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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER:

HER MAJESTY THE QUEEN

VS

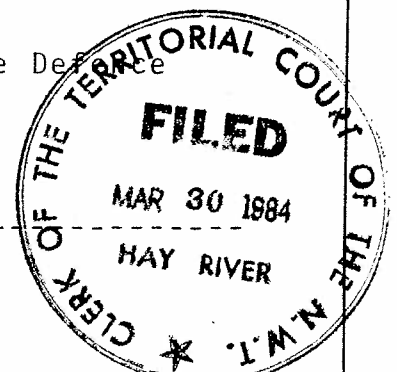
HENRY HOWARD BEAVER

Transcript of Proceedings of an Oral Judgment given
by His Honour Judge R. W. HALIFAX, sitting at Hay
River in the Northwest Territories on Thursday,
March 29, A.D. 1984.

APPEARANCES:

MR. B. FONTAINE Counsel for the Crown

MR. G. BOYD Counsel for the Defence





1 THE COURT:

2 Well, it is an interesting point. I think
3 what you have to do, considering there is very little case
4 law; and the only case that is really on the point is
5 R. versus Thompson, a case from Britain, 1976, 64 Criminal
6 Appeal Reports at page 96, which deals with the situation
7 of a witness that is standing mute, basically, refusing to
8 answer any questions outside of the original questions as to
9 name and residence and that type of thing; but once the Crown
10 has asked questions as to the merits of the matter before the
11 Court, the witness has refused to answer. The Court has also
12 explained the provisions of Section 472 of the Criminal Code
13 to the witness and the possible repercussions, and the witness
14 has indicated in very flowery language that she is not going
15 to answer any further questions.

16 Now, as a result, firstly, the Crown initially
17 raised the issue of Section 9(2) of the Evidence Act to be
18 allowed without having the witness declared adverse to
19 cross-examine the witness on a previous statement which is
20 inconsistent with the evidence given at the Preliminary
21 Hearing in the present testimony. The only problem is there
22 is no present testimony.

23 The Thompson case, in a way, seems to infer
24 that although the Court of Appeal did not directly deal with
25 the issue that, standing mute, not giving any answers is
26 tantamount to inconsistent. I have some doubt in my mind
27 that it is the same. However, I think what the Thompson case
does stand for even though there are the statutory provisions



1 in Britain under Section 3, which is word for word almost our
2 Section 9(1) of the Canada Evidence Act, that even outside of
3 that, there is still the common-law discretion of the Court.
4 That being the case, I will deal with that further later.

5 It seems to me when you are talking about
6 a witness acknowledging and confirming that there was a
7 previous statement made and confirm the truth of that previous
8 statement that it is admissible in evidence. If you look at
9 what happened--that is under 9(2)--where the witness is giving
10 inconsistent testimony and the Crown applies to cross-examine
11 on a previous statement which is inconsistent with the present
12 testimony--I should point out without having the witness
13 declared adverse. In those circumstances, if the witness
14 says, "Yes, I made that previous statement" and "Yes, that
15 previous statement is true," it is admissible as to the
16 truth of it. If the witness denies making the statement or
17 denies that it is true, then the Crown can call other evidence;
18 and that goes to the credibility of the witness.

19 We are dealing under Section 9(1) which is
20 a different matter. The normal rule, of course, is that a
21 party calling a witness, in this case, the Crown calling
22 their witness who happens to be the complainant in the matter,
23 is not entitled to impeach the credit of that witness by
24 general evidence of bad character; but if the witness in the
25 opinion of the Court proves to be adverse, which is the case
26 before this Court: the witness has been found to be adverse,
27 the Crown in this case in the circumstances may contradict



1 her evidence by other evidence or with leave of the Court may
2 prove that she made at another time a statement inconsistent
3 with the present testimony. We are back to whether or not
4 the previous statement is inconsistent with the present
5 testimony when, in effect, there is no present testimony.

6 I think when you go back to Cross on Evidence,
7 Fifth Edition, and you look at page 253 about two-thirds of
8 the way down the page dealing with hostile witnesses--I am
9 going to read this slowly and apart. It is about a third of
10 a page:

11
12 Section 3 of the 1865 Act has not
13 affected the common law according
14 to which the Judge has discretion
15 to allow a hostile witness to be
16 examined by means of leading ques-
17 tions or with reference to a prev-
18 ious statement. . .

19 Of course, those are the cases of Clarke
20 versus Saffery from 1824 and Bastin versus Carew, 1824, both
21 of which cases are cited in R. versus Thompson. It goes on:

22 for this does not amount to impeach-
23 ment of credit "by general evidence
24 of bad character."

25 In R. versus Thompson, the accused
26 was convicted of incest with his
27 daughter who was called as a witness
by the prosecution. After answering
some formal questions, she said that
she did not wish to give evidence.



1 Which is our situation exactly.

2
3 The Judge allowed her to be treated
4 as hostile with the result that she
5 was examined on a statement that
6 she had made to the police and by
7 means of leading questions. The
8 Court of Appeal held that the Judge
9 had acted properly and affirmed the
10 conviction. The witness did not
11 deny making the statement to the
12 police; but even if she had done so,
13 it is doubtful whether Section 3
14 would have applied to the case for
15 the girl's statement was not "incon-
16 sistent with her present testimony."
17 If the Section does not apply in
18 such circumstances, it is question-
19 able whether the statement can be
20 proved.

21
22 Now, I just read that from Cross because it seems to me to
23 be an appropriate comment on the Thompson case.

24 It seems to me that the Crown hasn't proved
25 an inconsistent statement under Section 9(1) in the present
26 case. What the Crown has established in the voir dire is the
27 witness has confirmed the statement was made and is true.
That, in my view, does not allow it directly in the normal
course to be admissible as evidence and accepted for the
truth of the contents of what is in the statement.

It seems to me you cannot jump from Section
9(1) by route of an adverse witness application back to what
is the normal law with regard to confirming the contents of
a previous statement or what amounts to the same thing under
Section 9(2) of the Evidence Act; and therefore, the statement



1 would be admissible not only to the fact that it was made but
2 also to the truth of the statement.

3 I come to this conclusion, I must say, with
4 some hesitation; but it seems to me when you put the matter
5 in full perspective, to allow the Crown to put the complain-
6 ant's evidence before the Court via an application under
7 Section 9(1) after the witness having been declared adverse,
8 having it put before the Court as to the truth, not only that
9 the statement was made but the truth as to the contents, and
10 then put the Defence in the position of having to attempt to
11 cross-examine the witness who is refusing to answer questions,
12 in the normal course and, in my view, of what is right and fair
13 would prejudice the defence of the accused substantially;
14 and that is a part that has caused me some concern.

15 It may well be that procedurally it would
16 be more sensible to allow the Defence to cross-examine the
17 witness at this stage with regard to the statement and the
18 contents of the statement. However, that is not the law as
19 I understand it.

20 As I have said, there is really no case law
21 outside of the Thompson case which really, in effect, talks
22 about the common-law discretion and has not been changed as a
23 result of the statutory provisions in England in the Criminal
24 Procedures Act with regard to hostile witnesses. As I have
25 said, that is basically the same as our Section 9(1) of our
26 Canada Evidence Act. I could assume that there still is the
27 common-law jurisdiction in our country as well in this area



1 and whether or not the Judge wishes to allow the evidence in
2 under Section 9(1) or a finding that the evidence does not
3 come within Section 9(1) and exercise his common-law juris-
4 diction and allow it to be admitted. It just seems to me in
5 this case that it is not proper.

6 For the reasons I have said: firstly, the
7 prejudice to the accused; and secondly, it does not seem to
8 me that you can go by the adverse witness route under Section
9 9(1) get a witness who has been declared adverse and is
10 refusing to answer questions even under threat of possible
11 incarceration to all of a sudden be able to say, "Well, this
12 is a previous statement. She's affirmed that it is true.
13 There is no evidence that there is any previous inconsistent
14 statement as required by the Section, so it should be admis-
15 sible as an exhibit and as evidence not only as to the
16 statement but as to the truth and the contents." That seems
17 to me to go far beyond the bounds of fairness, and it seems
18 to me to go far beyond what is the normal course in our
19 criminal justice system as to the rules of admissibility. It
20 seems to me we would be creating a new rule as to admissibility
21 in our criminal justice system.

22 For those reasons, I rule that the statement
23 that has been filed as an exhibit on the voir dire will not
24 be admitted as an exhibit and as evidence on the Preliminary
25 Inquiry.

26

27 MR. FONTAINE: Sir, in view of the Court's ruling, I would



1 like to direct the Clerk of the Court to enter a Stay of
2 Proceedings on these matters.

3 THE COURT: You don't wish to go back to Fort Smith?

4 MR. FONTAINE: Not considering the ruling of the Court, sir.

5 THE COURT: I just wonder, Mr. Fontaine, if it would be
6 sensible to go back to Smith to do that in the circumstances
7 of this case so the accused is before the Court.

8 MR. FONTAINE: My view, sir, is that under recent amendment
9 to the Code, the accused may be excused from being present
10 before the Court as Counsel is here. Perhaps we can hear
11 from Mr. Boyd as to that.

12 THE COURT: Perhaps we can adjourn for five minutes.
13 Can I see Counsel in my Chambers, please.

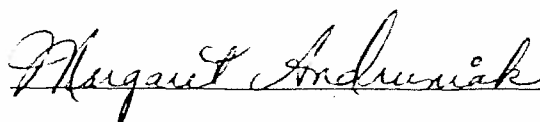
14 THE CLERK OF THE COURT: All rise. Court stands adjourned for
15 five minutes.

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17 (Court commences after a short adjournment.)

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19 THE COURT: Just prior to the adjournment, the Crown has
20 directed a Stay of Proceedings.

21 MR. FONTAINE: Yes, sir. . . .

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24 Certified a Correct Transcript:

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Margaret Andruniak
Court Reporter