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IN THE TERRITORIAL YOUTH COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

HER MAJESTY THE QUEEN

AND

BRUCE R.

Heard at Yellowknife, N. W. T.

Reasons filed: Interim Motion

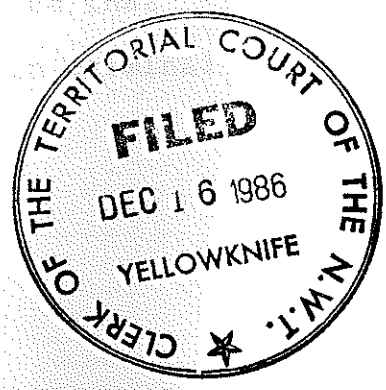
REASONS FOR JUDGMENT

of

His Honour Judge T.B. Davis

Counsel for the Crown: Mr. J. Sutton

Counsel for the Defence: Mr. S. Tate



Charter - Section 24(2)

On October 8, 1986, on a motion by Defence Counsel under the Charter, I ruled that the police Constable had complied with all the requirements under Section 24(2) when he had taken a breath sample from Bruce Richardson, who as a youth, is before the Youth Court on a charge under Section 237(b) of the Code.

Young Offenders Act - Section 56

Defence Counsel's next motion is to exclude the breathalizer reading if Section 56 of the Young Offenders Act has not been complied with, as that section is intended to give extra protection to young people who come under the authority of the police. Counsel for the youth argues that the giving of a breath sample is analagous to giving a statement and should only be admissible in evidence if the full protection under Section 56 is afforded the youth as if he were giving a written statement.

Breath Sample - Statement

Crown Counsel argues that the taking of a breath sample is not taking a statement and is directed and authorized under a specific section of the Code, which binds both young people and adults without distinction. Crown further states that the failure to provide a breath sample can result in criminal

charges being laid while there is no legal consequence for for failure to give a statement. Crown further states that statements can only be admitted into evidence if they are proven to have been voluntarily made, while certificates of breath samples are required and are admissible even though the sample was not voluntarily produced but was provided only to avoid a criminal charge being laid for failure to provide the sample.

Statements From Young Persons

Section 56 of the Young Offenders Act states that subject to the section itself, the general law relating to the admissiblity of statements governs statements made by young persons. The section however goes on with a number of conditions which must be met before any oral or written statement by a youth to a person in authority can be admitted in evidence against that young person.

Before considering these additional conditions, it is necessary to decide on whether a breathalizer sample should be considered and dealt with as a statement under a liberal interpretation which, Defence Counsel argues, would be appropriate for youths who have special needs and require assistance and who have the right to be informed of what their rights are pursuant to Section 3(1) of the Act. Sub-section 3(1) is to be

interpreted liberally pursuant to sub-section 3(2).

Defence Counsel has referred to **R vs Woodward**, 1975, 23 C.C.C. (2d) 508, in support of a liberal interpretation of the Young Offenders Act.

In that case, the defendant on being asked by a police officer if he had any marihuana in his possession did not make a statement, but in response, proceeded to empty the contents of his pockets onto a picnic table, some items of which were small bags of marihuana.

Two hours later, the accused was given the usual caution before the police officer took a statement following a trip to the accused's home and to a field in the presence of the accused in the exeuction of a search warrant. During the hour and one half investigation, there was conversation between the accused and the police officers.

Because all the persons in authority were not called as witnesses before the statement was admitted, the Appeal Court ordered a new trial, on this point of law.

The Appeal Court of Ontario also indicated that although the accused responded by a physical act rather than orally answering the question of the police officer, the conduct was a response. Expressing this opinion only as obiter dictum, the court said that it would have been a prudent course to have held a voir dire before determining the admissibility of evidence obtained by the physical action of emptying the pockets in response to the police officers questions.

The Appeal Court also refers to the emptying of his pockets as an "admission of the accused by his conduct", that he had violated the Narcotics Control Act.

Conduct as Admission by Accused

The Appeal Court must have therefore somewhat liberally translated the response, being the conduct of the accused, a form of admission or statement for without such a conclusion there would have been no reason to suggest that holding a vior dire would have been the prudent procedure.

After taking into account the added protection of a young persons rights as listed in Section 56 of the Young Offenders Act, am I to liberally interpret the Acts of providing a breath sample as a response or statement that would require the special procedures listed in the Section?

Section 56 governs the method to be used by a person in authority when taking a statement from a young person thus ensuring the additional guarantee that a youth will know he or she has the right to have, and indeed will have an adult of his choice with him when a statement is being made to the police during an investigation of an offence.

To summarize Section 56, the statement must be voluntary; the youth must actually and clearly understand: (1) that there is no obligation to give a statement; (2) that if given it can be used against the youth; (3) that the youth can consult with a lawyer, or a parent, or a relative, or any adult the youth might choose, before giving a statement; ... (4) the youth must be given the opportunity to have such a person present during the giving of a statement unless the youth desires otherwise.

My interpretation of the Section is that unless the youth understands what is happening and the effect of waiving his rights, and the youth then expressly indicates that he or she does not want an adult present, such a statement would not be admissible.

Section 56 however does appear to refer to what we usually

associate with adults as voluntary admission. Statements made by accused persons are only admissible as evidence if they can be shown to be made voluntarily.

Such restriction or qualification as being voluntary however does not extend to the giving of breath samples under Section 237 of the Code. If an adult person fails to give such sample, he is subject to other charges, possible conviction and penalty unless he has and can demonstrate a valid reason for refusal to comply with the requirement. The providing of a breath sample, being a physical response to a demand by a police officer is therefore not voluntary in the way that other forms of inculpatory statements or responses must be voluntary before they become admissible as evidence at a trial.

A short review of the facts of the case before me shows that the accused youth who showed signs of impairment, was given a warning and advised of his rights to counsel upon being placed in a police vehicle before going to the R.C.M.P. detachment, and again before the breathalizer test was made.

The Appeal Court of Nova Scotia **R vs T** (RW) - (1986) 41 M.V.R. 73 followed a decision in **R vs S**, from the Alberta Youth Court,

Y05-85-001 and ruled that a breath sample taken from a youth could not be excluded even when upon his arrest he was not provided with an opportunity to consult with a parent or adult person, because the court was of the opinion that an arrest under Section 237 is not a detention "pending his appearance in court". The court held that there was no obligation of the officials to notify the parents of a youth prior to the administration of the breathalizer tests.

This is a more restricted interpretation than I would choose but does influence me somewhat in the theory that a breathalizer test is a police investigative process that must be allowed unless it has been administered in circumstances which specifically violate a civil right of the accused person.

I must conclude that a breathalizer test can be administered to a young person if all the usual requirements in law for adults are met by the actions of the police and the youth has indicated that he does not wish to have a lawyer present, after he has been advised of his rights in language suitable to his ability to understand.

The evidence of the police officers was that the accused had been notified of his right to counsel both when arrested and

before the breath test.

I find the breath test is not a statement but is a requirement in law under the criminal code and need not be given voluntarily, either for an adult or a youth and cannot be excluded under the special term of the Young Offenders Act.

Motion dismissed.

Judge T.B. Davis