as opposed to assault causing bodily harm.

Corporal David Morin

[10] Cpl. Morin was with Cst. McIntyre when Mr. Rutley was arrested. His recollection was that Cst. McIntyre advised Mr. Rutley that he was being arrested for assault and break and enter. He saw Cst. McIntyre read Mr. Rutley his rights from the card. In Cpl. Morin's opinion, Mr. Rutley appeared to understand what was being said to him.

[11] Once they were back at the detachment, Cpl. Morin recalled Mr. Rutley indicating that he would like to speak to Legal Aid. He did not have a conversation with Mr. Rutley in which Mr. Rutley said he wanted to speak with private counsel. He remembers Cst. McIntyre phoning Legal Aid and leaving a voicemail message. Cpl.

Morin was present when the return call from Legal Aid was received but became occupied by other matters before Mr. Rutley finished with that phone call.

[12] Cpl. Morin testified that he and Cst. McIntyre discussed Mr. McCormick's injuries later that day and determined that a charge of aggravated assault would be appropriate. He did not recall whether this discussion was before or after Mr. Rutley provided a statement, but indicated that the discussion would have taken place after 6 p.m.

[13] On cross-examination, Cpl. Morin acknowledged that his recollection of Mr. Rutley requesting Legal Aid counsel could have been mistaken and agreed that he could have asked for counsel of his choice.

Darren Rutley

[14] Mr. Rutley remembers being arrested and having his rights read to him, although he didn't specifically remember the right to counsel. He recalled being arrested for assault causing bodily harm.

[15] Mr. Rutley said that he told Cst. McIntyre and Cpl. Morin that he wanted to contact counsel. He was put in a room with a phone book. He had only called one lawyer and reached voicemail when Cst. McIntyre entered the room to say it was lunchtime and he would be unlikely to reach anyone. He did not leave a message. Cst. McIntyre told Mr. Rutley that he would contact Legal Aid on his behalf. Mr. Rutley was put into a cell and taken out 30 or 40 minutes later when he was told that duty counsel was on the phone. He remembers having a seven to eight minute conversation with

duty counsel, after which he was taken back to his cell for five minutes and then taken for an interview.

[16] In cross-examination, Mr. Rutley acknowledged that he did not tell Cst. McIntyre that he did not want to talk to duty counsel, however he also indicated that he believed he did not have a choice in the matter. He denied telling Cst. McIntyre that he was satisfied with the legal advice he received, although in the taped statement, he is clearly asked if he was satisfied with his access to counsel, to which he replies, “pretty much”.

Credibility

[17] Much of Mr. Rutley’s submissions focused on the credibility of Cst. McIntyre. He pointed to a number of examples where Cst. McIntyre’s evidence differed either from other witnesses or from the evidence of Mr. Rutley. These included such examples as Cpl. Morin testifying that Cst. McIntyre called Legal Aid at 12:05 p.m., while Cst. McIntyre’s notes suggest the call was made at 12:10 p.m.

[18] Minor inconsistencies of this nature are not at all unusual in a trial, and do not automatically raise concerns with respect to credibility where such inconsistencies are neither significant nor material. I have carefully considered each of the inconsistencies raised by Mr. Rutley, but conclude that none of the examples are so markedly inconsistent as to raise concerns about the credibility of Cst. McIntyre, or, indeed, of Cpl. Morin or Mr. Rutley himself.

[19] It should be noted that Mr. Rutley is convinced that the existence of these inconsistencies not only raises issues with respect to credibility, but is also indicative of bad faith on the part of the RCMP. However, in my view, a careful review of the evidence simply does not substantiate this belief.

Law and analysis

[20] Sections 10(a) and (b) of the *Charter* guarantee that:

> Everyone has the right on arrest or detention
> (a) to be informed promptly of the reasons therefor;
> (b) to retain and instruct counsel without delay and to be informed of that right.

[21] There is an interplay between these two rights. The right to counsel arises in the context of an arrest or detention for a particular reason, and a person can only meaningfully exercise this right if he knows the extent of his jeopardy (*R. v. Black*, [1989] 2 S.C.R 138, *R. v. Smith*, [1991] 1 S.C.R 714).

Section 10(a)

[22] Mr. Rutley takes the position that his s. 10(a) right was violated because he was arrested for assault causing bodily harm but subsequently charged with aggravated assault. Therefore, he says that he was not fully aware of his jeopardy at the time he contacted counsel, with the result that his s. 10(b) right was undermined. As well, he takes the position that his s. 10(b) right to counsel was breached because he was denied the right to choose the counsel he ultimately spoke to on the phone.

[23] Despite Cpl. Morin's recollection that Mr. Rutley was arrested for assault and break and enter, both Cst. McIntyre and Mr. Rutley recall the arrest being for assault causing bodily harm and break and enter. On this point, I am satisfied that Cpl. Morin is mistaken in his recollection. While present at the time, he was not actually involved in the arrest and was simply observing while Mr. Rutley was handcuffed and read his rights. It is significant that both individuals directly involved in the arrest remember that it was for assault causing bodily harm and not common assault.

[24] Section 10(a) requires that the accused be given sufficient information to permit him to make a reasonable and informed decision with respect to exercising his right to counsel. This determination is to be made in view of all the circumstances of the case. It is the substance of what the accused can reasonably be supposed to have understood and not the formalism of the precise words used that governs the assessment of whether the requirement of 10(a) was met *(R. v. Evans*, [1991] 1 S.C.R. 869, para. 35). The accused must generally understand the sort of jeopardy being faced but need not be aware of the precise charge or of all the factual details (*R. v. Smith*, *Supra,* para. 28).

[25] Here, Mr. Rutley was arrested for assault causing bodily harm, which is a hybrid offence with a maximum sentence of ten years available if the charge is proceeded on by indictment. It requires that the injuries interfere with the health or comfort of the victim and are neither trivial nor trifling (s. 2 of the *Code*). By comparison, aggravated assault requires that the victim be wounded, maimed or disfigured or that his life be

endangered (*Code*, s. 268). Aggravated assault is an indictable offence that carries a maximum term of imprisonment of 14 years.

[26] The Crown argues there was effectively no change in the jeopardy faced by Mr. Rutley as he was advised at the beginning that he was also being charged for a break and enter, an offence for which the maximum sentence is life. However, in my view, the underlying indictable offence alleged to have been committed under the umbrella of a break and enter does, in practical terms, have an impact on the objective seriousness of the offence and thus the jeopardy being faced. To put it simply, a break, enter and commit theft is, on its face, less serious than a break, enter and commit sexual assault, notwithstanding the fact that the maximum sentence is the same for both. Accordingly, I do not find this argument to be persuasive.

[27] That being said, the available jurisprudence indicates that s. 10(a), and the incidental guarantee provided in s. 10(b), only come into play when the offence for which the accused believes he is detained or arrested is significantly different than the actual charge he is facing. In *Evans,* the accused had been arrested for trafficking marijuana but subsequently suspected of murder. In *Black*, the context was one where the accused was arrested for either a ‘stabbing’ or an attempted murder but subsequently charged with first degree murder. The Court in *Black* noted that the two charges were significantly different, as the strict *mens rea* requirements were distinct, the victim was unavailable to testify in a murder case, and the psychological impact of a murder charge is much more severe than the psychological impact of a charge for attempted murder or stabbing.

[28] Mr. Rutley argued, at length, that Constable McIntyre knew, or ought to have known, well before taking Mr. Rutley's statement that the evidence supported a charge of aggravated assault, and Mr. Rutley should have been so advised. However, I am not satisfied that this assertion is supported by the evidence, which clearly established that the decision to charge Mr. Rutley with aggravated assault was not made until all of the evidence gathered was reviewed, sometime after the taking of the statement.

[29] Furthermore, even if I were so satisfied, this would not necessarily lead to a finding of a s. 10(a) breach. I am satisfied here that Mr. Rutley's arrest for assault bodily harm as opposed to aggravated assault did not, in law or in fact, disadvantage him with respect to his subsequent conduct and decisions. Although I recognize that aggravated assault is a more serious offence than assault causing bodily harm, the two are not 'significantly different' in the way that a marijuana offence and a murder are, or even in the way that attempted murder and murder are. The *mens rea* requirement is identical between the two offences, witness availability is the same, and the psychological impact does not greatly vary.

[30] As well, this is not a case where Mr. Rutley declined to speak to counsel on an erroneous understanding of the seriousness of his charges. While he does argue that decisions he made and, presumably, the advice he received may have been different had he known that he was facing a charge of aggravated assault, there was nothing in his evidence to support this contention nor is this something that a court is in a position to speculate on.

[31] I am satisfied, in all the circumstances, that Mr. Rutley understood that he was accused of inflicting more than trifling injuries on Mr. McCormick, and that this information gave him a sufficient understanding of the jeopardy he was facing to meaningfully exercise his right to counsel. Accordingly I find that Mr. Rutley's s. 10(a) right was not breached.

Section 10(b)

[32] In terms of Mr. Rutley's right to counsel, while it is true that the right to choose counsel is acknowledged as a facet of the s. 10(b) guarantee, that acknowledgement generally presupposes a specific counsel of choice. Here, Mr. Rutley agrees that he had no specific lawyer in mind, but rather objects to either the use of Legal Aid versus private counsel or to the fact that it was the police who placed the call to counsel.

[33] The right to counsel of choice recognizes the importance of a solicitor-client relationship. Clients must feel free to disclose intimate and possibly damaging information to their lawyer, and the client should be confident in their advocate's loyalty and dedication. The ability to choose a lawyer allows for this relationship to be more readily realized. The choice of counsel is subjective and something that must be respected and protected, not only for the benefit of the individual client, but because, by recognizing the choice lies outside the realm of state or court interference, it also enhances the objective perception of fairness in the justice system as a whole (*R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.), paras. 34-37).

[34] With respect to Mr. Rutley, while I can to some extent appreciate how the rationale underlying the right to counsel of choice applies to this situation, the fact is that he did not have any pre-existing relationship with any particular counsel, nor, indeed, any particular counsel in mind when he was given the phone book by Cst. McIntyre. I am not sure that Mr. Rutley's right to counsel of choice is even engaged in these circumstances. However, even assuming that it could be, section 10(b) only entitles a detainee to a reasonable opportunity to contact chosen counsel, and the individual must use reasonable diligence in the exercise of that right (*R. v. McCrimmon,* 2010 SCC 36). While it is not entirely clear from the evidence, it appears that Mr. Rutley tried one lawyer, did not leave a message when he or she was unavailable, and was going to continue on through the names in the phone book in a more-or-less random manner. Moreover, when Cst. McIntyre reappeared at the door of the room, Mr. Rutley did not tell him that he wanted to make additional attempts to phone counsel. Neither did Mr. Rutley tell Cst. McIntyre that he did not wish to speak to Legal Aid when that phone call was returned after lunch. Finally, Mr. Rutley clearly indicated that he was satisfied with the phone call he had with Legal Aid; indeed, as noted above, this is audible in the taped statement that was played in the *voir dire.*

[35] In *McCrimmon*, cited above, the accused had indicated his preference for a particular lawyer, who was unavailable when the police tried to place a call. A message was left, but the accused indicated to the police officer that he was uncertain whether the lawyer would call back. When asked if he would like to call a legal aid lawyer, he replied affirmatively, but said that he still preferred his lawyer. However, he took a phone call with duty counsel and confirmed that he was satisfied with the consultation.

The Court found that these circumstances did not give rise to a breach of the accused's s. 10(b) *Charter* right. I find Mr. Rutley's circumstances even less compelling than those in *McCrimmon*. I acknowledge his testimony about feeling that he had no choice about speaking to legal aid duty counsel. However, I have found him throughout this trial to be a strong and articulate advocate for himself. This is equally evident in his demeanour as viewed on the taped statement. I do not believe that he truly felt he could not tell Cst. McIntyre that he did not want to speak with Legal Aid. As well, he expressed satisfaction with the consultation. In these circumstances, I do not find that there was any further obligation on the police to hold off on taking a statement to provide Mr. Rutley the opportunity to contact another counsel.

[36] I dismiss Mr. Rutley's s. 10(b) application.

[37] As I am not satisfied that a breach of either Mr. Rutley's s. 10(a) or s. 10(b) rights has been established, I need not address s. 24(2). Having dismissed the application, the Crown will have leave to rely on Mr. Rutley's statement for the purposes of cross-examination should Mr. Rutley choose to take the stand in his own defence.

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RUDDY T.C.J.