CR 02518

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN

Transcript of the Ruling Delivered by the Honourable Mr. Justice M. M. de Weerdt, sitting at Yellowknife in the Northwest Territories, on Wednesday, November 9th, A.D., 1994.

APPEARANCES:

MR. P. MARTIN Q.C.:
MR. D. GUENTER: Counsel for the Crown

MR. G. ORRIS Q.C.:
MS. G. BOOTHROYD: Counsel for the Defence

THE COURT: Crown counsel has taken objection to questions posed in cross-examination of a Crown witness as to that witness's knowledge of the content of police interviews with the accused other than those respecting which the Crown has led evidence in-chief during the trial.

I ruled on a similar objection earlier in the trial. At that time I ruled that the content of those other interviews was not to be made the subject of inquiry during cross-examination of the Crown's witnesses. However, I permitted counsel for the accused to ask the Crown's witnesses questions as to the statement dates, times, durations and places of such other interviews, and as to the names and ranks of any of the interviewers.

What is sought by counsel for the accused at this point is a modification of that earlier ruling which will allow him to cross-examine Sergeant G. T. McMartin, at present a Crown witness before the court, as to the content of any or all of those other interviews.

It is apparent that Sergeant McMartin does not have direct knowledge as to the content of those other interviews. At best he may have a recollection of having heard a tape recording or of having read a transcript of a tape recording of one or more such interviews. He neither took part in nor monitored the

interviews in question.

It should be noticed that the Crown has at this point in the trial introduced evidence of three interviews between a police officer and the accused. These were held in September and October, 1992. The other interviews, all of which have been ruled admissible at trial, took place following those three, and prior to Sergeant McMartin's interview with the accused on October 15, 1993.

There is no difficulty in respect of the three interviews of which there is evidence now before the jury. The difficulty lies in respect of the other interviews leading up to Sergeant McMartin's interview on October 15, 1993.

The content of all the interviews prior to that held on October 15, 1993, is exculpatory of the accused, who is before the court charged with nine counts of first degree murder, and the content of the first part of that October 15, 1993 interview is likewise exculpatory. However, the content of the second part of that interview, although it begins as exculpatory, ends with a confession that the accused set the explosive device which killed the nine individuals who are named in the indictment.

As I understand the position of the accused, it is that he is entitled to elicit evidence from Sergeant McMartin as to the factual basis upon which he,

Sergeant McMartin, formed the opinion that the accused was lying in his previous statements to the police, and furthermore, that the accused was responsible for the fatal explosion. Sergeant McMartin made his opinions or conclusions on each of those two points emphatically explicit when he was interviewing the accused on October 15, 1993. It is open to the jury to conclude that what Sergeant McMartin said, though not itself evidence of anything else, nevertheless is evidence of the circumstances in which the accused finally made his alleged confession. And that is a circumstance which the jury should no doubt consider when weighing and considering the evidence of the alleged confession.

It is the accused's position as declared by his counsel that the alleged confession is false. Furthermore, it is submitted by counsel for the accused that he is entitled to adduce evidence, in the course of cross-examining the Crown's witnesses, of those other interviews - beyond the very restrictive limits allowed by my previous ruling. It is his submission that the jury must be permitted to learn in this way that Sergeant McMartin was not the first police investigator to confront the accused with allegations that he was untruthful and that he was a suspect in their investigation of the offences now charged against him. And he contends that the accused

is entitled not only to bring this out from the Crown's witnesses, but also, likewise, bring out the accused's responses to those earlier allegations.

In addition, counsel for the accused seeks to show, from the evidence of those earlier interviews, what was the mental state and the understanding of the accused as to his situation in relation to the police investigation on October 15, 1993. That understanding was, it is presumably intended to be shown in a significant way, the product of those earlier interviews when the accused was led to believe that he would remain a police suspect in the case unless he cooperated fully with the investigators and the Attorney General (of whom Sergeant McMartin was obstensibly a senior representative).

There are approximately a dozen interviews in the category to which counsel for the accused wishes to refer in cross-examining Sergeant McMartin and other police witnesses. A week was taken during the voir dire to hear the tape recordings and related evidence of some of those interviews.

In addition, I spent many hours reading the transcripts of those tape recordings which were not heard during during the voir dire, although they were made part of the voir dire evidence.

There is, therefore, a considerable bulk of evidence which could be made the subject of reference

by counsel for the accused if I should rule against Crown counsel's submission that no such reference is permissible as a matter of law.

Apart from the volume of this additional evidence, Crown counsel asks me to consider the timing of the accused's proposed course of action. We are now in the third week of the trial. And the first inkling of the Defence intention to refer to those other interviews in the course of cross-examination was not given until late last week when I made my earlier ruling. Crown counsel takes the position that this course, if taken by the Defence, could possibly disrupt the Crown's presentation of its case if that were to be permitted by the court.

We have reached a stage of the trial where the jury have heard a tape recording of the alleged confession during the examination-in-chief of Sergeant McMartin. To now allow counsel for the accused to engage in a lengthy and potentially confusing cross-examination of Sergeant McMartin as to statements made by the accused to police or by police to the accused, on any of about a dozen or so occasions, would in Crown counsel's submission be not only wrong in law but potentially very damaging to the due presentation of the prosecution's case.

The issues are clearly critical. Counsel on both sides have referred me to various authorities. I

therefore took a few hours to consider the matter, and have now reached my conclusions.

First, as to the timeliness of the matter, let me say that I do not fault counsel for the accused for remaining silent as to his intentions until now. However, given my earlier ruling, I should have expected him to have made a motion in the absence of the jury for a variation of that ruling before proceeding now with any question in his cross-examination touching upon Sergeant McMartin's knowledge or conclusions in reference to the other interviews, giving some advance notice to Crown counsel and the bench of his variation motion with some indication of the basis for it.

I accept that the basis on which I am now asked to vary that ruling was not before me earlier, although I did at that time consider the rule that exculpatory statements may be referred to in cross-examination where they are inextricably linked to or form part of an inculpatory statement placed in evidence before the jury by the Crown. And I recognized in my earlier ruling that the fact that there had been other police interviews may properly be elicited in the cross-examination of police witnesses who have direct knowledge of those interviews provided that no attempt is made to refer to the contents of those interviews.

It requires no more than to mention it that

evidence of a statement made by the accused out of court, sought to be given by someone else in the course of testimony, is inadmissible at the trial of the accused for the truth of the contents of that statement, unless the evidence is adduced by the prosecution or for the purpose of showing that the testimony given by the accused is not a recent fabrication. This is so whether or not the statement was made by the accused to a person in authority, though that is usually the situation.

It has been held in the English case of **R. vs. Willis** (1960) 1 W.L.R., 55, Court of Criminal Appeal, that evidence of a statement made by the accused may be placed before the jury where the purpose for doing so is not to establish the statement as true, that is to prove the truth of its contents, but where it is instead sought to show what was accused's state of mind at some other time. Counsel for the accused argues, on the basis of that case, that he is entitled to adduce evidence of the statements made by the accused during the other interviews - not to prove the truth of those statements, but to show the accused's state of mind on October 15, 1993.

Reliance is also placed by the accused on the English case of **R. vs. Gerald Joseph McCarthy** (1980) 70 Cr. App. Rep. 142, where it was held, and I quote:

"One of the best pieces of evidence that an innocent man can produce is his reaction to an

accusation of a crime. If he has been told, as the appellant was told, that he was suspected of having committed a particular crime at a particular time and place, and he says at once "that cannot be right because I was elsewhere", and gives details of where he was, that is something which the jury can take into account."

Although such a statement, being exculpatory, can be regarded with suspicion as self-serving and as coming out only in the cross-examination of a Crown witness and not from the accused himself, it appears that evidence of the statement is allowed on the basis that it is received to rebut any suggestion of recent fabrication and not simply for its truth. It appears from the head note that failure to call upon the accused to testify in such a case might be made the subject of comment by the bench in England. This, however, is not permissible in Canada.

A classic statement of what is meant by "hearsay" in our law, is contained in the often quoted words of Lord Radcliffe in the advice given to Her Majesty by the Judicial Committee of the Privy Council in **Subramaniam vs Public Prosecutor** (1956), 1 W.L.R., 965, on appeal from the Supreme Court of the Federation of Malaya. The passage to be noted is at page 970, and it reads as follows:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement

was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

Notice may also be taken of the remarks made by **Wigmore on Evidence (Chadbourn Edition)** at paragraphs 1144 and 1732. At 1144 I read:

"Accused's consistent exculpatory statements. It would seem that, in a liberal view of the principle of paragraph 1129 supra, the statements of an accused person made before or the upon accusation made (i.e., before motive for deliberate contrivance could have operated), should be receivable, whether or not he becomes a witness. Probatively, an accused person's protestations of innocence, made in such circumstances, seem to have, for anyone inquiring without prepossessions as to the rules of evidence, a value similar to the class of statements dealt with in paragraph 1129. Moreover, they serve to repel (as in the cases of preceding section) the inference from silence (paragraph 284 supra). Most courts dismiss them as ordinary hearsay assertions; this result seems harsh and needless. But a few courts indicate a willingness to accept them.

An accused's statements may of course be admissible under other principles - for example, as exculpatory parts of a confession, as statements of a mental condition or as spontaneous exclamations; his conduct indicating consciousness of innocence may also be admissible.

What has been said elsewhere as to the illiberal and over-technical judicial treatment of similar questions, may be urged again here."

Then in part, paragraph 1732, beginning at page 159:

"It has here been argued that the party must not be allowed to "make evidence for himself." But this objection applies equally to many classes of statements under the present exception, and is yet not thought of as fatal. Moreover, the notion of "making," that is "manufacturing" evidence assumes that the statements are false which is to beg the whole question."

There is more, but I think that states the essence of it.

R. vs. Willis is quoted in the unanimous judgment of the Supreme Court of Canada in **R. vs. Simpson and Ochs** (1988) 38 C.C.C., (3d), 481 at page 497 for the proposition that:

"... provided that the evidence as to his state of mind and conduct is relevant, it matters not whether it was in regard to the conduct at the time of the commission of the offence or, as here, at a subsequent time to explain his answers to the police and his conduct when charged."

That quotation appears in the following context beginning at page 496:

"As a general rule, the statements of an accused person made outside court - subject to a finding of voluntariness where the statement is made to one in authority - are receivable in evidence against him but not for him. This rule is based on the sound proposition that an accused person should not be free to make an unsworn statement and compel its admission into evidence through other witnesses and thus put his defence before the jury without being put on oath and being subjected, as well, to cross-examination. It is, however, not an inflexible rule, and in proper circumstances such statements may be admissible; for example, where they are relevant to show the state of mind of an accused at a given time or to rebut the suggestion of recent fabrication of a defence. The first exception has been recognized in the authorities and in the text writings. In Phipson on Evidence, 13th ed. (1982), paragraphs 7 - 34 the following appears:

"Whenever the physical condition, emotions, opinions and state of mind of a person are material to be proved, the statements indicative thereof made at or about the time in question may be given in evidence. In the case of physical condition or emotions, if they were the natural language of the affection, whether of body or mind, they furnish original and satisfactory evidence of its existance,

and the question whether they were real or feigned is for the jury to determine"."

On behalf of the Crown, I am referred to a number of authorities including **R. vs. Waddell** (1975) 28 C.C.C (2d) 315, (B.C.C.A.). It is noteworthy that McIntyre J.A. (as he then was) is the judge who delivered the unanimous judgment not only for the British Columbia Court of Appeal in this case, but for the Supreme Court of Canada in **R. vs. Simpson and Ochs**. The general statement of the law in the **Waddell** case must therefore be read along with the qualifying remarks to be found in **Simpson and Ochs**, which is not only a later decision, but one of higher authority.

Crown counsel has also referred me to **R. vs. Keeler**, (1977) 36 C.C.C. (2d) 8, (Alta S.C. App. Div.). Once again, this is a decision to exclude an accused's out of court statement as evidence of its truth when it was not led by the Crown. Like the **Waddell** case which turns on the same point, this case must be understood as being qualified by the decision of our highest court in **R. vs. Simpson and Ochs**.

Crown counsel has mentioned **R. vs. Hobbins**, (1982) 66 C.C.C. (2d) 289, (S.C.C.) as an example where the police obtained two statements from an accused two months apart. The first of these statements was ruled inadmissible, given the circumstances. It was argued that the second statement had been tainted

by the first. That argument was rejected, Laskin C.J.C. saying at page 293:

"There can be no hard and fast rule that merely because a prior statement is ruled inadmissible a second statement taken by the same interrogating officers must be equally vulnerable. Factual considerations must govern, including similarity of circumstances and of police conduct and the lapse of time between the obtaining of the two statements."

The **Hobbins** case does, however, recognize the importance of an accused person's state of mind when making a statement to the police. At page 292, Laskin C.J.C. noted and I quote:

"There is no doubt that the state of mind of the accused is relevant to the admissibility of a statement made by him to the police after interrogation, and even if he has been cautioned, as was the case here in respect of the second statement".

I do not understand that there is any issue of tainting in the matter now before me. What is sought to be shown is not tainting, which would affect the admissibility of the accused's statement, but only prior police conduct which will be relied upon by the accused as affecting his mental state and understanding on October 15, 1993.

In **R. vs. Campbell** (1977), 38 C.C.C. (2d) 6, (Ont. C.A.), Martin J.A. considered a point which is somewhat similar to the point now before me, and did so at some length, but in a context where it is quite clear that the accused's self-serving out of court statements were being sought to be placed in evidence at trial to rebut an inference of recent fabrication,

and not, as here, to show the state of mind of the accused on a subsequent occasion.

Mr. Justice Martin's decisions are very highly respected, and certainly anything he has put his pen to is worth reading, but what he has stated in the case is rather long so I shall simply say that I have read in particular what he had to say beginning at page 17 on the question of whether the trial judge in that case erred in rejecting evidence of an appellant's previous statements. Let me say that I have found nothing in what Mr. Justice Martin said in that case which takes away anything of what I have already said and so I shall refrain from repeating it here.

I have also examined **McWilliams Canadian Criminal Evidence, Third Edition**, Chapter 12, page 12-1 referring to the **Campbell** case, page 12-3 dealing with certain exceptions to the general rule, referring again amongst other things to the **Campbell** case; page 12-5 where again there is reference to **Campbell** and other cases; page 12-6 dealing with the whole line of cases referred to in **Waddell** and other authorities; but I shall not read those in here.

I have also had the advantage, thanks to Crown counsel providing me with a copy of **Ewaschuk's Criminal Pleadings and Practice in Canada**, from I suppose we could call it Title 16:18010, **Self-Serving**

Evidence (Prior Consistent Statements), in which a number of the authorities that have been mentioned are digested. I propose therefore to rule as follows. Before I do, I will just add I have also looked at the references to Salhany's valuable book on **Evidence in Criminal Cases**, and **Phipson on Evidence**.

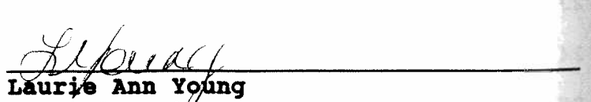
To my ruling. First of all, and this is perhaps a narrow point, I rule against any cross-examination if the witness is unable to testify from his own knowledge with respect to the matter under examination. Sergeant McMartin, it is quite clear, had not met the accused prior to October 15th. His only knowledge of the statements made by the accused prior to that date came to Sergeant McMartin through various channels, the details of which are not known to me and which are unimportant for present purposes. It seems that he can only give hearsay, second or third removed at best, intermingled with opinions and conclusions which are of no value in evidence.

Secondly, there shall be no cross-examination of Crown witnesses as to other statements than those now before the court or to be adduced at the instance of the Crown except to the limited extent that the cross-examination will reveal evidence of the accused person's state of mind on October 15, 1993, to the extent that his words or actions are revealed to have been influenced thereby.

For example, if it is sought to show his reasons for cooperating with the police, or his reasons for not showing any physical or verbal reaction or his demeanor, attitude and conduct during the October 15th interview. In other words, Mr. Orris, I do not see that this court should have to hear or read all the interviews. Far from it, but if there is anything which is of the kind that I have mentioned, then I will ask you in the absence of the jury to indicate it to me so that I may rule as to whether or not cross-examination may be pursued on that particular point.

I hope that makes it simple and clear, but should you wish to address me further on either the Crown's side or the Defence side, I will be pleased to hear from you.

Certified correct to the best of my skill and ability,



Laurie Ann Young
Court Reporter