SC CR 95 084

CR 02709

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

KOLOLA (KULULAK) ITULU

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Ruling on the admissibility of a statement, given by Mr. Justice C.F. Tallis sitting in IQALUIT, N.W.T. on March 29, 1995.

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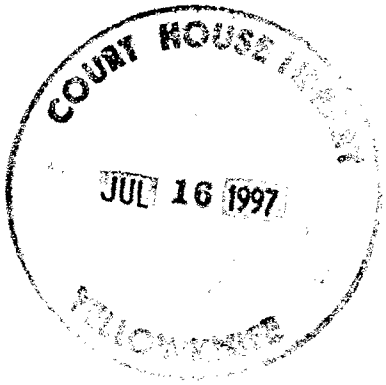

APPEARANCES:

S. COUPER, Esq., Counsel for the Crown

R. GORIN, Esq, Counsel for the defence

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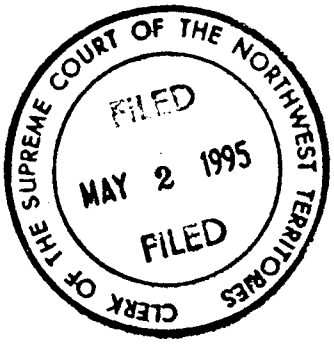

THE COURT: In the absence of the jury, I now make this ruling with respect to the admissibility of P-1 for identification on the voir dire that we held yesterday.

Following a voir dire as to the admissibility of a statement made by the accused to Constable Akavak on July 7, 1994, I heard submissions from counsel. This "warned" statement was taken from the accused with respect to an alleged charge of a sexual assault on the person of Nala Michael on May 26, 1994. The only witness called before me was Constable Akavak. Unfortunately the library facilities here are minimal, but counsel have, with their best endeavours, placed the issues before me. As in all cases involving a ruling on admissibility, I would have preferred more time to research this matter, but in a jury trial one must endeavour to make a timely ruling, not only for the benefit of the jury, but in this case counsel are entitled to know where they stand, and in my view at this stage.

Having heard the testimony of Constable Akavak, I am satisfied that the impugned statement is "free and voluntary" within the common law principles that govern admissibility. Constable Akavak impressed me as an experienced police officer of aboriginal ancestry who carefully explained matters to the accused in his first language.

The Crown has satisfied the legal tests which are required under the controlling authorities, and I

might add here, those authorities are considered in detail by Mr. Justice de Weerdt in a ruling that he made in the case of The Queen v. Roger Warren. Although counsel for the accused did not concede that the statement was "free and voluntary," no submissions were made on this point before me.

I now turn to the more fundamental issue. The accused contends that his Section 10(b) right to counsel under the Charter was infringed, and accordingly the statement should be excluded on that basis. The significant words which were translated and explained by the constable to the accused in his own language read, and here I quote first the warning.

"You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you do say anything. Anything you do say may be used as evidence."

Following that, several questions were put.
"Do you understand?
A. Yeah."

Then this statement.

"It is my duty to inform you that you have the right to retain and instruct counsel without delay.
Q. Do you understand?
A. Yeah."

This statement then appears:

"If you cannot afford legal counsel, you may speak to a legal aid lawyer without any cost to you. Do you understand?
A. Yeah.
Q. Do you wish to contact a lawyer?
A. No, not right now."

And then that's followed by an opening question on the handwritten statement as distinct from the form which I read from.

"Do you wish to give me a statement on this?" And the answer was "Yeah." And then the accused proceeded to give a statement.

Now, I've mentioned that these statements were translated and explained by the constable to the accused in his own language, and before me the officer detailed how he went about that step.

Having heard the constable's testimony, I'm satisfied and find that he honoured the spirit of the requirements in Brydges. I appreciate the decision in R. v. D.(D.), (1994), N.W.T.R., 114, but in the case before me, the officer conveyed a message that the accused could have access to immediate legal advice -- to immediate advice whether or not he could afford a lawyer. I find that the officer effectively explained that fact to the accused in his own language.

This is not a case where something was inevitably lost in the translation, and my impression from the officer was that he went out of his way to explain matters in detail in the accused's own language and that included, of course, a reference to the Clinic here in Iqaluit. Needless to say, I think that the system is fortunate to have police officers who are capable in the first language of an accused person, because otherwise the

result that I see might very well have been different in this case.

Having said that the officer's conduct and explanation met the requirements in Brydges, I do find that it fell short of the requirements articulated by the Supreme Court of Canada in R. v. Bartle, (1994), 3 S.C.R., 173, and the companion cases including Cobham and Harper and others reported in the same court.

Having reached that conclusion, the question arises whether the ruling of the Supreme Court of Canada in Cobham is retrospective in operation. I observe that the alleged offence took place before Cobham was decided. In such circumstances, I conclude that the principles articulated by the Alberta Court of Appeal in The Queen v. Kenneth Steve Lorincz, an unreported decision dated January 6, 1995, are apposite, since the facts giving rise to this case before me arose before the Supreme Court decisions delivered on September 29, 1994 in Bartle, Cobham and the other companion cases. I rule that P-1 is admissible. In Lorincz the Alberta Court of Appeal considered the effect of the Supreme Court of Canada's judgment on the application for a rehearing in Cobham dated October 21, 1994, and I follow and adopt the interpretation given by the Alberta Court of Appeal as to the effect of that Supreme Court decision in Cobham.

In this case, after considering all of the evidence on the voir dire, I would also invoke Section

24(2) of the Charter in support of my conclusion that the accused waived his right to counsel before giving a statement to the officer.

Having heard all the evidence and capturing the atmosphere of the discussion in Inuktitut to the best of my ability, I'm satisfied that the statement P-1, which on its face is exculpatory, would have been made even if his Section 10(b) rights had not been violated. And on that particular point, I refer to the judgment in The Queen v. Harper, (1994), 3 S.C.R., 343.

In arriving at this alternative decision on the point, I bear in mind the direction of the Supreme Court with respect to the onus of proof, but in this particular case the evidence of the officer is uncontradicted, and had we not been dealing with -- had we been dealing with a non-aboriginal constable in discussing this matter, the result might well have been different. My earlier remarks with respect to the availability of an aboriginal officer are apposite to this phase of the case. For these relatively brief reasons, I rule that P-1 is admissible.

I observe that the Crown sought this ruling to have the statement available for cross-examination if the accused chooses to give evidence. At this juncture it is important, I think, to observe that an accused facing cross-examination is in a different position than a witness called in the case, and under the circumstances I would

expect Crown counsel to respect that position.

As I mentioned earlier, counsel for the defense were anxious to have an answer before electing whether or not to call evidence, and this is a significant reason for a prompt ruling on the matter in the absence of the jury.

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

L. Belsito

Laurie Belsito, CSR, RPR