

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GEORGE BETSAKA

Applicant

- and -

THE HONOURABLE JUDGE R.M. BOURASSA
and HER MAJESTY THE QUEEN

Respondents

An order in the nature of certiorari granted quashing a committal to stand trial by reason of procedural unfairness to the accused during the preliminary inquiry.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Heard at Yellowknife, Northwest Territories
February 3, 1995

Reasons filed: February 6, 1995

Counsel for the Applicant: J. Tarlton

Counsel for the Crown: L. Rose

REASONS FOR JUDGMENT

1 The accused is a 44 year old Slavey Indian from Nahanni Butte, N.W.T. He is charged with aggravated assault contrary to s.268 C.C. and also with failing to attend Court contrary to s.145(4) CC. On January 19, 1995 at Fort Liard N.W.T., following a preliminary inquiry in Territorial Court on the s.268 CC charge he was ordered to stand trial on that charge before a Supreme Court judge. He now applies for an order in the nature of certiori quashing that order to stand trial, and other relief.

2 The main ground advanced by the accused in support of his application is the refusal of the presiding judge to allow the accused to use his first language, i.e., the Slavey language, in the course of the preliminary inquiry.

3 The accused's complaint must, in fairness, be placed in context. He was originally charged with aggravated assault in May 1994. The allegation against him is serious - it is alleged that while intoxicated in Fort Liard in October 1993 he physically assaulted his adult sister causing her serious injuries including a broken back. His sister was confined to a wheelchair at the time of the preliminary inquiry last month.

4 The record indicates that the accused's case was on the Territorial Court docket on circuits to Fort Liard on June 23, 1994, August 11, 1994, October 6, 1994, December 1, 1994 and January 19, 1995. On June 23, 1994 the accused appeared without counsel and sought an adjournment to allow him to apply for a legal aid

lawyer. On August 11, 1994 he appeared with counsel and elected trial by Supreme Court judge. The preliminary inquiry was scheduled for October 6, 1994. On this latter date the accused did not appear in court and a warrant was issued for his arrest. He was arrested on October 8 and brought before a Justice of the Peace. He was now also facing a s.145(4) CC (failure to attend Court) charge. The Justice released him on signing a Promise to Appear in Territorial Court in Fort Liard on December 1, 1994. On December 1, 1994 the accused and his counsel appeared in Territorial Court. On that date the preliminary inquiry on the s.268 CC charge and the trial on the s.145(4) CC charge were scheduled for January 19, 1995.

5 On January 19, 1995 the Territorial Court apparently had a busy docket in Fort Liard. Court was held in an aircraft hangar beside the airstrip, presumably because the community hall was unavailable. A Slavey language interpreter was present in Court throughout the day until 4:00 p.m. and did do some translation in some of the cases on the docket.

6 The accused's counsel Mr. Shabala, had decided he wished to withdraw as counsel due to his inability to obtain a retainer from the accused.

7 During the morning of January 19, the accused's case was called by the clerk. I quote here from the transcript:

THE COURT: This is a matter for preliminary inquiry on a aggravated assault charge of maiming, and also a charge of failing to attend court.

MR. CLIFFE: It's a trial for the matter of failing to appear in court, Your Honour. There is a preliminary inquiry on the aggravated assault. The preliminary inquiry, as it relates to the aggravated assault, there's one witness. That witness has to be transported here, that person is in a wheelchair, so I would be asking that the matter be dealt with today and be dealt with at a specific time so that arrangements can be made to bring the witness to court. I would suggest that perhaps this afternoon at two o'clock, Your Honour, right at two, it is only a one witness preliminary inquiry.

THE COURT: I will set the preliminary inquiry this afternoon at two o'clock, Mr. Betsaka, do you understand, you have to be back in this building at two o'clock sober and ready to proceed because we are going to proceed with the preliminary inquiry. This is the fourth time you have been in court now, the fifth time, and it's going ahead whether you have a lawyer this afternoon or not, do you understand? Two o'clock.

THE ACCUSED: Yes, Your Honour.

8 Just prior to 2:00 p.m. the prosecutor, Mr. Shabala, and the local police officer, as a result of their conversations with the accused, determined that the accused had been drinking and appeared to be intoxicated. At 2:00 p.m. the case was called. The transcript:

THE CLERK: George Betsaka.

THE COURT: I take it you don't have a lawyer to assist you today Mr. Betsaka?

THE ACCUSED: No, Your Honour.

THE COURT: You haven't taken any steps to hire a lawyer?

THE ACCUSED: I do work right now, but I --

MR. SHABALA: Your Honour, I have been in contact with Mr.

Betsaka off and on for perhaps the last six months and I have repeatedly asked that he arrange for a retainer. I understand that he is gainfully employed, and he has not fulfilled my request and I have received no instructions from Mr. Betsaka. I would request that I be removed as solicitor of record.

THE COURT: Mr. Betsaka, you are charged with a serious criminal offence and it is going to go ahead ultimately whether you want to have someone take care of your interests or not, do you understand me?

THE ACCUSED: Yes, Your Honour.

THE COURT: This matter has been ongoing now since May of 1994. I am going to proceed with the preliminary inquiry date today. I will try and assist you as far as the law allows me to. Following the preliminary inquiry, depending on the results, the matter may be set for trial, do you understand?

THE ACCUSED: Yes, Your Honour.

MR. CLIFFE: Your Honour, just before the matter commences a concern was raised by my learned friend Mr. Shabala. Prior to convening court and as a result of information I had, I had the RCMP Constable Dosko talk to Mr. Betsaka, I have also talked to Mr. Betsaka, it is obvious that he has a smell of alcohol on his breath. Constable Dosko carried out two physical tests with respect to his sobriety and it is quite clear to Constable Dosko and myself, and I think it is fair to say my friend Mr. Shabala, that Mr. Betsaka has been drinking. He acknowledged in a conversation that he has had at least "one cup" is his words, but my concern is that the police officer says that he may have consumed more than just that. I give that information to the Court. I have some

concerns, of course, because he's unrepresented and he appears to have consumed alcohol whether the matter proceeds. I want it to proceed because this matter has such a checkered history; I think this is the second time the victim has come to court to deal with this matter.

THE COURT: The victim is in a wheelchair?

MR. CLIFFE: The victim is the one in the wheelchair, Your Honour.

THE COURT: How much have you had to drink, Mr. Betsaka?

THE ACCUSED: I had one drink before lunch, Your Honour, and I had dinner at the coffee shop.

THE COURT: How much did you have to drink, Mr. Betsaka?

THE ACCUSED: One drink.

THE COURT: Straight or mixed?

THE ACCUSED: Straight.

MR. CLIFFE: Your Honour, I am sitting here about five feet away from him and I can smell the alcohol emanating from him.

THE COURT: I am going to order you arrested, Mr. Betsaka, you are in contempt of court to come to court half cut or drinking on the date of your preliminary inquiry. I am going to cancel the process upon which you were released. The only thing I can do is set it over to tomorrow morning when the chief judge is here and he can do the preliminary inquiry tomorrow morning. It's unfortunate, it looked as though we would be finished today.

MR. CLIFFE: I appreciate that.

THE COURT: But there is nothing that can be done.

MR. CLIFFE: I appreciate that, Your Honour.

THE COURT: My apologies to the witness, the victim, who has been brought here again to testify. Mr. Betsaka will be kept in custody and he'll have to try and get out, it will be up to him. Ten o'clock tomorrow morning for preliminary inquiry.

9 Sometime after 4:00 p.m. after concluding all of the other matters on the docket, the Territorial Court judge decided to reconvene court at 7:30 p.m. to ascertain if the accused was sober and if his preliminary inquiry and trial could proceed at that time. Court reconvened at 7:30 p.m. The transcript:

THE COURT: This is the matter of George Betsaka, who is before the court on a charge of maiming Corrine Timbre. This is the continuation of a matter we started earlier today when Mr. Betsaka appeared to be drunk in court. He appears to be sober at this point.

Mr. Betsaka is unrepresented by counsel. I note the comments that Mr. Shabala made earlier today about being removed from the record as counsel. I note as well that this is the second time that the matter has been scheduled for preliminary inquiry and the accused has not been prepared to go ahead. In my view there is some element of delay here and I am going to proceed with the preliminary inquiry.

Mr. Betsaka, the preliminary inquiry is to determine whether or not there is sufficient evidence against you which would justify a trial. Do you understand that this is not a trial but only to see if there is enough evidence, or as the Criminal Code says, sufficient evidence that you should go to trial, do you understand?

THE ACCUSED: Yes, Your Honour.

THE COURT: Do you understand that you are charged with an offence of aggravated assault on one Corrine Timbre, which is the Corrine Timbre who is in this courtroom?

THE ACCUSED: Yes, Your Honour.

THE COURT: Swear her in, please.

10 After the prosecutor finished his direct examination of the Crown witness, the following exchange occurred between the Territorial Court judge and the accused:

THE COURT: Mr. Betsaka, you have an opportunity to ask questions of this witness if you want to ask questions. I don't want you to argue with the witness, but if you want to ask any questions that might help clarify what happened that night, you may ask questions.

THE ACCUSED: I didn't quite understand what you mean?

THE COURT: If you want an opportunity, if you wish to ask questions of this witness you can do so now. If there are any questions that you want to put to her that might help you understand or explain what happened that night, this is your opportunity to put those questions. Go ahead if you want to.

THE ACCUSED: Could I talk Slavey?

THE COURT: Talk to who?

MR. CLIFFE: Talk Slavey, Your Honour.

THE COURT: No.

THE ACCUSED: No questions.

11 Subsequently the Territorial Court judge, after addressing the accused as required by s.541 CC, ordered him to stand trial in Supreme Court on the aggravated assault charge.

For many years it has been the practice of the courts of this jurisdiction to allow an aboriginal person - whether an accused or a witness - to use an aboriginal language during court proceedings. Interpreters have been provided to permit an accused person

to be effectively present at his trial, to understand the proceedings, and to make full answer and defence. This was standard practice in the courts of this jurisdiction even before the advent of the Charter of Rights and Freedoms in 1982 and before the Territorial legislature enacted statutory provisions in that regard in 1990.

12 When a judge presiding at a trial or preliminary inquiry is presented with a request by an accused person for an interpreter, or for permission to speak in his first language, it is incumbent on the presiding judge, if the request is not immediately granted, to conduct an inquiry into the *bona fides* and reason for the request. In the present case the presiding judge did not do so but simply refused the accused's request to speak in his first language. With this summary refusal the presiding judge denied procedural fairness to the accused, in my respectful view, resulting in a denial of natural justice which taints the order to stand trial.

13 For these reasons the order to stand trial is hereby quashed. It will be necessary to conduct a fresh preliminary inquiry.

14 In view of my ruling on the language issue, it is not necessary for me to deal with the other complaints raised on this application with respect to the conduct of the preliminary inquiry.

15 I do not find any merit in the application for other forms of relief, i.e., an order for the immediate release of the accused, an order of prohibition, and a judicial stay of proceedings.

16 At the end of the day on January 19, 1995 in Fort Liard, the presiding judge adjourned the trial on the s.145(4) CC charge and also the matter of the accused's continued detention pending his trial on the s.268 CC charge until January 24 at Yellowknife (and remanded the accused in custody until that time) to specifically allow the accused the opportunity to obtain new counsel and to prepare for a bail hearing. In doing so, the presiding judge acted reasonably and within his jurisdiction, in my view. I understand that on January 24, those matters were further adjourned pending the within application. I see no reason why those matters should not now proceed in Territorial Court in the normal course.

17 An order in the nature of certiorari will issue quashing the order to stand trial on the s.268 CC charge. The balance of the relief requested in the Notice of Motion dated February 1, 1995 is denied.

J. E. Richard
J.S.C.

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Reasons filed: February 6, 1995

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Counsel for the Crown: L. Rose

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