

CR 02993

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

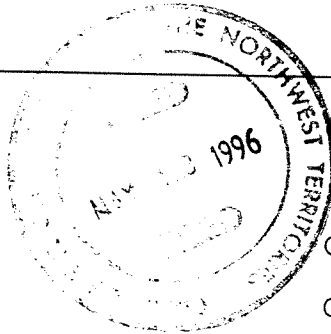
WENDALL ARLO TRAVERS

Transcript of the Court's Ruling on Crown and Defence
Motions before The Honourable Mr. Justice J.Z. Vertes, at
Hay River in the Northwest Territories, on Tuesday, April
30th, A.D. 1996.

APPEARANCES:

Mr. L. Rose:

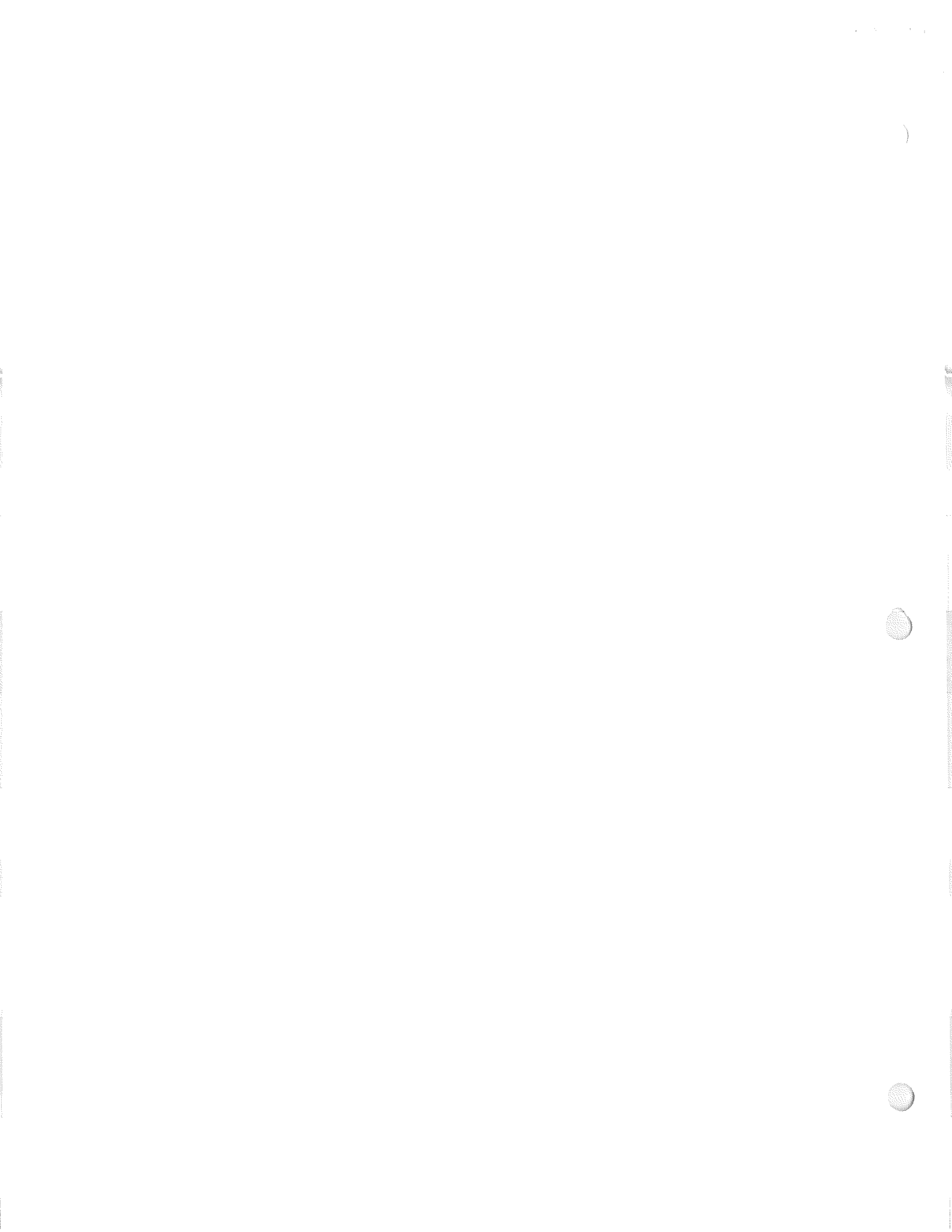
Mr. S. Cooper:



Counsel for the Crown

Counsel for the Accused

CHARGE UNDER s. 144 CRIMINAL CODE OF CANADA



1 THE COURT:

2 In this case, I am called upon to
3 make a decision on competing applications: the first
4 being a Crown application to amend the Indictment; the
5 second being a defence application to stay proceedings
6 pursuant to s. 24(1) of the Charter of Rights and
7 Freedoms on alleged violations of sections 7, 11(a),
8 and 11(b) of the Charter.

9 The accused has been arraigned on a two-count
10 Indictment alleging, between April of 1974 and August
11 of 1975, that he had sexual intercourse with the
12 complainant while she was under 14 (contrary to s.
13 146(1) of the Criminal Code as at that time) and that
14 he had sexual intercourse with her without her consent
15 (contrary to s. 144). His trial has not yet started
16 before the jury. The Crown now wishes to proceed on an
17 Indictment alleging one count under s. 144 but with a
18 time frame of April to August of 1976. The difference
19 here is that the first offences were alleged to have
20 occurred when the complainant was under 14 while the
21 new offence is alleged to have occurred when she was
22 over 14. Consent is not an issue if she was under 14
23 at the time.

24 At the preliminary inquiry, the complainant
25 testified as to one incident occurring when she was
26 under 14. This incident allegedly occurred in the
27 basement of her parent's home. It was allegedly
witnessed by her older sister.

1 After the preliminary inquiry, defence counsel
2 provided to Crown counsel evidence of an alibi for the
3 time period in the Indictment. Crown counsel verified
4 the alibi. Crown counsel also asked the complainant
5 about the alibi and then she recalled that the incident
6 occurred when she was 15 years old. Crown counsel then
7 notified defence counsel of his intention to amend the
8 Indictment.

9 At the pre-trial conference held, as required by
10 s. 625.1 of the Code, on April 2nd, 1996, defence
11 counsel indicated that he will oppose the amendment
12 but, in any event, an alibi will be presented for the
13 new time frame. I am told that on the eve of trial,
14 the defence changed its position. The defence will no
15 longer be alibi; it will be consent. Apparently, in
16 one of the complainant's statements to the police, she
17 referred to a second incident when she was 15. Defence
18 counsel says that this prompted his client to recall
19 this as the consensual incident that took place one
20 time in the basement of the complainant's home.

21 The defence submits that they have been prejudiced
22 in their ability to defend the charge. In their
23 submission, time was an essential element of at least
24 the s. 146.(1) charge. The whole Crown theory of the
25 case rested on the assumption that the offence occurred
26 when the complainant was under 14. Therefore, if they
27 are now to defend an alleged offence when she was 15,

1 they lack disclosure and an opportunity to examine this
2 evidence at a preliminary hearing.

3 Crown counsel, however, has gone on record as
4 stating that the substance of the Crown's case has not
5 changed, only the date has. The complainant's evidence
6 as to the alleged evidence is anticipated to be exactly
7 the same as that given at the preliminary inquiry with
8 the exception of her recollection as to when it
9 happened.

10 I note that at the preliminary inquiry the
11 complainant was cross-examined so as to pin down the
12 alleged dates. She was also cross-examined as to the
13 specific details of the alleged offence and the issue
14 of consent was raised by defence counsel before the
15 presiding Judge. There was no cross-examination
16 suggesting that the incident did not happen.

17 In this case, it is important, indeed decisive,
18 that the application to amend is brought before any
19 evidence has been called. It is not like so many cases
20 where an amendment is sought either after the close of
21 the Crown's case or after the accused has put his
22 defence forward by testifying. The exercise of this
23 Court's discretion to allow the amendment is therefore
24 governed by s. 601(4) of the Criminal Code. The
25 emphasis is always on fairness and the avoidance of
26 injustice.

27 Here, the defence has changed from alibi to

1 consent. Generally speaking, it is not that unusual
2 for a defence to change prior to trial. It may be due
3 to any number of factors - strategic as well as
4 substantive. But, specifically with respect to alibi,
5 the conclusive word is that of Chief Justice Lamer in
6 R. vs. M.B.P. (1994), 89 C.C.C. (3d) 289, at page 297:

7 The fact that an accused may have an
8 alibi for the period (or part of the
9 period) described in an Indictment
10 does not necessarily or automatically
11 freeze the dates specified in that
12 Indictment. That is to say, there is
13 no vested right to a given alibi.
14 Alibi evidence must respond to the
15 case as presented by the Crown, and
16 not the other way around. Section
17 601(4) directs a trial Judge to allow
18 an Indictment to be amended, including
19 whether an accused has been misled or
20 prejudiced and whether an injustice
21 might result. . .

22 Nowhere does s. 601(4) say that
23 inability to rely on a particular
24 defence is coextensive with
25 irreparable "prejudice" or "injustice"
26 and nor can this be inferred from the
27 language of the provision. Rather,
such matters are properly left to the
trial Judge to consider in the
particular circumstances of a case.

28 In my opinion, there would be no injustice in
29 allowing the amendment. It is recognized that the
30 overriding issue is credibility. All of the
31 complainant's prior statements to the police and under
32 oath are available for cross-examination purposes. The
33 Crown has represented that the allegations have not
34 changed, only the date has shifted. Case law has held
35 that absolute precision with respect to dates is

1 usually not a requirement. We are dealing with one,
2 and only one, incident that allegedly occurred in the
3 basement and was allegedly interrupted by the
4 complainant's sister. The issue is not whether the
5 incident happened (for which alibi evidence would be
6 relevant) but whether it was consensual. And, even on
7 the amended Indictment, consent was an issue at least
8 with respect to the count under s. 144 so that even if
9 age was not proven, the accused could still be
10 convicted of that count. The consent issue was, as I
11 noted before, at least raised at the preliminary
12 inquiry.

13 It is on the basis of all of these factors that I
14 find that there would be no injustice in allowing the
15 Crown to amend the Indictment.

16 Defence counsel raises two further issues.

17 First, he submits that there is a perception of
18 unfairness because the accused was, essentially,
19 conscripted to provide evidence against himself. He
20 provided the evidence as to his alibi after the
21 preliminary inquiry and then the Crown took this
22 evidence, reviewed it with the complainant, who then
23 changed her allegation as to when this offence
24 occurred.

25 I fail to see how there is any violation of any
26 right enjoyed by the accused in all of this. In my
27 opinion, the defence acted properly in disclosing the

1 alibi evidence and the Crown acted properly in
2 verifying it. Indeed, there may be a perception of
3 incompetence if Crown counsel did not review it with
4 the complainant.

5 Second, defence counsel submits that Crown counsel
6 failed to act in a timely manner in bringing this
7 application on for a hearing.

8 It seems to me that this may be irrelevant
9 considering the fact that the underlying argument now
10 against the amendment is that the defence shifted from
11 alibi to consent. It seems to me that any prejudice in
12 the lateness of the application is vitiated by the
13 advance notice of the proposed amendment and the fact
14 that alibi is no longer an issue.

15 Finally, I find no evidence or argument to support
16 alleged violations of either sections 11(a) or (b) of
17 the Charter. I find no violation of a principle of
18 fundamental justice. Hence the defence application for
19 a stay of proceedings is dismissed.

20 Finally, I have considered whether the trial
21 should be adjourned.

22 Defence counsel says that his preparation of his
23 client's testimony may have to change now. That may be
24 true but that results only because the client did not
25 advise his counsel that alibi or outright denial were
26 not appropriate defences until the eve of trial. It
27 also assumes that the accused will testify. It may be


1 likely that he will, but he is not obliged to testify.

2 Also, as I noted before, the issue of consent was
3 at least contemplated at the preliminary inquiry. I do
4 not see what an adjournment may accomplish at this
5 point.

6 For these reasons, I allow the Crown's application
7 to amend the Indictment. As a procedural matter, I
8 will direct a stay of proceedings on the two-count
9 Indictment filed August 3, 1995, and when we recommence
10 in front of the jury, we will arraign the accused on
11 the amended Indictment, the one filed on April 4th,
12 1996, prior to putting him in the charge of the jury.
13

14 (AT WHICH TIME THE COURT'S RULING CONCLUDED)

15
16
17 Certified Pursuant to Practice Direction
18 #20 dated December 28, 1987

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Lois Hewitt,
22 Court Reporter
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