Lennie v. H.M.T.Q., 2007 NWTSC 81 Date: 2007 10 04
Docket: S-1-CR2007000058

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RAYMOND LENNIE

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] In *R. v. Lennie*, 2007 NWTSC 69, I found that the sentencing judge erred in not inviting submissions from counsel before making a discretionary DNA order pursuant to s. 487.051(1)(b) of the *Criminal Code* when such order had not been requested by the Crown.

[2] In accordance with the procedure followed in *R. v. Ku* (2002), 169 C.C.C. (3d) 535 (B.C.C.A.), I directed that counsel appear before me to make submissions so that I could review the DNA order for correctness.

[3] The Appellant did not make submissions as to the correctness of the order on its merits. Instead, he distinguishes *Ku* on the basis that the Crown in that case had asked for the DNA order, whereas in this case the Crown did not ask for one in speaking to the joint submission on sentence.

[4] The Appellant also relies on a statement in the majority judgment in *R. v. R.C.*, [2005] S.C.J. No. 62, 2005 SCC 61. In paragraph 20 of the decision, in referring to the distinction between primary and secondary designated offences, the majority said that where the offender is convicted of a secondary designated offence, the burden is on the Crown to show that an order would be in the best interests of the administration of justice. In contrast, where an offender is convicted of a primary designated offence, the DNA order must be made unless the judge is satisfied that the

offender has established that the privacy interest exception in s. 487.051(2) should apply instead.

[1] The Appellant submits that the Crown has not shown, nor has it attempted to show, that a DNA order would be in the best interests of the administration of justice in this case. Therefore, the Appellant argues, the order must be set aside.

[2] For his part, Crown counsel submits that s. 487.051(1)(b) does not require an application by the prosecutor. It only requires that the court be satisfied that it is in the best interests of the administration of justice to make the order. Crown counsel says, however, that in the circumstances, this Court should consider the matter afresh. His submission is that the offences and circumstances in this case are not such that DNA evidence is usually engaged or helpful. The Crown did not originally request the DNA order and does not seek to uphold it.

[3] In light of the position taken by the Crown, I have concluded, not without some hesitation, that I should not review the order for correctness. Instead, since the order was made without giving the Appellant the opportunity to address the issue, the order should be set aside for lack of procedural fairness. As Crown counsel did not and does not seek a DNA order, I decline, in the circumstances of this case, to make a DNA order.

[4] In so ruling, I do not want to be taken to accede to the Appellant's argument that the Court cannot make a discretionary DNA order when the Crown has not requested such order. There is case law holding that the burden on the Crown is an evidentiary one to produce sufficient information to raise the issue: *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.). If the burden referred to in *R.C.* is an evidentiary one, then so long as the Crown has put sufficient evidence before the Court during sentencing so as to enable the Court to be satisfied that the order is in the best interests of the administration of justice, the Crown has satisfied its burden even if it did not specifically ask that the order be made. This interpretation is consistent with the decision in *R. v. T.N.T.*, [2004] A.J. No. 780 (C.A.).

[5] For the reasons noted above, the DNA order is set aside. Crown counsel has indicated that the National DNA Data Bank of Canada will comply with an order that the sample of bodily substance already taken from the Appellant and the DNA profile obtained from it be destroyed. Accordingly, I make that order. Counsel may agree

on, and submit for my review, other wording for this aspect of the order to ensure it accomplishes its intended purpose.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 4th day of October, 2007.

Counsel for the Appellant: Daniel Rideout
Counsel for the Respondent: Steven Hinkley