CR 02265

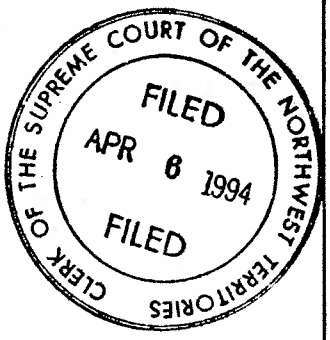
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

RUDOLF MINGILGAK



Transcript of the Voir Dire Ruling delivered by The Honourable Mr. Justice J.Z. Vertes, sitting at Yellowknife, in the Northwest Territories, on February 25th, A.D., 1994.

APPEARANCES:

MS. L. CHARBONNEAU: Counsel for the Crown

MR. T. McCAULEY: Counsel for the Accused

On this voir dire the Crown seeks rulings as to the admissibility of certain statements and a video re-enactment made by the accused to persons in authority.

The accused is charged with second-degree murder in the death of Peter Kokliak at Cambridge Bay on February 20th, 1993. I have had the benefit of detailed evidence relating to the circumstances of the taking of the statements and making of the video. I will simply summarize it here.

The accused was arrested at his residence shortly after 6 p.m. on February 20th. He was heavily intoxicated at the time. The accused was lodged by himself in a cell at the R.C.M.P. detachment.

At approximately 10 p.m., Corporal Stiles went to the accused's cell. He advised the accused of his rights at that time but it appeared to the officer that the accused was still intoxicated and disinterested in what the officer was saying.

Shortly after 2 a.m., the accused was taken out of his cell for a breathalyzer test. He was then in a more sober condition. During this procedure the accused was advised by Corporal Stiles that he was to be charged with manslaughter and then he was told by Corporal McCambridge that he may be charged with murder. Both officers then explained to the accused his right to counsel and gave him the warning as to

his right to remain silent. This was done by reading the formulaic wording from a card and then by breaking it down into laymen's language. Both officers formed the clear impression that the accused did not understand what they were saying.

Corporal Stiles then made efforts to obtain the services of an interpreter. The accused, suffice to say, is an Inuk of what appears to be middle age. He speaks the Innuinaktun language.

The first interpreter located by the officer did not speak the accused's dialect. The officer then located John Komak to act as interpreter.

Mr. Komak has significant training as an interpreter and works for the government's Language Bureau. I am satisfied as to his ability. I am also satisfied by his evidence that he was given no instructions or directions by the police other than, as he put it, to act as a "communication link" between the accused and the police. He was to translate only what was said back and forth. I am satisfied that is what he did. There has been no evidence to call that conclusion into question.

Mr. Komak arrived at the detachment shortly before 4 a.m. He met with the accused, Corporal Stiles, and Corporal McCambridge in an interview room. The accused appeared sober. Corporal Stiles then proceeded to explain the right to remain silent, the

right to counsel, and the reason for his arrest to the accused through the interpreter. All of what was said is recorded on a cassette tape (Exhibit 13) and in a written transcript (Exhibit 14).

The accused said he wanted to speak to a lawyer. He and the interpreter were then taken to another room, left alone, whereupon the accused telephoned a lawyer (Mr. McCauley as it turned out). The accused spoke to the lawyer, with the assistance of the interpreter. I am satisfied that Mr. Komak did not disucss anything related to this discussion with the police officers. At one point Corporal Stiles also spoke to the lawyer and advised him of the accused's status. The telephone call lasted approximately 25 minutes. The accused was then taken back to his cell.

The first statement sought to be ruled admissible is one taken between 2:04 p.m. and 3:05 p.m. at the detachment. The accused was interviewed, again with the assistance of Mr. Komak, by Corporal White and Corporal McCambridge. The interview was recorded on a cassette tape (Exhibit 15) and transcribed (Exhibit 16).

The interview began with a repetition of the charge and the right to counsel as well as the right to remain silent. The accused is repeatedly asked, through the interpreter, if he understands and each time he responds "yes".

During the course of this interview the accused produced a drawing of a knife (Exhibit 17). On part of it, he may have been assisted by Corporal McCambridge. The Crown asks me to rule the drawing admissible as well.

Shortly before 5 p.m., the accused was taken back to his residence. There, in the presence of Corporal McCambridge and the interpreter, he answered questions and went through a re-enactment of the alleged crime. This was recorded on video by Corporal Forsythe. A copy of the videotape (Exhibit 18) and a transcript (Exhibit 19) were provided to me. This ended at 5:15 p.m.

Later that same evening, around 6:30 p.m., at the detachment cell block, the accused was shown a knife. The evidence was that Corporal McCambridge said to the accused: "Vern (meaning Corporal White) is going to show you a knife. Tell me if that's the one.". At that point, Corporal White shows a knife to him and the accused said, "Yeah that one.". Corporal White then asked him, "Is that the one you stabbed him with?", and the accused nodded his head.

The interpreter was not present during this exchange.

This utterance at 6:30 is the third statement which the Crown seeks to be ruled admissible.

For any statement by an accused to persons in

authority to be ruled admissible, it must be the result of a conscious, considered decision freely made by the accused who knew that he had the choice to speak to the authorities or not or to answer their questions. I have to be convinced beyond a reasonable doubt that this is the case: R v. Hebert (1990), 57 C.C.C. (3d) 1 (S.C.C.).

The statement must be the result of a choice made by the accused to speak to the police. The factors that must be considered are:

- the absence of any hope of advantage or fear of a threat;
- the lack of any form of coersion or improper influence;
- the accused is shown to be in possession of his mental faculties;
- the accused was aware of the general nature of the extent of his jeopardy;
- the accused was aware that he had the right to remain silent; and,
- the accused was able to obtain advice in order to exercise his right and to make an informed choice.

These factors are demonstrated by the usual police cautions and by evidence that the accused's right to consult counsel and to be informed of this right have been respected.

In this case, the defence does not raise any issue as to the traditional test for voluntariness in that there is no allegation of any threats, promises, or inducements.

I am satisfied that, if one examines the entire sequence of events, the police acted appropriately in their dealings with the accused.

Once the officers suspected that the accused had difficulty with the English language, they made arrangements for an interpreter. The accused was made aware of the charges he was facing. The accused exercised his right to consult with counsel.

No issue has been raised by the defence as to the police questioning of the accused after he consulted counsel. In my opinion no such issue can be raised in the circumstances of this case.

First, there is no evidence of what advice was conveyed to the accused by his counsel. The only evidence as far as counsel's conversation with Corporal Stiles is that of the officer who said that he advised Mr. McCauley of the accused's status. There is no evidence that the police were told not to question the accused.

Second, there is no rule forbidding police questioning of an accused after he has consulted counsel or in the absence of counsel. As stated by Madam Justice McLaughlin in the Hebert case (at page

41):

> "...there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence."

In this case, the police informed the accused of his right to counsel, gave him an opportunity to exercise the right without delay, and refrained from eliciting evidence from the accused until he had the opportunity to consult with counsel. Thus they have satisfied the duties imposed on them by the constitution: Evans v. R. (1991), 4 C.R. (4th) 144 (S.C.C.).

With respect to the statement made at 2 p.m., I rule that it is admissible. The necessary cautions were repeated by the police and, at one point, the accused was told, "If at any time you want to talk to that lawyer or any other lawyer all's you have to do is ask and we will make that available to you.". There is no suggestion that the accused did not understand his rights or his situation. He was now in a more sober condition, he had the assistance of an interpreter, and he had already talked to a lawyer.

With respect to the drawing made during this

interview, that too is admissible. It is part of and flows from the interview. Any concerns about its accuracy and who drew what part are matters of weight for the jury.

With respect to the videotaped re-enactment, defence counsel argues that it should be ruled inadmissible because the police failed to respect an expressed desire by the accused to remain silent.

In the re-enactment, the police again caution the accused. Then early on the accused says (through the interpreter): "I got no more comment..." and "I got no more comments, other than what I've already said today.". The police officer then carries on and asks another question to which the accused replies readily and the re-enactment carries on.

Defence counsel submits that the only conclusion to draw from these comments is that the accused did not want to say anything further. Crown counsel, however, says that this is a wrong interpretation. She says that the only reasonable interpretation of these comments is that the accused has no more to say (in the sense that he is "unable" to say anymore not that he is "unwilling" to do so). She says that any doubt on that point should be erased by the accused's willing continued participation in the re-enactment.

This submission raises the issue of "waiver" of his rights by the accused. An accused may explicitly

or implicitly by words or conduct waive his constitutional rights. Such a waiver, however, must be premised on a true appreciation of the consequences of giving up that right: R v. Manninen (1987), 34 C.C.C. (3d) 385 (S.C.C.).

In this case the accused continued to participate in the re-enactment. By this time he had been cautioned repeatedly and his rights were repeated to him. He had consulted a lawyer. I can conclude only that he had implicitly waived any reliance on his right to remain silent.

Furthermore, when these comments are looked at in context, I agree with Crown counsel's interpretation of them. They are made right after the accused said: "Cause I got drunk so fast here I can't remember anything after that." Clearly when the accused says, "I got no more comments", he is saying that he cannot remember anything more.

In the circumstances I rule the videotaped re-enactment to be admissible.

Finally, with respect to the exchange in the police detachment at 6:30 p.m., defence counsel says that it should be kept out because (a) the accused was not cautioned, and (b) there was no interpretation.

With respect to the lack of a further caution, Crown counsel draws my attention to the comments by Mr. Justice Richard in R v. Keyookta, (1993) N.W.T.R.

380 (S.C.) at page 397:

> "There is no rigid rule which requires that an accused person be reminded of his right to remain silent every time a person in authority speaks to him. The necessity and frequency of such a caution will depend on the circumstances of the particular situation."

In the circumstances of this case the lack of a repeated caution is not fatal. The accused was advised of his rights several times since four o'clock that morning.

What does bother me is the lack of interpretation.

There is ample evidence to conclude that the accused is not competent in the English language. The fact that this exchange was conducted in English raises the question of whether the accused's responses could be said to be those of an "operating mind" in the sense of the accused's capacity to understand what he was responding to and what he was saying.

On this point Crown counsel points to other evidence where the accused, during questioning, answered brief and direct questions put in English with a "yes" or a "no" before the question was interpreted. Thus it cannot be said that the accused has no understanding at all of the English language.

Crown counsel also refers to the case of R. v. Lapointe & Sicotte (1983), 9 C.C.C. (3d) 366

(Ont. C.A.), affirmed by S.C.C. at (1987) 35 C.C.C. (3d) 287. That case says that, where an issue arises as to the capacity of the accused to speak and understand the language in which he is being questioned, the only determination on a voir dire is whether the accused's understanding and ability to communicate was so deficient that it was impossible for the accused to have understood the police or to have made any statements in the language he is being questioned. Authenticity and reliability of the statement are not relevant to admissibility and the accused's capacity to make a statement, by reason of language difficulties, is to be determined by the trier of fact.

I do not disagree with these general propositions but they must be applied in the context of each particular case.

For example, in the case of R. v. Vanstaceghem (1987), 36 C.C.C. (3d) 142, the Ontario Court of Appeal considered a case where a French-speaking accused, asked to take a breathalyzer test, was informed of his rights in English by an English-speaking officer. There the Court held that it is by no means sure that such person understood the nature of his rights.

In this case there is ample evidence that everyone was sensitive to the language problems

encountered in speaking to the accused. The police did an admirable job in securing the assistance of an interpreter. While the exchange at 6:30 p.m. was very brief, almost spontaneous, those concerns about language are just as alive then as they were earlier.

I am not sure by any means that the accused was able to comprehend the meaning and import of what he was asked or what he responded. On this point I have a doubt and such doubt must be exercised in favour of the accused.

Therefore the evidence relating to the exchange between the accused and Corporal McCambridge and Corporal White at 6:30 p.m. is ruled inadmissible.

(VOIR DIRE RULINGS CONCLUDED)

Certified Pursuant to Practice Direction #20 dated December 28, 1987.

Karen Steer,
Court Reporter