R. v. Delorme, 2005 NWTSC 53

Date: May 26, 2005
Docket: S-1-CR 2004000034

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GERALD DELORME

Rulings on the admissibility of statements made to the police. These Reasons for Judgment are subject to a publication ban pursuant to s.648(1) of the *Criminal Code* prohibiting its publication or broadcast before the jury on this trial retires to consider its verdict.

Heard at Yellowknife, NT: May 3-6, 9-13 & 16-18, 2005

Reasons for Judgment filed: May 26, 2005

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for Her Majesty the Queen: Caroline Carrasco and Noel Sinclair
Counsel for the Applicant (Delorme): Catherine Rhinelander and Michael Hansen

R. v. Delorme, 2005 NWTSC 53

Date: May 26, 2005
Docket: S-1-CR 2004000034

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GERALD DELORME

REASONS FOR JUDGMENT

[1] The accused, Gerald Delorme, is about to stand trial on charges of first degree murder and being an accessary after the fact to murder. These reasons address the admissibility of various statements and related evidence given by the accused to the police. The defence challenges admissibility essentially on the grounds that the accused's right to silence and right to counsel, as protected by sections 7 and 10(b) of the Charter of Rights and Freedoms, have been infringed.

[2] I gave my rulings orally on May 25, 2005, and said that written reasons would follow. These are those reasons.

[3] The issues raised on this *voir dire* implicate both the common law confessions rule and Charter rights. In some ways they interact. But there are discrete aspects of each. The Crown bears the burden of proving beyond a reasonable doubt that a statement was made voluntarily. The defendant, however, bears the burden of establishing on a balance of probabilities that his Charter rights were violated. If that is done, then there must be an evaluation made as to whether any evidence obtained as a result of that violation must be excluded pursuant to s.24(2) of the Charter. In both instances the analysis is by necessity contextual and fact-specific.

[4] The *voir dire* took place over 12 days; I heard from 26 witnesses (including the accused); and, I viewed and listened to over 10 ½ hours of video and audio tape. I

will, in the course of these reasons, review the important features of the evidence. I will attempt, as much as possible, to address the issues raised as I go through the evidence so as to avoid repetition.

[5] On June 16, 2003, a burned body was found outside of Yellowknife. The Major Crimes Unit ("MCU") of the Yellowknife RCMP detachment commenced an investigation. On June 17, a missing person report was filed concerning one Justin Vo. MCU then received information that Vo was last seen in the company of the accused and three other individuals (Francis Yukon, Dale Courtoreille and Richard Tutin) at a house at 5117-51st Street on the morning of June 16. There were also reports of an armed altercation between the accused and one Kiwi Lafferty. On June 18 the burned body was positively identified as that of Vo. Subsequently, an MCU briefing was held in which various theories were discussed, including a rumour that Vo's death was related to illegal drug activity. Officers were assigned various tasks, including locating and interviewing numerous persons of interest such as the accused.

[6] Corporal O'Brien and Constable Schellenberg were assigned the task of interviewing the accused. I am satisfied that this was part of the ongoing investigation into Vo's death and that, at that time, the accused was not a suspect in the death. The two officers went to the accused's home on Taylor Road at approximately 5:00 p.m. on June 18. Constable Schellenberg, who took the lead in dealing with the accused, asked the accused to come to the detachment for an interview. The accused asked them to come back in half an hour after he had fed his son. The officers left and then returned 30 minutes later. The accused was waiting outside his residence. He got into the police car and went with the officers back to the detachment.

[7] Constable Schellenberg interviewed the accused for approximately one hour and fifteen minutes. He did not caution or warn the accused in the usual manner nor did he explain the right to counsel. Constable Schellenberg told the accused that he was investigating a missing person report regarding Vo. The accused was sober, coherent and cooperative. The interview was videotaped. The accused spoke freely. At the conclusion, Constable Schellenberg returned the accused to his residence. Before parting, the accused offered to provide further information to Schellenberg and relayed what the accused said were rumours around town regarding what happened to Vo.

[8] I am satisfied that this statement was voluntary. I am further satisfied that there was no violation of the accused's Charter rights. He was not a suspect nor was he under arrest. The only potential issue is whether he was "detained", in the sense of being "psychologically detained", feeling that he was under compulsion to speak to the police.

[9] As noted in *R.* v. *Therens*, [1985] 1 S.C.R. 613, detention may be effected without the application of physical force if the person concerned submits or acquiesces in the deprivation of his or her liberty and believes that there is no choice but to submit. Here, the accused testified that he was not given an explicit choice as to where the interview was to be conducted. He felt he had to go with the officers "because they're cops". This may be more indicative of the accused's experience with the police than any sense of psychological submission.

[10] It is important to recall that the extension of the concept of detention to instances of psychological detention is predicated on two requirements: (1) a demand or direction in response to which (2) the person concerned reasonably believes that the choice to do otherwise does not exist. There is no evidence of either in this case. There was no demand, merely a request. The accused went willingly as evidenced by the fact that he was waiting for the officers when they returned to his home. I discerned no evidence of submission or compulsion on the videotape. He wanted to cooperate as evidenced by his subsequent offer to provide information. Finally, when I consider the various factors set out in *R.* v. *Moran* (1987), 36 C.C.C.(3d) 325 (Ont.C.A.), dealing with indicia of detention, none of them necessarily point to a situation of detention in this scenario.

[11] For these reasons, I find that the statement of June 18, 2003, is admissible. In addition, the statements made to Constable Schellenberg after the interview on June 18, and as a result of the accused contacting Schellenberg on June 20, are also admissible. They were initiated and voluntarily provided by the accused without any prompting or demand by the officer.

[12] As the investigation continued, further information was developed by the police. A person was interviewed and she described witnessing Vo being assaulted by Delorme, Yukon and Tutin. The house at 51st Street was identified as a known "crack house". The house was rented by Courtoreille. Vo and these others were identified as being involved in the drug scene. Intelligence was received that a firearm was seen

inside the house. By June 21st the primary investigator, Corporal Beland, came to view the accused, and the three others, as suspects in Vo's death. Warrants were prepared and eventually obtained on June 27.

[13] The police obtained four warrants: (1) a search warrant under s.487 of the *Criminal Code* to enter and search the 51st Street house; (2) a general warrant under s.487.01 of the *Criminal Code* to seize the house and conduct forensic examinations; (3) a "Feeney" warrant (as per *R. v. Feeney*, [1997] 2 S.C.R. 13) pursuant to s.529.1 of the *Criminal Code* authorizing the arrest of the accused at his Taylor Road residence; and, (4) a "Feeney" warrant authorizing the arrest of Courtoreille at his known residence at Sissons Court.

[14] The MCU operational plan was to execute the warrants on the morning of June 28. However, as a result of concerns for the safety of a potential witness, it was decided to move up the execution of these warrants to midnight of June 27.

[15] At 20 minutes past midnight, the police raided the house on 51st Street. Entry was forcibly made by the RCMP Emergency Response Team, in full battle gear (to use a commonly-known expression), with the aid of a diversionary device. This device sets off a loud explosive sound and a bright flash of light. The accused was found in the house, handcuffed, and told to lie face down on the floor. Corporal O'Brien then took control of the accused. He stood the accused up and told him that he was under arrest for murder, that he could contact a lawyer, and that he did not have to say anything. Corporal O'Brien and another officer then escorted the accused out of the house and turned him over to Corporal Richardson who placed the accused in a police car.

[16] Before being placed in the car, Corporal O'Brien seized a small tape recorder from the accused's pocket. In the police car, Corporal Richardson gave the standard police caution and Charter rights to the accused. He read these from a form on which he recorded the accused's responses. The time was 40 minutes after midnight.

[17] Corporal Richardson advised the accused of his right to retain and instruct counsel immediately, how that can be done, and the availability of free legal aid. No issue is taken with the content of the advice given to the accused. Corporal Richardson recorded the accused's responses. He answered "yes" when asked if he understood. The accused also kept referring to the tape recorder and said that the

police should listen to the tape. Corporal Richardson described the accused as appearing normal, calm, responsive, although he appeared to be sleepy or slow as if under the influence of some medication.

[18] I accept Corporal Richardson's evidence as being reliable and accurate.

[19] At the detachment the accused was turned over to Constable Burkell at 1:20 a.m. The booking area was a hub of much activity. Besides the accused, the other three suspects (Yukon, Tutin and Courtoreille) had been arrested and were brought in for booking. Constable Burkell described the accused as appearing normal, quiet and cooperative, with no signs of impairment.

[20] At 1:28 a.m., Constable Culhane advised the accused that he was under arrest for the murder of Justin Vo and then read to the accused his rights from a printed form. No issue is raised with respect to the information provided by Constable Culhane. The officer described the accused as cooperative, appearing normal, with good motor coordination.

[21] Constable Culhane testified (and much of this was corroborated by Constable Burkell) that, after he read his rights to the accused, he asked the accused if he understood. The accused replied "yes". Culhane then asked if he wanted to call a lawyer. The accused responded that he wanted to talk to "Jason". The accused said that he forgot Jason's last name but he is from Hay River. The officers, Culhane and Burkell, formed the impression that "Jason" was a lawyer in Hay River. I pause to note that Constable Schellenberg's first name is Jason. The officers could not locate a lawyer in Hay River with the name of "Jason". The accused was asked by Burkell if he wanted them to call a lawyer for him. The accused replied, "Do what you have to do."

[22] Constable Burkell then contacted legal aid duty counsel, James Brydon, at 1:32 a.m. The accused spoke to Brydon for less than a minute and came out of the phone room. He said he wanted to speak to another lawyer. The accused mentioned Robert Gorin. Burkell placed a call but got Mr. Gorin's answering machine. The accused then asked to be taken to his cell but, when he was told that his clothes were to be confiscated, he changed his mind and asked Burkell to call another lawyer, Glen Boyd. Burkell tried but had to leave a message. Constable Culhane formed the opinion that the accused was vacillating about wanting to speak to a lawyer but he

instructed Constable Burkell to keep making calls until they reach one. Burkell started calling numbers from a list of legal aid lawyers.

[23] Constable Burkell called several lawyers with no response. Eventually, at 1:49 a.m., he reached Lou Sebert, a lawyer in Fort Smith, and put him through to speak to the accused. The cellblock logs show that the accused came out of the phone room at 2:07 a.m. He was then lodged in a cell in the detachment cellblock.

[24] I accept the evidence of Constables Culhane and Burkell, regarding this sequence of events, as being reliable and accurate.

[25] Here I wish to address an issue raised by the defence with respect to the execution of the warrants at the 51st Street house. There is no attack on the validity of the warrants. The defence says, however, that the manner in which the warrants were executed was unreasonable and thus has a bearing on the voluntariness of subsequent statements made by the accused.

[26] Forcible entry into the house was made shortly after midnight without any prior warning. Defence counsel pointed out that neither the search warrant nor the general warrant contained authorization for a "no knock" night entry. The common law requires that police announce their presence prior to entry and a "no knock" entry should only be effected in exigent circumstances. Similarly, s.488 of the *Criminal Code* requires that a warrant be executed by day unless the issuing justice is satisfied that there are reasonable grounds for it to be executed by night and the warrant authorizes it. Here, the search and general warrants made no reference to execution by night other than the authorization to enter between 14:00 hours on June 27 and 23:59 hours on June 30. The "Feeney" warrant, however, had an express authorization to enter the dwelling-house (albeit a different dwelling-house) to arrest the accused without prior announcement and the information to obtain that warrant referred to attending to execute the warrant during the night on June 28.

[27] I agree with defence counsel that the search warrant, issued under s.487, is defective in that it does not expressly authorize night entry as required by s.488 of the Code. Also, there is nothing in the information to obtain that warrant that refers to either the need to execute at night or the need to use forcible entry (even though use of the Emergency Response Team had been already discussed). But, s.488 applies only to warrants issued pursuant to sections 487 and 487.1 of the Code. It does not include

a general warrant issued pursuant to s.487.01 of the Code. While this distinction may be puzzling, I have to assume that Parliament means what it says when it chooses to include something in a provision or not to include it.

[28] The police were armed with warrants that authorized entry into the house. Based on the information available to the police at the time, I find that there were reasonable grounds to use forcible entry at night. The execution of the warrants was moved up because, at the time, there were reasons to fear for a witness' safety. The use of armed force was reasonable because they were entering a known crack house, in search of suspects involved in a violent murder, and there were reports that a firearm or other weapons may be in the house. The situation as a whole was one where it was not uncommon to find weapons (although, as it turned out, no weapons were located inside the house).

[29] There is no doubt that the police were fully empowered to arrest the accused where they found him pursuant to s.495(1) of the *Criminal Code*. The defence conceded that the police were entitled to arrest the accused. In my opinion, the execution of the warrants was reasonable in the circumstances.

[30] The defence raised another issue that it said reflects on the voluntariness of any statements given by the accused.

[31] When the accused was lodged in the cell at approximately 2:07 a.m., his clothes were confiscated. The evidence is unclear as to how he was left. There is evidence that he was given a blanket. The accused said the police took all his clothes and only gave him some underwear and a sweatshirt the next day. Constable Culhane said that, if clothing is seized from a prisoner, he would give the prisoner replacement clothes from a supply on hand. It is not his practice, he said, to place a prisoner into a cell without any clothes. Constable Pittman, who saw the accused at 9:20 a.m. on June 28, said that the accused was wearing a t-shirt and covered in a blanket. He gave him some shorts and a sweatshirt. He remembered, however, that the accused was not naked so I conclude from that that the accused had something, perhaps only underwear, on the lower part of his body. Constable Culhane also testified that when he saw the accused at shortly after 10:00 a.m. on June 30 the accused was wearing a t-shirt and boxer shorts. He got a pair of pants and some slippers for the accused.

[32] From all this I conclude that, while the accused may have been dressed skimpily for the first night in cells, he was not naked in the cell. This was, however, merely part of what defence counsel referred to as the oppressive conditions under which the accused was held.

[33] When the accused and the other three prisoners were lodged in cells, the MCU commander, Sgt. Lamothe, issued directions that there be no contact allowed with anyone. They were, in effect, held incommunicado. Specific officers were assigned for each prisoner. If a prisoner made a request, such request was to be forwarded to the responsible officer and to MCU command for evaluation and response. This included requests to make telephone calls. No one from outside, including relatives, were to have contact with the prisoners. This was confirmed by the accused's sister who went to the detachment shortly after his arrest but was not allowed to speak to him. Sgt. Lamothe, however, did instruct the assigned officers that if there was a request to call a lawyer then that was to be facilitated. These directions remained in place until all the prisoners were eventually transferred to remand facilities at the Yellowknife Correctional Centre. The prisoners Yukon, Tutin and Courtoreille were transferred on July 3; this accused was transferred on July 4 (after six days at the detachment).

[34] Sgt. Lamothe testified that these conditions were put in place so as to maintain the integrity of the ongoing investigation. Also, he said that the authorities at the correctional centre required time to put arrangements into place to house these four prisoners separately. I accept these explanations. But, I also have no doubt that another aim was to have ready and continuing access to these prisoners for interrogation purposes.

[35] Oppression, of course, can encompass a multitude of things, some obvious, some not so. If police create conditions distasteful enough, it should be no surprise that a suspect may make a confession just to escape those conditions. A confession in those circumstances would not be voluntary. But I saw no evidence of that.

[36] The accused's clothes were confiscated when first lodged in the cell. But he was at least given a blanket. He made no complaint, either recorded at the time or before me on the witness stand, as to oppressive discomfort. The logs record that he slept until approximately 8:00 a.m. on June 28. He was served breakfast at 8:50 a.m. He complained about the lack of clothes but they were eventually provided to him.

Later on he complained about not having a shower but that was later and eventually he was given one. In the strict context of oppression, therefore, I find none. There was also no evidence of that on any of the videotapes that I saw. There was no inhumane or degrading treatment, intimidation or deprivation, so as to overcome the will of the accused.

[37] As I said previously, Constable Pittman attended at the accused's cell at 9:20 a.m. on June 28. He had been told that a lawyer, Mr. Sebert, was trying to contact the accused. He asked Sebert to call back. Pittman then asked the accused if he wanted to talk to Sebert. His recollection was that the accused said "yes". He then took the accused to the telephone room and transferred Sebert's call. After approximately three minutes the accused came out and he was returned to his cell. Constable Pittman testified that the accused made no request of him at that time. I accept this evidence.

[38] Later that same day, Sebert called again at 3:15 p.m. The accused was taken by Corporal Demmon to the phone room. At the telephone room, the accused told Demmon that he did not want to speak to Sebert, that he wanted to speak to a different lawyer, and asked him to contact Andy Mahar. Demmon attempted to do so but there was no answer. He then called Sebert and put the accused on the line and left him in private. Approximately three minutes later, the accused told him that he did not wish to speak with Sebert. He wanted to speak to Robert Gorin. Demmon phoned Gorin's number but got the answering machine. It should be noted that June 28 was a Saturday in 2003.

[39] After the unsuccessful attempt to reach Mr. Gorin, Corporal Demmon then called the legal aid number and reached Mr. Brydon at 3:26 p.m. He put the accused on the phone with Brydon and again left him in private. At 3:42 p.m., the accused came out of the phone room and asked to be returned to his cell. Demmon testified that on the way to the cell the accused said he wanted to speak to "Jason" but Demmon did not know who that was. I accept this evidence.

[40] At 9:18 p.m. that same day, the accused was taken before a Justice of the Peace at the Court House. He had no access to a lawyer at that time. The court record does not show any lawyer present at the time. The accused was remanded in custody and returned to the detachment cells at 9:40 p.m.

[41] On June 29th, a Sunday, the accused was in his cell all day. There is no record of the accused making any request until 7:40 p.m. when he asked for a shower and then 8:42 p.m. when he asked to phone his lawyer. This latter request was relayed to Corporal McGregor, the shift supervisor on duty. He went to see the accused at 9:11 p.m. The accused asked to speak to "the lawyer he had been dealing with". He said he expected a lawyer to come see him that day. McGregor did not know who that was. The accused then suggested calling John Bayly, another local lawyer. McGregor dialled the number for the accused but the accused said there was no answer. So, then, Corporal McGregor placed the accused back in his cell and contacted Sgt. Lamothe who informed him that the accused had been dealing with Mr. Sebert. Sgt. Lamothe told McGregor to let the accused call a lawyer if he knows who he wants to call. When McGregor told the accused that it was Sebert, the accused said he was no longer dealing with Sebert. I accept this evidence.

[42] The accused testified as well as to the sequence of events from his arrest until the evening of June 29th. He said that when he was arrested he had been consuming crack cocaine and drinking alcohol. When the police raided the house he was disoriented by the diversionary device that was used. His vision was affected for awhile and his hearing was impaired for quite some time. He said he could not recall either Corporal Richardson talking to him in the police car, or at least he could not hear him, nor the officers talking to him at the detachment. He remembered having phone calls put through to him, including one from Sebert, but he did not want to talk to Sebert. He claimed that he did not listen to anything that the lawyers with whom he had contact were saying to him.

[43] I do not accept the accused's claims of disorientation and incomprehension. I viewed the videotape of his arrest at the house. He appeared to be as the officers described him to be: calm, cooperative and responsive. I am satisfied that he knew what was happening and what was being said to him.

[44] The fact that the accused did not listen to what the lawyers said to him may be a factor to consider as to whether he was reasonably diligent in consulting counsel or in looking out for his own interests. All the police can do is provide the means for consultation; they cannot make a detainee listen or pay attention to the advice he is getting. But, in any event, the accused, no doubt because of his past dealings with the police, testified that he was aware of his right generally to remain silent when confronted by the police.

[45] The accused testified that he was not allowed to call any family members. But there was no evidence that he asked to do so on either June 28 or 29. He said that sometime during the night of his arrest he asked the officers to call his cousin in Ontario, who was a criminal lawyer, but he needed to get the number from either his mother or sister. Constable Burkell, however, said that he could not recall a request by the accused to call either a lawyer in Ontario or a family member. He said that if a prisoner does request to contact a lawyer outside of the jurisdiction then attempts would be made to contact that lawyer. Constable Culhane, when asked if the accused requested on June 28 to contact a lawyer in Ontario, answered "no" and that he "cannot recall" that. Corporal M^{c}Gregor made no reference to any request to call an Ontario lawyer. Sgt. Lamothe testified that he was not told of any request by the accused to contact his mother or sister so as to be able to contact a lawyer in Ontario. If he had been, he said, he would have directed that steps be taken to accommodate that request. I accept this evidence. I am not persuaded that the accused made any such request on June 28 or 29.

[46] The first reference to wanting to call his cousin the lawyer in Ontario came, I find, on the morning of June 30th when the accused was in the interview room with Constable Culhane and Corporal Buhler. This interview started at 10:21 a.m.; stopped at 10:43 a.m.; resumed at 1:41 p.m. and lasted until 4:08 p.m. At 4:21 p.m. the accused was taken once more before a Justice of the Peace at the Court House. The record shows that Mr. Brydon was in attendance as duty counsel but I accept what the accused said, that being that he did not talk to a lawyer at that time. At 4:30 p.m. the accused was returned to the detachment cells. Then at 9:22 p.m. he was taken by Constable Culhane and other officers out to conduct a re-enactment at two alleged crime sites. He was back in his cell at 11:39 p.m.

[47] The statements made by the accused that day are partly inculpatory in that they place the accused at the scene of the murder and implicate him in certain actions relating to the death of Vo and afterwards. The statements are also partly exculpatory in the sense that they try to minimize the accused's role in the actual killing of Vo. Of course, whether a statement is inculpatory or exculpatory makes no difference to the analysis that must be applied.

[48] In my opinion, the encounters between the accused and the police on June 30th constitute one continuous, but interrupted, interview. The morning session ends when

the accused, after being confronted by Corporal Buhler's statement to the effect of "we can just throw you back in the cell", decides to get up and leave. He said, "I'm going back to my cell." It continued after lunch and commenced by Corporal Buhler saying, "Now we've given you time to think about it." It ended in the afternoon with a reference by Corporal Buhler to talking to the accused again later, after he goes to court, and the possibility of going out to the area where the accused described certain events as happening. And that is what occurred later on. So all of this is indicative of one continuous encounter that day.

[49] Also, in my opinion, whatever the accused said was said voluntarily, in the broad sense of that term. And here I want to make some comments on the issue of voluntariness as it relates to the statements of June 30 and all subsequent statements.

[50] The governing rule, as I understand it, is as follows. To be admissible, it must be proven that the statement is the product of an operating mind, voluntarily made, without hope of advantage or fear of prejudice, in circumstances free of oppression or such police conduct as would shock the conscience of the community: *R.* v. *Hebert*, [1990] 2 S.C.R. 151; *R.* v. *Oickle*, [2000] 2 S.C.R. 3.

[51] The criterion of an operating mind requires only that the accused knows what he is saying and that he is saying it to police officers who can use it to his detriment. That is plainly evident in all the interviews given by the accused. There were no apparent cognitive difficulties. There were no oppressive interrogation techniques employed so as to result in the psychological disintegration or manipulation of the accused. And, the accused himself did not claim that he did not know what he was saying. It is true that he was feeling bad at times and he was worried about his family's safety. But none of that has been shown to be a causative factor in his willingness to talk. There were no improper inducements; no threats; and, he was appropriately cautioned on each occasion. Therefore, I have concluded that the accused's statements were voluntary.

[52] Having found voluntariness, the focus of the inquiry now shifts to the conduct of the police vis-à-vis the accused. The issue here is the right to counsel. This issue arises because of the following exchange early on in the June 30 interview (as reflected in the transcript prepared by the police):

ACCUSED: Well this conversations over til I talk, yeah I just want to talk to a lawyer to find out what's going on here.
BUHLER: Which lawyer you talking to. Do you want to...
ACCUSED: Ah, ah...
BUHLER: One you used before.
ACCUSED: No I want to phone my cousin she's in Ottawa she's a criminal lawyer. That's who I really want to get a hold of. But I don't know her name. I mean I don't know her number. And I don't know her last name. Just my mother knows her.
BUHLER: You can phone any lawyer of your choice alright.
ACCUSED: But gee, I'm limited on the phone, I can't even phone there. They let me talk to this one lawyer because they kept on saying you gotta talk to a lawyer, you gotta talk to a lawyer.
BUHLER: Well that would be duty counsel and you sort of pick and choose from there I guess.
ACCUSED: Well I finally got a hold of this guy from Fort Smith, "sic" Lou Sever. And I didn't want to talk to Lou Sever but they said I had to talk to somebody. Well I talked to him and now they think that he's my lawyer, that's the last lawyer I ever wanted.
BUHLER: Okay we'll do that but let's just explain things. Um, what we know about everything. Alright. Chris you want enlighten Mr. Delorme here.

[53] After this, the officers started to tell the accused what they learned from the other three accused and that engaged the accused in conversation. The conversation continued for approximately twenty minutes further until the accused got up and said he wanted to go back to his cell. At that point the accused said to the officers, "I'm trying to get a hold of my lawyer." And Corporal Buhler responded, "Yeah, we want you to talk to your lawyer."

[54] Defence counsel made strenuous efforts to convince both Constable Culhane and Corporal Buhler that what was actually said, at this point, was the accused asking, "So you're going to try to get a hold of my lawyer?"; and Corporal Buhler responding, "Yeah, we can let you talk to your lawyer." But, after listening several times to both the videotape and audiotape of this exchange, both officers confirmed that to them the words sounded as reproduced on the transcript filed as an exhibit. I could not discern any difference in the words. Be that as it may, the officers confirmed that no steps were taken by them to contact anyone on the accused's behalf so as to enable him to speak to his cousin the lawyer in Ontario.

[55] Why were there no steps taken by the officers? Both officers testified, in effect, that they did not consider anything said by the accused as an express request to call a lawyer (notwithstanding the fact that the accused was dependent on the officers to make phone calls). Constable Culhane also said that, as far as he was concerned, the

accused had been given the opportunity to speak to a lawyer and had in fact spoken to both Mr. Brydon and Mr. Sebert on June 28. Therefore the right to counsel had been satisfied and nothing more need be done.

[56] Thus we come to what both the Crown and the defence identify as the principal issue. Was the accused accorded his right to counsel on the morning of June 30th? Did the police have the obligation to halt further questioning so as to facilitate contact with counsel of choice?

[57] Section 10(b) of the Charter provides that "everyone has the right on arrest or detention...to retain and instruct counsel without delay and to be informed of that right." The purpose of this right is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations. In order to give meaning to this right, three duties are imposed on the police:

1. To inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel.

In this case, I am satisfied that was done on June 28th.

2. If a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to do so.

Again, this was done by the efforts made to contact counsel on June 28th. On that date, between 1:32 a.m. and 3:42 p.m., the accused had spoken twice to Mr. Brydon (once for 16 minutes) and three times to Mr. Sebert (once for 18 minutes).

3. To refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity.

In this case, that, too, was done since no attempt was made to interrogate the accused until June 30th.

[58] So, it can be argued, as the Crown argued in this case, that the police met all of their informational and implementational obligations. Thus they were not required to halt their questioning of the accused. The accused's right, after he had consulted counsel, was the right to keep silent, not the right to dictate how the interviews went, or when and how he was to consult counsel. Crown counsel relied on a formidable

array of case law to support the proposition that there is no continuing obligation to advise a detainee of his or her right to retain and instruct counsel or to provide the opportunity to consult counsel. The constitutional obligation is fulfilled when the police carry out their duties upon arrest or detention: *R.* v. *Bohnet*, [2003] A.J. No. 1106 (C.A.), leave to appeal denied [2003] S.C.C.A. No. 479; *R.* v. *Ekman* (2000), 146 C.C.C.(3d) 346 (B.C.C.A.); *R.* v. *Gormley* (1999), 140 C.C.C.(3d) 110 (P.E.I.C.A.).

[59] There is no doubt that the police are entitled to question an accused after he or she has consulted or retained counsel. As noted in *Hebert*, presumably counsel will have informed the accused of the right to remain silent. Even if an accused asserts that right, the police may try, within limits, to persuade him or her to speak. Police persuasion, short of denying the accused the right to choose, or depriving him or her of an operating mind, does not breach the right to silence. Here there was no impermissible persuasion. Here, the complaint is that the police should have renewed access to counsel, specifically counsel of choice, when requested to do so.

[60] Defence counsel made a number of points in support of the proposition that the accused's right to counsel was violated on June 30th.

[61] First, defence counsel submitted that the right to counsel includes the right to counsel of choice. I agree. The right to choose one's counsel is important because it enhances the objective perception of trial fairness. It removes the spectre of state interference with the accused's decision as to whom to rely on for his or her defence. But, there are limitations. Two of those limitations are the exercise of reasonable diligence by the accused and the availability of the chosen lawyer. As stated in *R.* v. *Ross*, [1989] 1 S.C.R. 3 (at para.13): "... accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer."

[62] But these factors are not truly pertinent to the situation in which the accused found himself on June 30th. He had no independent access to enable a call to a family member or the lawyer of his choice. So there was no way of knowing whether the counsel of choice was available. He had been put into contact with two lawyers but he made it known that he did not want to avail himself of their services. There was no urgency since he had already been kept in the detachment cells for approximately 57 hours without any attempt on the part of the police to interrogate him.

[63] Defence counsel also submitted that the accused had the right to contact counsel of choice through a third party and the police should have facilitated that. She referred me to *R.* v. *LaPlante* (1987), 40 C.C.C. (3d) 63 (Sask.C.A.). There the accused was arrested on a drug charge. He kept asking to call his wife from the holding cells to ascertain if she had arranged a lawyer. He was refused. He then gave an incriminating statement. In allowing an appeal from conviction, the Court of Appeal held that, having regard to the circumstances in which the request to call his wife had been made, the accused was requesting to consult a lawyer. The right to counsel is not to be construed narrowly. The accused had the right to consult counsel and the police should have made the necessary arrangements to enable him to call his wife. He was therefore not afforded the opportunity to consult with counsel and this constituted a violation of s.10(b) of the Charter.

[64] In a similar vein, in *R.* v. *McLaren*, [2001] S.J.No. 723 (Q.B.), the accused had been arrested and advised of his rights. He said he did not know who to call and wanted to contact his wife. Instead, the police contacted a legal aid lawyer who spoke to the accused. The court held this to be a breach of s.10(b) because the police should have afforded a reasonable and realistic opportunity to the accused to contact counsel of choice. But in this case, as in *LaPlante*, the situation was one of what to do upon arrest; not over a period of continuing detention.

[65] The difference here, as well, is that the accused had been given the opportunity to consult counsel already. Did the police have to give him the opportunity again? As noted in many cases, the implementational duties imposed on the police will need to be exercised in a wide variety of circumstances. The test is what was or was not reasonable to do.

[66] A helpful analysis of the different considerations that apply to subsequent access to counsel, once the right to counsel has been initially exercised, can be found in *R.* v. *Wood* (1994), 94 C.C.C.(3d) 193 (N.S.C.A.), leave to appeal to S.C.C. refused at 99 C.C.C.(3d) vi. There the accused, suspected of a robbery, had been arrested and gave an exculpatory statement. Prior to that he had consulted a lawyer. He was then released. A week later he was again arrested and subjected to lengthy questioning. He was advised of his right to counsel and met with his lawyer after midnight for a lengthy consultation. The questioning then continued. At 5:00 a.m., the accused asked if he could call his lawyer. The police essentially suggested that he was not going to be able to reach the lawyer at that hour. The questioning continued and he

incriminated himself. In admitting the statements, the trial judge held that there was no violation of the accused's s.10(b) rights because he had already consulted with counsel and, despite his later request, he had continued to talk to the police. He was convicted and the conviction was upheld on appeal.

[67] The Court of Appeal in *Wood* noted that the most important reason to accord a detainee the right to counsel is so the detainee knows that he or she has the right to remain silent. That is why the right must be extended on arrest or detention. Otherwise the detainee might make an incriminating statement unaware of the right to choose whether or not to speak. However, once the detainee has already exercised the right to counsel, then presumably he or she has been advised of the right to remain silent. Then the detainee participates further in the interrogation at his or her peril. And the detainee cannot cease the continuing investigation merely by indicating that he would like to speak to counsel. The judgment went on to state (at p.225):

> A detainee always has a right to a reasonable opportunity to consult counsel. However, once he is informed, he cannot, without more, stop an interrogation or investigation merely by purporting to exercise his right to counsel again. He can, of course, stop the interview by exercising his right to remain silent and, thus, withdraw from further participation in it. However, the right to counsel is not something that can be asserted without reasonable limit. Police pressure, short of denying the right of choice or of depriving the detainee of an operating mind does not breach the right of silence once the detainee has been advised.

[68] The judgment in *Wood* quoted from the case of *R.* v. *Logan* (1988), 46 C.C.C.(3d) 354 (Ont.C.A.), to support the proposition that there is no right in a detainee of the continued attendance of counsel throughout the police investigation. At p.381 of *Logan*, the court wrote:

> . . . s.10(b) confers the right, upon arrest or detention, to retain, instruct and be instructed by counsel *before* any statements of the accused are elicited. The words "*upon* arrest or detention" indicate a point in time, not a continuum. They do not deal with a continuing right to be reinstructed before every occasion on which the police obtain a statement from the accused. It is true that "retain" has a connotation of continuity (The Shorter Oxford English Dictionary (1973), p.1813), but this is with respect to the engagement of services, *i.e.*, the availability and subsequent resort to them when one wants to do so. It does not express a prerequisite to every subsequent elicitation of information.

[69] What these and other authorities emphasize is that the focus of the inquiry, once the detainee has been afforded the right to consult counsel upon arrest or detention, is

on whether there is any subsequent police conduct, by way of persuasion or otherwise, which had the effect of depriving the detainee of the right to choose to speak or not. On that strict analysis, there is no evidence that the accused here was deprived of the ability to choose to remain silent or to speak. But these cases also speak of a detainee *always* having the right to a reasonable opportunity to consult counsel (as stated in the first sentence of the quote from *Wood* above). How is that to be exercised in circumstances such as those present in this case?

[70] On June 30th, the accused had already been held in custody for 57 hours and this was the first attempt to interview him. There was no apparent urgency and no apparent reason why the officers could not have stopped and made some inquiries so as to try to put the accused in contact with the lawyer of his choice. He clearly indicated that he wanted to talk to that lawyer before continuing the interview. He also made clear that he did not want advice from the lawyers whom the police had put him together with. The accused was completely dependent on the officers for communication with the outside world. In my opinion, the officers should have respected the accused's clearly articulated wish to contact his cousin the lawyer in Ontario. They should have done exactly what Sgt. Lamothe expected them to do, to take steps to accommodate this request. The officers said they would "do that" but they never did.

[71] The time lines alone serve to distinguish the present case from those relied on by the Crown. Those cases dealt with statements made shortly after consultation with a lawyer but, generally speaking, also shortly after arrest. They are usually in the context of an investigation being quickly pursued. Also, the question is often more about whether the police have a continuing obligation to re-instruct the detainee as to his or her right to counsel (as in *Logan*) or the propriety of police persuasion to talk after consulting counsel (as in *Wood* and others). Here the questioning came two days later, after his arrest and initial contacts with counsel, and with the accused in continuing detention and without outside contact. It is not a question of re-instructing him or of trying to get him to talk right after his lawyer told him not to. It is a situation where they are interviewing him for the first time and he says he wants to contact a particular lawyer.

[72] In my opinion, if the right to counsel is to have any meaning in the context of this ongoing detention, then the implementational obligations of the police to facilitate contact with counsel must extend to this situation. The Supreme Court of Canada, in *Clarkson* v. *The Queen*, [1986] 1 S.C.R. 383 (as quoted in *Ross* at para.14), referred to

a concern for the fair treatment of an accused person that underlies such constitutional civil liberties as the right to counsel. I do not think that what transpired on June 30th was fair treatment. For these reasons, I have concluded that, in the context of these circumstances, the accused's right to counsel was violated on the morning of June 30th.

[73] Since the statement given at that time was the result of the breach of the accused's right to counsel, and since it emanated from the accused, it is conscriptive evidence and its admission would render the trial unfair: *R.* v. *Stillman*, [1997] 1 S.C.R. 607. An unfair trial would necessarily bring the administration of justice into disrepute. Therefore the statement is inadmissible.

[74] I already said that, in my opinion, the interviews on June 30 were one long continuous encounter. Based on that temporal connection, I find that the statement given on the afternoon of June 30 is also inadmissible.

[75] Similarly, the re-enactment conducted in the evening of June 30th is tainted by the breach of the accused's right to counsel earlier that day. Nothing had changed during that day. He was still under the total control of the authorities and his contact with the rest of the world was solely through them and subject to their control. At the end of the morning interview the officers had said to the accused that they want him to talk to his lawyer but still nothing was done. Therefore, the re-enactment conducted on the evening of June 30th is also inadmissible.

[76] Crown counsel indicated that there was some physical evidence discovered during the re-enactment. If the Crown wishes to introduce this evidence at trial, then it will have to establish that such evidence would have been either inevitably discovered or discovered through an independent source. That was not canvassed on this *voir dire* and the Crown is therefore free to try to establish that if it can.

[77] After the interviews on June 30th, the accused was in his cell all of July 1. On July 2nd, he sent word that he wanted to speak to Constable Culhane. After Culhane arrived, the accused was taken for a shower. He was then taken to meet a legal aid worker to fill out some forms. During that meeting he asked the worker to try to contact his cousin, the lawyer in Ontario, and told the worker that he could obtain the name and number from his sister. Later on, at 10:39 a.m., he was brought into the interview room where he met again with Constable Culhane and Corporal Buhler.

[78] The interview began by Constable Culhane expressly referring to the accused's desire, as stated to the legal aid worker, to speak with his cousin. Constable Culhane asked: "Do you wish to talk to your cousin? Do you wish to talk to us before you talk to your cousin?" And the accused replied, "No, I'll talk to her a little bit later." He was cautioned again and confirmed that he was talking voluntarily.

[79] In these circumstances, I find the statement of July 2nd to be admissible. It is unconnected causally or temporally to the earlier inadmissible interviews of June 30. The officer and the accused clearly put their minds to the accused contacting counsel and the accused chose to go ahead and speak.

[80] On July 3, 2003, the other three prisoners were taken from the detachment cells to the Yellowknife Correctional Centre. The accused, however, did not go even though he, too, was to have been moved. The accused did not want to go because he wanted to be kept separate from the others. He again asked to speak to Constable Culhane. Culhane, however, did not speak with the accused until the next day, July 4th, after the accused again sent a message that he wanted to speak to him.

[81] The statement of July 4 began at 8:52 a.m. with the accused confirming that his wish to talk was voluntary. Again Culhane adverted to the accused wanting to speak to his cousin the lawyer. The accused complained about not being able to use the telephone but he confirmed his desire to talk. Under the circumstances I find this statement to be admissible.

[82] At the end of the July 4 interview, there are approximately 68 minutes unaccounted for in the evidence. The officers testified that, when the interview ended, at 9:43 a.m., they escorted the accused back to his cell. The matron's log, however, shows the accused back in his cell at 11:01 a.m. The officers denied that there was some unrecorded interview. Notwithstanding this gap in the evidence, I am satisfied that anything that occurred then did not affect the interview that went before.

[83] The accused was transferred to the Yellowknife Correctional Centre in the afternoon of July 4. It was shortly after that, whether the same day or some days later, that he received a visit from his sister. It was not specified in the evidence when he first made contact with his counsel of choice but the accused testified that it was after he was moved to the correctional centre that he first talked to a lawyer.

[84] Subsequently on July 15, 2003, the accused was escorted to court. The record indicates that a representative of the legal aid service was there but acting only in a duty counsel role to speak to dates. I am satisfied that the accused received no advice at that time.

[85] During the escort, the accused asked Constable Culhane, one of the escort officers, to come to the correctional centre to see him. The accused acknowledged that he wanted to see him. Also during the escort, Constable Culhane took some papers from the accused and copied them. The officer testified that the accused wanted to show him the papers. The accused said that the officer asked to look at them but they were meant for his lawyer and he never gave permission to copy them. Having regard to the conflict in the evidence, and the circumstances under which the photocopying took place, I am not satisfied that these papers were voluntarily handed over by the accused, in the sense of full awareness of his right to confidentiality particularly if they were meant for his lawyer. Therefore, I rule the paper writings copied on July 15, and marked as Ex.V-28, to be inadmissible.

[86] Constable Culhane went out to see the accused at the Yellowknife Correctional Centre on July 18, 2003. Warnings were given. Culhane asked if the accused wanted to talk to a lawyer first and he declined. The accused then gave a 19 minute statement. I am satisfied that it is voluntary, free from any violation of the accused's rights, and therefore admissible.

[87] Three months later, on October 6, 2003, Constable Beland and Corporal Ing went to the Yellowknife Correctional Centre to interview the accused. This was in response to a request from his then counsel, Ms. Emerald Murphy, who asked Corporal Beland to take a complaint from her client to the effect that he and his family were being threatened. The interview lasted 67 minutes. Ms. Murphy was present throughout the interview which took the form of a sworn "*K.G.B.* statement". Nothing was said about the accused's right to remain silent or as to what use anything he said could be made. Subsequently, Ms. Murphy also delivered 12 pages of notes, made by the accused, to Corporal Beland.

[88] Notwithstanding the fact that no formal warnings or cautions had been given, one can presume from the presence of his lawyer that the accused was well aware that anything he said could be used against him. This statement, and the notes eventually delivered to the police, are admissible as being voluntarily and freely given with the benefit of the advice of counsel.

[89] Finally, I wish to address two points raised by the defence.

[90] During his testimony, the accused said that he talked to the police in the hope that if he cooperated with them, then they would take steps to protect his family. There is no question that protecting his family from what he perceived as danger from others was a concern of his throughout his encounters with the police, but in particular, in the last encounter. But there is no evidence of a *quid pro quo* on the part of the police. At no time did the officers use his family's safety as an inducement or threat so as to obtain information from the accused.

[91] Also, the defence pointed to some missing potential evidence. The RCMP detachment has a video-monitoring system of each cell and the cellblock. These, for the relevant time period, were taped over after three months in accordance with standard RCMP procedure. In addition, there was testimony that on the evening of June 29th a tape recorder was placed in the hallway between the cell occupied by the accused and that occupied by the prisoner Yukon. This was done to try and pick up any conversation between the two of them. Sgt. Lamothe testified that he listened to the tape but, either because of a malfunction or some other cause, there was no discernible audio. So he destroyed the tape.

[92] Defence counsel argued that the videotapes would have provided further evidence of any contacts with the accused in the cellblock, as would have the audiotape. I am not satisfied, however, that there is any reasonable expectation that these tapes would have provided anything more useful than the evidence already presented. The cellblock logs, in particular, provide a detailed guide to all contacts with these prisoners. The likelihood of some significant contact not being recorded is slight. This would be a different matter if the Crown were relying on something that would have been captured on this "missing" evidence, but it is not. Thus, this is immaterial and does not affect my conclusions on this *voir dire*. Further, even if these missing items constituted relevant information subject to the Crown's disclosure obligations, there is certainly nothing in the evidence to even suggest that these items were "lost" due to unacceptable negligence (as per *R.* v. *La*, [1997] 2 S.C.R. 680).

[93] I thank all counsel for their thorough and helpful submissions.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
26th day of May 2005

Counsel for the Crown: Caroline Carrasco and Noel Sinclair
Counsel for the Defence: Catherine Rhinelander and Michael Hansen

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GERALD DELORME

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
