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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

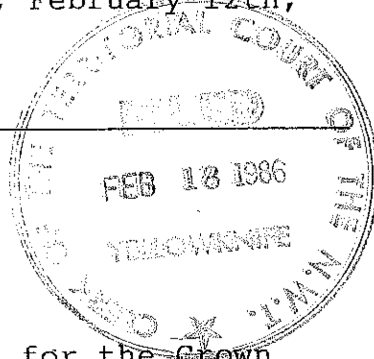
IN THE MATTER OF:

HER MAJESTY THE QUEEN

VS

ALFRED JESSIE ORLIAS

Transcript of the Oral Ruling Delivered by His Honour Judge T. B. Davis, sitting at Yellowknife in the Northwest Territories, on Wednesday, February 12th, A.D., 1986.



APPEARANCES:

MR. J. SUTTON: Counsel for the Crown

MR. P. PENNY: Counsel for the Defence

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1 THE COURT: I would like very much to be able to take the
2 time to do the necessary research to come up with what
3 might be classed as a logical and properly prepared ruling
4 on this particular application today, but because we are
5 in a show cause hearing, I am sure that the accused doesn't
6 want to sit around for any length of time waiting for
7 me to do the necessary research into the reason that the
8 Section 457.3 was put into effect to start with. The
9 section of the Code at the present time does, on a show
10 cause hearing, restrict the right of cross-examining or
11 examining the accused person about any offences that are
12 being discussed in the show cause hearing, and no inquiry
13 of the accused person can be made at the show cause hearing
14 under that section of the Criminal Code.

15 Mr. Penny, on behalf of the accused, Alfred Orlias
16 today has found a case from the Quebec Superior Court
17 dated the 27th of July, 1983, and reported in 1984 in
18 7 Canadian Criminal Cases, third edition at page 286,
19 in which case Mr. Justice Barredde-Joycas has extended
20 what he calls the **audi alteram partem** rule. That generally
21 means the requirement to listen to the other side, so
22 that his interpretation of the maxim is that it causes
23 the section of the Criminal Code to be in violation of
24 the Charter of Rights, because it does not give the accused
25 person the full opportunity to be heard, and His Lordship
26 felt that by depriving him of his right to be heard, he
27 was deprived of a fundamental principle of justice.

His Lordship does recognize that he is in opposition to other Supreme Court rulings as he mentions, Re Deom et al. and The Queen, as reported in 1981 at 64 C.C.C. (2d) at page 222, and The Queen vs. Paonessa and Paquette, reported in 1982 in 66 C.C.C. (2d) at page 300, as well as in 135 D.L.R. (3d) at page 277.

I therefore must today try and determine whether the restriction to have Defence counsel or any other person examine the accused as is restricted in Section 457.3 is to be upheld or is to be overruled on the basis suggested by the Millar case.

It would seem to me that as pointed out by Crown counsel here today, we are not at a hearing in which guilt or innocence is in dispute and not to be determined. The purpose of the show cause hearing is simply and only to determine whether or not the accused should be released until he must appear in court for a trial or trials. Therefore, the mechanism and the procedure at a pretrial hearing which is one of the pretrial hearings being a show cause hearing is not such that we can determine the guilt or innocence of the accused, and unless Crown counsel were entitled to cross-examine the accused on any statements made under evidence or when giving evidence, there would be a violation of the same maxim suggested by His Lordship in the Millar case because we then would not be listening to the other side because the other side would not be able to be brought out by cross-examination.

1 I think it would be, therefore, harmful to the
2 procedure if I were to interfere at this time with the
3 ruling that exists and that has existed which restricts
4 the examination of the accused on evidence relating to
5 t alleged offences, because we are not in a position
6 to fully have the matters disclosed and tried at a show
7 cause hearing.
8 I would also feel that the fundamental principle
9 of justice is that if there is evidence adduced, it must
10 be subject to cross-examination in order to be given any
11 weight by the court. I also find that the Millar decision
12 does not go so far as to suggest that cross-examination
13 is available on the evidence - that His Lordship felt
14 could be adduced by the Defence.
15 On that basis, therefore, although the decision
16 certainly was of interest to me, and one that if I felt
17 it were not harmful to the procedure and maybe even to
18 the protection of the accused, I would be prepared to
19 follow today.
20 I am not satisfied that it would be proper to follow
21 the case, and therefore, I am going to choose to follow
22 the law as it has been directed in the other cases that
23 His Lordship refers to, and at this time I do not believe
24 that I can allow the Defence counsel to examine the witness
25 on the facts relating to the matters with which the accused
26 is charged.
27

Certified a correct transcript,

Laurie Ann Young

Laurie Ann Young
Court Reporter