IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R.*** v. ***Ashraf***, 2003 NSPC 042

Date: 20030909
Case No.(s): 1202696
1202697
Registry: Halifax

Between:

R.

v.

Nabeel Ashraf

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision on the Voir Dire rendered orally on September 9, 2003 in Halifax Nova Scotia
Counsel:	Eric R. Woodburn, for the Crown Roger A. Burrill, for the Defence

BY THE COURT

Introduction

[1] The accused, Nabeel Ashraf, and the complainant, Jing Zhang, were once dating, but he is now directed by a court order to have no contact with her. However, the complainant reported to the police that the accused had contacted and spoke to her and that she had not invited or initiated those contacts. The latest contact was in the ladies' washroom at a local university where they were both students. On his arrest, at the university campus, for the violation of the court order, the police chartered and cautioned the accused which he stated that he understood. Further, they informed him why they arrested him. He also told them that he had a lawyer whom he wanted to call. Nevertheless, when they placed him in the police vehicle to transport him to the police detachment by the most direct route, he asked them what he had violated. In response, the police, without any other comments or conversations, again informed him that the reason for his arrest was that he had violated his court order of no contact with the complainant. Without any encouragement or questioning from the police the accused spontaneously rejoined that he did have, on occasions, contact with the complainant.

[2] Admitting that his statements were voluntary the accused however seeks to exclude the statements on the basis that his section 10(b) ***Charter*** rights were violated as the police elicited conscripted information from him although they knew that he wanted to speak to a lawyer and before he had the opportunity to do so.

The Facts on the Voire Dire

[3] Constable Paul Cameron was the arresting officer. On his arrest and prior to placing him in the police cruiser the Constable informed the accused that he was under arrest for violating his undertaking. The Constable then read to the accused his ***Charter*** rights which he indicated that he understood and, when the Constable asked him whether he "wished to call a lawyer now?" He responded: "Yes, I have a lawyer." The Constable also read to the accused the police caution that he also indicated that he understood. However, when the Constable placed the accused into the police cruiser the accused asked him what he, the accused, had violated. Prior to the accused query, neither the Constable nor his partner, Constable Greg Beach, had asked the accused any questions or had any conversations with him. When he responded to the accused query of the violation, the Constable stated that he, the accused, had violated his conditions by having contact with the complainant. The following dialogue resulted:

Accused: I don't know what you are talking about.

Constable: You can't have any contact with [the] victim at all.

Accused: The only time I speak to her is when I have questions about the court case.

[4] The Constable said nothing more to the accused and no more conversation took place. They went to the police station by the most direct route where Constable Beach contacted a Legal Aid lawyer for the accused. After the accused had spoken to a lawyer he was released from the cells and held for court.

The Issue

[5] The issue for determination on the voire dire is whether the police breached the accused's section 10(b) ***Charter*** right to counsel.

The Law and Analysis

[6] A person who is arrested or detained has the right to decide whom that person wishes to retain as his or her lawyer. ***R. v. Ross***, [1989] 1 S.C.R. 3, S.C.J. No. 2., 91 N.R. 81 (S.C.C.). Further, such a person must be provided with a reasonable opportunity to exercise that right, and, except in cases of urgency or danger, the police must refrain from attempting to elicit evidence from the detainee until he or she has had that opportunity to retain and instruct counsel. ***R. v. Bartle*** (1994), 92 C.C.C. (3d) 289 (S.C.C.) per Lamer C.J.C. at 301; ***R. v. Brydges*** (1990), 53 C.C.C. (3d) 330 (S.C.C.) per Lamer J. at 340-341; ***R. v. Smith*** (1989), 50 C.C.C. (3d) 308 (S.C.C.) per Lamer J. at 313; ***R. v. Black*** (1989), 50 C.C.C. (3d) 1 (S.C.C.) per Wilson J. at 13-14.

[7] However, the authorities that I have canvassed appear to address only the issue of the detained person positively asserting the right to counsel and that right was ignored by the police who continued to question the detainee and thereby obtaining incriminating evidence. See for example, ***R. v Mannien*** (1987), 34 C.C.C. (3d) 385 (S.C.C.). Here, the Constable correctly informed the accused of his right to remain silent and as put by Lamer J., in Mannien at p.392:

> ...the main function of counsel would be to confirm the existence of that right and then to advise him as to how to exercise it. For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence.

[8] In this case however, the predicament is that after the accused had positively asserted his right to counsel under s.10(b) ***Charter***, and even though the police were about to ensure that

he had the opportunity to exercise that right, without any questioning, it was the accused who questioned the police to clarify or to explain further the reason for his arrest. Whether the accused diligently sought legal advice would therefore depend upon the context of the situation. See for example, ***R. v. Richfield*** [2003] O.J. No. 3230 (Ont. C.A.). Therefore, I think that as a general proposition, the proper administration of justice entails not only the right to counsel under s.10(b) ***Charter*** but also that the detainee reasonably understands, in all the circumstances of the case, that he or she has sufficient information under s.10 (a) ***Charter*** to permit him or her, to make a reasonable decision on whether to decline or to submit to arrest or whether or not to exercise the right to retain counsel. Each right must be considered in light of the other. ***R. v. Black*** [1989] 2 S.C.R. 138, 50 C.C.C. (3d) 1, 70 C.R. (3d) 97, ***R. v. Evans***, [1991] 1 S.C.R. 869, 63 C.C.C. (3d) 289.

[9] It would also appear that the element of reasonableness in providing the detainee with the opportunity to retain and instruct counsel excludes, as was alluded to by counsel for the accused, the absolute right to counsel of choice. Lamer J., expressed this view in ***Leclair and Ross v. The Queen*** (1989), 46 C.C.C. (3d) 129 (S.C.C.) at 135:

> Although an accused or detained person has the right to choose counsel, it must be noted that, as this court said in R. v. Tremblay (1987), 37 C.C.C. (3d) 565 (S.C.C.), a detainee must be reasonably diligent in the exercise of these rights, and if he is not, the correlative duties imposed on the police and set out in Mannien (1987), 34 C.C.C. (3d) 385 (S.C.C.), are suspended. Reasonable diligence in the exercise of the right to choose one's counsel depends upon the context facing the accused or detained person.

[10] Here, it seems to me that the police had a duty to ensure that the accused understood why he was arrested and to explain that reason, if requested to do so, in a manner that he understood. In my view, they are obliged to facilitate that understanding so that the accused may be fully informed and understood his jeopardy. It is therefore reasonable to infer and I do infer that when the police initially told him that he had violated his undertaking he was not sure what that meant hence his query to them to tell him what he had violated and what it all meant.

[11] The police, in my view, only explained to the accused the essence of the allegation supporting the arrest. They did not engage in any other conversation or any questioning of the accused. The Constable's explanation, on the accused's request, was not meant to elicit any involuntary answers or responses. It was merely the exercise of his duty to inform the accused of the reason for the arrest. The accused had already been given his rights to counsel and had been cautioned. Hence, it seems to me that after the initial contact and the reading of his ***Charter*** rights, the words "upon arrest or detention" in s10 (b) ***Charter***, when that

right must be given, would indicate a point in time and not a continuum. ***R. v. Logan*** (1988), 46 C.C.C.(3d) 354, 67 O.R. (2d) 87 (C.A.), affd on other grounds [1990] 2 S.C.R.731, 58 C.C.C. (3d) 391.

[12] Therefore, I think, following the Logan rationale, that once the accused was told of and understood his right to counsel and his right to remain silent when he was arrested and he had asserted the right to counsel, it does not give him a further right to be informed of his right to counsel and the opportunity to instruct counsel if he decides to engage the police in a conversation to clarify the reason for his detention. His rights have been engaged, so to speak and he was aware of them. He knew the extent of his jeopardy and his query was directly related to the investigation. It was a single incident in which the accused was made fully aware of his rights, and his statement, however unwittingly, was voluntary, unsolicited and spontaneous.

[13] Having admitted that his statement was voluntary, I find and conclude that the accused's statement was not the product of any direct or indirect compulsion. It was not tainted by the fact that he was unable to contact his lawyer of choice or that the police had questioned him. It is clear from the evidence that the police had no conversations with him before and after his utterances and, at the earliest opportunity, they did permit him, as he had requested, to speak with counsel.

Conclusion

[14] Consequently, I find that the police cannot be faulted for the accused's predicament and I do not find, in the circumstances, that they have violated his s.10(b) ***Charter*** right to counsel. Accordingly, I find that the statement is admissible.