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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER:

HER MAJESTY THE QUEEN

VS

HENRY ROBERT MCKAY

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Transcript of Proceedings of an Oral Judgment on a  
Voir Dire delivered by His Honour Judge R. W. HALIFAX,  
sitting at Hay River in the Northwest Territories on  
Wednesday, January 13, A.D. 1988.

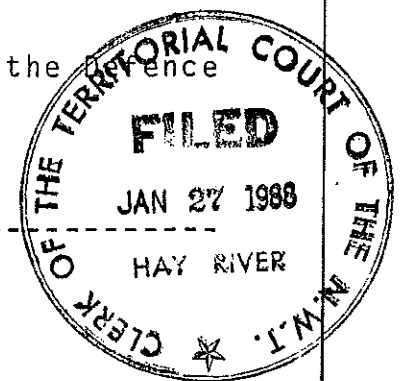
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APPEARANCES:

MR. T. HUMPHRIES Counsel for the Crown

MR. D. MACDONALD Counsel for the Defence

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1 THE COURT: Firstly, there is no doubt in my mind that the  
2 accused was advised of his right to retain and instruct  
3 Counsel without delay, as required by Section 10(b) of the  
4 Charter. Constable Asels not only advised him of that right  
5 at the time he was arrested, upon being returned to the  
6 Detachment, he advised him of that right again, together  
7 with advising that he would be charged with a sexual assault,  
8 that he had the right to remain silent, and that anything  
9 that he said could be used against him as evidence; and he  
10 was advised that he had the right to retain and instruct  
11 Counsel. Constable Asels then went a step further and asked  
12 the accused if he wished to contact a lawyer; and the  
13 accused indicated in the affirmative that, yes, he did. An  
14 attempt was then made to contact Mr. MacDonald, which from  
15 the accused's evidence, is the only lawyer he knew. He had  
16 had dealings with Mr. MacDonald previously. He attempted to  
17 contact Mr. MacDonald at his residence and his Office,  
18 according to his evidence, and was unsuccessful. Constable  
19 Asels allowed him to do this in private. He then returned  
20 to the interview room and was advised by the accused he had  
21 been unable to contact Mr. MacDonald. Constable Asels then  
22 went on to say, "Do you wish to contact any other lawyer?"  
23 The accused said, "No. I'll contact Mr. MacDonald in the  
24 morning." Constable Asels then continued to question the  
25 accused and obtained the statement that is in question  
26 today.

27 There is no doubt, as I say, in my mind that

1 the accused was aware of his right to retain and instruct  
2 Counsel without delay; and he attempted to do so unsuccess-  
3 fully.

4 I read--perhaps being a little too technical--  
5 the Judgment of Mr. Justice Marshall in Avadluk, which  
6 indicates that he is entitled at that point when he answers  
7 in the affirmative not to be questioned further until he has  
8 had the time to consult his Counsel and obtain legal advice,  
9 in the one area; and the other quote is that:

10  
11 The officer, at that point, . . .

12  
13 In other words, after an affirmative answer of wishing to  
14 exercise the right:

15  
16 . . . was obliged to accept that  
17 decision, that affirmative decision  
18 on the part of the accused person,  
19 and take no statement from the  
20 accused until he had indeed talked  
21 to his lawyer.

22 Now, that must be tempered from the case depending on the  
23 question of urgency, which does not exist, in my view, in  
24 this case; and I think Constable Asels quite properly and  
25 fairly and honestly gave evidence in that regard, that it  
26 was not necessarily urgent that he receive the statement  
27 immediately. I do not believe there was any improper  
conduct on the part of Constable Asels as he understood his

2 obligations. He did not do anything, in my view, to attempt  
3 to trick or mislead the accused to get a statement from him.  
4 Of course, the law has been in a bit of a flux at this stage  
5 in this whole area.

6 Firstly, I must say that I am bound by the  
7 Avadluk decision of the Supreme Court of the Northwest  
8 Territories. Having said that, it seems to me, firstly,  
9 that once an accused indicates he wishes to exercise his  
10 right under Section 10(b), then, the police officer is  
11 obliged to come to a full stop, so to speak, with regard to  
12 obtaining any further evidence from the accused until the  
13 accused has had a reasonable opportunity to exercise that  
14 right. He was unable to contact Mr. MacDonald. He did not  
15 wish to phone any other lawyer. He did not know any other  
16 lawyer. If there was some urgency, I might take a different  
17 view; but in this case, there was no urgency; and it seems  
18 to me that the Constable is then under an obligation not to  
19 question the accused further until he has consulted Counsel  
20 and obtained legal advice. To say otherwise in the circum-  
21 stances, in my view, would make hollow the 10(b) right.  
22 If a person--what happens if he phones or the phone is busy  
23 or it is out of order; and he never got his right to contact  
24 Counsel, then; and to abandon his right under Section 10(b)  
25 would make that right hollow, in my view.

26 With regard to the question of waiver and the  
27 fact that the accused thereafter attempted to contact Counsel  
and was then questioned by the police, and he answered those

1 questions, in my view, does not amount to a waiver. A  
2 waiver must be in an explicit manner for a person once  
3 indicating affirmatively that he wishes to exercise his  
4 right to Counsel. For it to be waive, it has to be an  
5 explicit waiver. The fact, in my view, that he answered  
6 questions put to him by the police officer when he was under  
7 arrest and detained and that he answered those questions  
8 does not amount to a waiver.

9 As a result, I am satisfied that Mr. McKay's  
10 right under Section 10(b) has been violated--his right to  
11 retain and instruct Counsel in the circumstances has been  
12 violated.

13 The question then becomes whether or not the  
14 evidence should be excluded under Section 24(2) of the  
15 Charter. To not exclude the evidence, in my view, in this  
16 case would again make his 10(b) Charter right somewhat of a  
17 nice written document but of no force and effect, really,  
18 when it comes to protecting a person when there has been a  
19 violation; and I do not say a flagrant, intentional viola-  
20 tion; but there has been, in my view, a violation perhaps  
21 unwittingly by Constable Asels to a degree because of the  
22 situation with regard to the law in the Territories. Of  
23 course, the Avadluk case was not decided at the time this  
24 incident occurred, nor were several other Judgments that we  
25 now have available to us rendered after the 9th of June, 1987.

26 In my view, as I have said, the 10(b) right  
27 has been violated. There would be no remedy at all, in my



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view, if it was not for a remedy under Section 24(2) to exclude the evidence.

I therefore am satisfied the Application succeeds on the balance of probabilities.

I can again refer to Mr. Justice Marshall and the result of the Avadluk case, when he was referring to the Manninen Judgment:

'It is true that the offence is a serious one and that the respondent's guilt is clearly established by the statement sought to be excluded, but that cannot justify the admission of the evidence in the light of the seriousness of the violation and the effect of the evidence on the fairness of the trial.'

In my view, that same situation applies to this case; and the evidence, therefore, will be excluded.

Certified a Correct Transcript:

*Margaret Andruniak*

Margaret Andruniak  
Court Reporter