SUPREME COURT OF YUKON

Citation: *Her Majesty the Queen v. Allen and Allen*, 2010 YKSC 30

Date: 20100625
S.C. No. 09-01504
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

DOUGLAS ALLEN and HEATHER ALLEN

Before: Mr. Justice L.F. Gower

Appearances:

Noel Sinclair	Counsel for Her Majesty the Queen
Edward J. Horembala, Q.C.	Counsel for Heather Allen
André Roothman	Counsel for Douglas Allen

RULING ON CHARTER APPLICATION

INTRODUCTION

[1] Counsel for Heather Allen has applied for an order excluding the statement his client made to the Royal Canadian Mounted Police ("RCMP") following her arrest on October 18, 2008, based upon alleged breaches of ss. 10(a) and (b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). At the time of the statement, Ms. Allen was informed that she was being investigated for a common assault upon the complainant, Allan Bullers. Later the same day, Ms. Allen was released on a promise to

appear and an undertaking, each of which similarly alleged a common assault under s. 266 of the *Criminal Code*.

[2] On November 4, 2008, pursuant to a direction from the Crown's office, the RCMP laid an information which jointly charged Heather Allen and her co-accused son, Douglas Allen, with aggravated assault and assault with a weapon upon Mr. Bullers. At the commencement of the trial, Crown counsel, Mr. Sinclair, filed a replacement indictment which reduced the charges against Heather Allen to common assault and aiding or abetting Douglas Allen in committing a common assault on Mr. Bullers.

[3] The charges arise from a dispute between Mr. Bullers, Heather Allen and Douglas Allen at Ms. Allen's residence on October 18, 2008, which resulted in Mr. Bullers being stabbed in the back with a large kitchen knife.

[4] At the hearing of this application, Ms. Allen's counsel acknowledged that the charge his client faced at the time of the statement is the same charge she is now being tried for. However, he submitted that it was fundamentally unfair that his client had been in jeopardy of the serious charges of aggravated assault and assault with a weapon for more than a year and a half. He and suggested that the unfairness smacked of abuse of process, although he was quite careful not to implicate Mr. Sinclair in that regard.

[5] There was no objection by the Crown to my consideration of the potential s. 7 breach as well.

ISSUES

[6] This was a somewhat unusual application in that defence counsel was not specifically alleging any improper conduct or bad faith on the part of either the RCMP or the current Crown prosecutor. Further, defence counsel went so far as to apparently

concede that the informational and implementational components of ss. 10(a) and (b) of the *Charter* had been satisfied by the RCMP when the statement was taken. However, submitted counsel, the situation changed significantly when the Crown directed that an information be laid charging Ms. Allen with the more serious charges. Further, defence counsel submitted that from that point until the filing of the replacement indictment at the outset of trial, it would have been unfair to admit the statement, given Ms. Allen's increased jeopardy. Finally, notwithstanding that the charges against Ms. Allen were ultimately reduced back to allegations of common assault, it would still be unfair in all the circumstances to admit the statement.

[7] Because of the unusual nature of these arguments, I will attempt to address what I see as the specific issues, even though they were not necessarily framed as such by defence counsel:

1. At the time Ms. Allen provided her statement:
    (a) Was there a breach of her rights under ss. 10(a) or (b) of the *Charter*? Or,
    (b) Was there a breach of her right to remain silent under s. 7 of the *Charter*?
2. At the time of trial:
    (a) Is there a continuing breach of Ms. Allen's rights to counsel rights under ss. 10(a) or (b)? Or,
    (b) Is there a continuing breach of her right to remain silent under s. 7 of the *Charter*? Or,

(c) Is there any other breach of her “liberty” right under s. 7 of the *Charter*?

FACTS

[8] Ms. Allen and her son were placed under arrest outside her residence at approximately 2:08 a.m. on October 18, 2008. At that time, they both were told they would be charged with assault with a weapon, and on that basis they were advised of their *Charter* rights under ss. 10(a) and (b) and given the police warning that they need not say anything. Ms. Allen, who was observed by one of the witnesses to be in a hysterical state at the time, indicated that she wanted to speak with a lawyer.

[9] After being transported to the RCMP Whitehorse detachment, Ms. Allen was given an opportunity to speak with counsel on the telephone between 2:42 a.m. and 2:48 a.m.

[10] At about 3:15 a.m. a warned statement was taken from Douglas Allen, which was generally exculpatory of his mother.

[11] At about 5 a.m., the RCMP took at statement from Mr. Bullers at Whitehorse General Hospital.

[12] At about 5:30 a.m., the RCMP officers involved met to discuss the status of the investigation. It was then determined that the nature of the assault and the injuries sustained by Mr. Bullers constituted an aggravated assault *vis-à-vis* Douglas Allen. However, the information the police had at that time regarding Heather Allen was that she had either punched or slapped Mr. Bullers, and it was apparently determined that her charge would be reduced from assault with a weapon down to common assault.

[13] At 6:35 a.m., the lead investigator, Cst. Wright, met with Heather Allen in police cells and informed her that she was being investigated for assault and might be charged

with that offence. He then took Ms. Allen to the interview room to obtain the subject statement, commencing at 6:43 a.m. Cst. Wright began by reminding Ms. Allen that she had been arrested at about 2:00 a.m. for assault with a weapon. He re-Chartered and re-warned Ms. Allen. She chose to speak with counsel a second time and was given that opportunity. After returning to the interview room, Cst. Wright again informed her that she was being arrested for assault and may be charged with that offence. She was similarly told the same thing a couple of other times during the interview, including once by another officer. At one point, Ms. Allen confirmed her understanding that she might be charged with assault.

[14] Later in the morning of October 18, 2008, Ms. Allen was released from custody on a promise to appear and an undertaking to a peace officer. As stated, both documents alleged that she had committed an assault, contrary to s. 266 of the *Criminal Code*.

[15] On November 4, 2008, based upon a direction from the Whitehorse Crown prosecutor's office, the RCMP laid an information charging both Heather Allen and Douglas Allen with aggravated assault and assault with a weapon.

[16] A preliminary inquiry was held on June 29, 2009, and both accused were committed to stand trial on both counts.

[17] On August 3, 2009, an initial indictment was filed again alleging that both Ms. Allen and Douglas Allen had committed an aggravated assault and an assault with a weapon upon Mr. Bullers. However, there was an additional count against Ms. Allen of criminal negligence causing bodily harm. Ms. Allen's counsel strongly objected to the addition of this third count, following which the file was transferred to the present prosecutor, Noel Sinclair. Under Mr. Sinclair's carriage, the initial indictment was stayed and replaced by

an indictment filed September 22, 2009, which dropped the criminal negligence count and once again charged Heather Allen and Douglas Allen with aggravated assault and assault with a weapon.

[18] On the first day of trial, June 9, 2010, Mr. Sinclair filed a further replacement indictment in which the charges against Ms. Allen were reduced to common assault and aiding or abetting Douglas Allen in committing a common assault.

ANALYSIS

[19] On the question of the sufficiency of what Ms. Allen was told about the extent of her jeopardy at the time she provided her statement, counsel are agreed that the leading authorities are *R. v. Smith*, [1991] 1 S.C.R. 714 and *R. v. Evans*, [1991] 1 S.C.R. 869. The Supreme Court released these decisions within weeks of each other in the spring of 1991, with *Smith* coming down first.

[20] In *Smith*, the Crown conceded a violation of the accused's s. 10(a) right to be informed promptly of the reason for his arrest. With respect to the accused's s. 10(b) right to counsel, in order for him to meaningfully exercise the right, the Supreme Court held that he must possess knowledge of the extent of his jeopardy, and a lack of information in this regard can taint any related police warning. In addressing the question of whether the accused's waiver of his right to counsel was valid, McLachlin J., as she then was, speaking for the Court, said at para. 23:

> "In Canada, we have adopted a different approach. We take the view that the accused's understanding of his situation is relevant to whether he has made a valid and informed waiver. This approach is mandated by s. 10(a) of the Charter, which gives the detainee the right to be promptly advised of the reasons for his or her detention. It is exemplified by three related concepts: (1) the "tainting" of a warning as to the right to counsel by lack of information; (2) the idea that one is

> entitled to know "the extent of one's jeopardy"; and (3) the concept of "awareness of the consequences" developed in the context of waiver."

[21] Later, at paras. 27 and 28, McLachlin J. clarified that it is not a precondition for a valid waiver that "full information" be provided to the accused, nor that the police "precisely identify" the charge being faced. Rather, the emphasis should be on whether the accused was provided with sufficient information to understand the reality of the situation in order to make a decision on whether to waive his right to counsel:

> "It has never been suggested, however, that full information is required for a valid waiver. Indeed, if this were the case, waivers would seldom be valid, since the police typically do not know the whole story when the accused is arrested. Nor is the failure of the police to precisely identify the charge faced in the words of the Criminal Code necessarily fatal. In the initial stages of an investigation the police themselves may not know the precise offence with which the accused will be charged. Moreover, the words of the Code may be less helpful to a lay person than more common parlance in communicating the extent of jeopardy. Finally, the degree of awareness which the accused may be reasonably assumed to possess in all the circumstances may play a role in determining whether what the police said was sufficient to bring home to him the extent of his jeopardy and the consequences of declining his right to counsel.
>
> The question reduces to this: in this case was the accused possessed of sufficient information to make his waiver of counsel valid? To my mind, to establish [page729] a valid waiver of the right to counsel the trial judge must be satisfied that in all the circumstances revealed by the evidence the accused generally understood the sort of jeopardy he faced <u>when he or she made the decision to dispense with counsel</u>. The accused need not be aware of the precise charge faced. Nor need the accused be made aware of all the factual details of the case. What is required is that he or she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not. The emphasis should be on the reality of the total situation as it impacts on the understanding of the accused, rather than on

> technical detail of what the accused may or may not have been told." (my emphasis)

[22] In the subsequent case of *Evans*, the accused argued that his rights under ss. 10(a) and (b) of the *Charter* had been violated. The police suspected that the accused's older brother was involved in the killing of two women and that the accused had some knowledge of this. They initially arrested the accused on a charge of trafficking marijuana in the hope that he would provide some evidence against his brother. However, during the course of the interrogation, the accused became the principal suspect in the two murders. The police did not inform the accused that he was then being investigated for murder, nor did they repeat his right to counsel when his circumstances changed. McLachlin J., speaking for the majority, repeated her earlier statements in *Smith* that, with respect to a potential breach of s. 10(a) of the *Charter*, the focus should be on the substance of what an accused person is told, rather than the specific words used by the police. At para. 35, she said:

> "When considering whether there has been a breach of s. 10(a) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b)."

[23] On the facts in *Evans*, McLachlin J. held that the accused was aware that he was being questioned with respect to the killings and that the requirements of s. 10(a) had been met.

[24] With respect to the accused's right to counsel under s. 10(b) of the *Charter*, McLachlin J. addressed the informational component of the right, as well as the components relating to its implementation. At paras. 42 and 43, she said:

> "The jurisprudence establishes that the duty on the police to inform a detained person of his or her right to counsel encompasses three subsidiary duties: (1) the duty to inform the detainee of his right to counsel; (2) the duty to give the detainee who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay; and (3) the duty to refrain from eliciting evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel…
>
> The right to be advised of the right to counsel arguably arises at three points in the dealings of the police with the appellant. The first is the failure of the police upon arresting the appellant to take steps to assist him in understanding his right after he indicated he did not. The second is the failure of the police to reaffirm the appellant's right to counsel <u>when the nature of the investigation changed</u>. The third is the taking of a written statement after the appellant indicated that he would like to speak to a lawyer." (my emphasis)

[25] As is evident from the paragraph quoted immediately above, McLachlin J. found that the police failed to make a reasonable effort to explain the accused's right to counsel to him, when he indicated he did not understand that right. However, more relevant to the case at bar are McLachlin J.'s comments regarding failure of the police to reiterate the accused's right to counsel after the nature of their investigation changed. She pursued this latter point in greater details at paras. 47 and 48, and because her comments are particularly relevant to my analysis, I will set them out in full, despite their length:

> "A second violation of the appellant's s. 10(b) right occurred when the police failed to reiterate the appellant's right to counsel after the nature of their investigation changed and the appellant became a suspect in the two killings. This Court's judgment in *R. v. Black*, supra, per Wilson J., makes it clear

> that there is a duty on the police to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. This is because the accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge he or she faces. The new circumstances give rise to a new and different situation, one requiring reconsideration of an initial waiver of the right to counsel. On this point I prefer the judgment of *R. v. Nelson* (1982), 32 C.R. (3d) 256 (Man. Q.B.), to the decision in *R. v. Broyles* (1987), 82 A.R. 238 (C.A.). I add that to hold otherwise leaves open the possibility of police manipulation, whereby the police -- hoping to question a suspect in a serious crime without the suspect's lawyer present -- bring in the suspect on a relatively minor offence, one for which a person may not consider it necessary to have a lawyer immediately present, in order to question him or her on the more serious crime.
>
> I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. I do, however, affirm that in order to comply with the first of the three duties set out above, the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning." (my emphasis)

[26] The comments of Sopinka J. in *Evans* are also helpful. He concurred with the majority on the s. 10(b) issue, but found that s. 10(a) had been violated as well. With respect to the latter, he said this at paras. 2 and 4:

> "…In the case of s. 10(a), the right is to be informed of the reasons for the arrest or detention. The right to be informed of the true grounds for the arrest or detention is firmly rooted in the common law which required that the detainee be informed in sufficient detail that he or she "knows in substance the reason why it is claimed that this restraint should be imposed"…

...

> While in some circumstances the initial questions, which are put before an incriminatory response is obtained, may disclose the true ground for an arrest, in my opinion this is not such a case..." (my emphasis)

[27] Ms. Allen's counsel initially seemed to argue that, when the information that charged his client with aggravated assault and assault with a weapon was laid on November 4, 2008, there had been "a fundamental and discrete change in the purpose of the investigation" to use the language in *Evans*, and that somehow his client's rights under ss. 10(a) and (b) of the *Charter* had been retroactively violated. However, I challenged that proposition by referring to the language I have emphasised in the passages from both *Smith* and *Evans* that indicate that the relevant time to determine whether an accused has been properly informed of the reasons for her arrest, or has been properly informed of her right to counsel and been given an opportunity to implement that right, is when the accused makes the decision to waive the right to counsel. The same could be said of a waiver of the right to silence under s. 7 of the *Charter*. In the context of the case at bar, the relevant time for determining whether Ms. Allen's *Charter* rights were breached is when she was giving her statement to Cst. Wright on the morning of October 18, 2008. Indeed, when confronted on this point, Ms. Allen's counsel seemed to resile somewhat by confirming that he took no issue with the good faith of the RCMP in their dealings with Ms. Allen that morning. In other words, as I understood him, there was no disagreement that, when Cst. Wright told Ms. Allen that she was being investigated for an assault, and might be charged with that offence, that was legitimate information and, to use the words of Sopinka J. in *Evans*, that was then the "true ground" for her arrest. Viewed another way, what Ms. Allen was told at the time

she provided her statement was sufficient for her to decide whether to waive her right to silence under s. 7 of the *Charter*.

[28] Crown counsel initially submitted on this application that Ms. Allen's counsel seemed to have conceded that the RCMP met both the informational and implementational components of Ms. Allen's rights under ss. 10(a) and (b) of the *Charter*. Whether Ms. Allen's counsel intended to make that concession or not, I agree with the Crown's second point that the change in circumstances, arising from the direction of the Crown prosecutor's office to file the information on November 4, 2008, did not re-engage any obligation on the police or the state to seek out Ms. Allen to inform her of the increased charges and give her a further opportunity to consult counsel. Those obligations under ss. 10(a) and (b) of the *Charter* were only triggered upon Ms. Allen's arrest (or detention) and terminated as soon as she was released from police custody.

[29] This is another way of expressing my point above that the alleged breach of Ms. Allen's *Charter* rights must be placed in time, and that time was when she decided to waive her right to silence by providing a statement. Thus, contrary to the suggestion of Ms. Allen's counsel, the breach cannot arise retrospectively with the filing of the November 4th information.

[30] I also agree with the Crown's final point that, when Ms. Allen conceded that her statement was voluntary, she effectively conceded that her right to silence under s. 7 of the *Charter* had not been violated. As was noted in *R. v. Singh*, 2007 SCC 48, at para. 39, the common law confessions rule is effectively subsumed by the constitutional right to silence in circumstances where a person in authority (e.g. Cst. Wright) is interrogating a detained person, because, in such circumstances, the two tests are functionally

equivalent. While s. 7 may provide some “added value” to an accused by the residual protection afforded to the right to silence under s. 7 in certain circumstances (e.g. a statement to an undercover state agent), none of those circumstances exist in this case.

[31] Although Ms. Allen’s counsel alluded to an element of abuse of process in this case, he stopped short of squarely making that allegation. In any event, I do not see how such an allegation could have any merit since, in the end result, Ms. Allen is being tried with the very offence which she was told she was being investigated for when she gave her statement. While I am sympathetic to the fact that she was exposed to significantly greater jeopardy for over a year and a half while awaiting trial, there is no basis for suggesting that the type of egregious and unfair conduct or oblique motive on the part of the Crown necessary to ground an abuse of process is present in this case.

CONCLUSION

[32] At the time that she provided her statement to Cst. Wright on the morning of October 18, 2008:

a) Ms. Allen had been properly informed of the reason for her arrest, namely an offence of common assault;

b) Ms. Allen was properly informed of her right to counsel and was given an opportunity to exercise that right on two occasions prior to providing her statement;

c) Ms. Allen was effectively informed of her right to silence under s. 7 of the *Charter,* by being told she did not have to say anything to Cst. Wright; and

d) Ms. Allen made a fully informed right to waive her right to silence by providing a statement.

Therefore, there was no breach of her rights under s. 7 or ss. 10(a) or (b) of the *Charter*.

[33] Since the relevant time to determine whether there was a *Charter* breach was the time of the waiver and the statement, there is no continuing breach of any of Ms. Allen's *Charter* rights at the time of trial.

[34] As no other reason in law has been provided for ruling her statement inadmissible, Ms. Allen's application is dismissed.

Gower J.