2003 NWTC A16

AMENDED

T-1-CR-2003000285/286

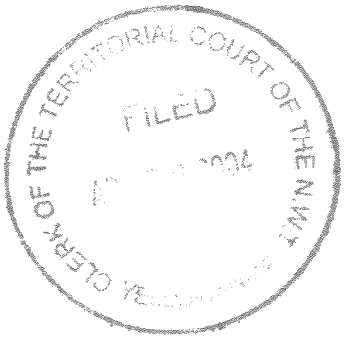
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

ELVIS JAMES JEREMICK'CA



Transcript of a Ruling on Voir Dire delivered by The Honourable Judge B.A. Bruser, in Yellowknife, in the Northwest Territories, on the 8th day of August, A.D. 2003.

APPEARANCES:

Ms. S. Smallwood: Counsel for the Crown

Mr. J. Mahon: Counsel for the Defence

Charges under ss. 129(a) C.C., 270(1) C.C. and 4(1) CDSA

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THE COURT: This is a ruling in a *voir dire*. The bulk of the evidence has been heard in this single *voir dire*. If the evidence in the *voir dire* is not admissible because of the *Charter* attack, the Crown has no evidence upon which to seek a conviction on either count.

The two charges are, Count 1, resisting Constable Kosmenko, a peace officer engaged in the execution of his duty, by physically resisting him. Count 2 alleges an assault on Constable Kosmenko, a peace officer engaged in the execution of his duty. Both counts arise from the same incident on February 9th, 2003, at the home of the accused in the City of Yellowknife.

Two police officers testified for the prosecution, and Mary Mantla, who lives common-law with the accused, testified on behalf of the defence.

At the outset, it is instructive to address some common law principles separate from the *Charter*.

In the case of *Sanderson* [2003] O.J. No. 1481, there is at paragraph 29 reference to the case of *Waterfield*. This is a leading case from England. It is commented upon by the Supreme Court of Canada in the *Godoy* judgment of 1999. The court in *Godoy* commented upon the question of police entry. In *Sanderson*, the judgment of Lamer C.J.C. in *Godoy* is referred to in this way, with the Supreme Court

apparently following *Waterfield*:

> The accepted test for evaluating the common law powers and duties of the police was set out in *Waterfield*... If police conduct constitutes a *prima facie* interference with a person's liberty or property, the court must consider two questions: first, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty.

I have this leading test in mind in my assessment and weighing of the totality of the evidence in the *voir dire*.

In the *Godoy* judgment, the Supreme Court at paragraph 22 emphasized "that the intrusion must be limited to the protection of life and safety". This has to do with the forced entry into a dwelling house in order to ascertain the health and safety of a 911 caller. A 911 caller is somebody making an emergency call. We do not have a 911 number as such in Yellowknife, although we do have an emergency number for the RCMP.

I continue reading from paragraph 22:

> The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required.

In the case before me, the police received a call from their Operations Centre. I do not know with any certainty if the call placed to the Operations Centre was an emergency call or simply a call of a complaint about something that had happened in the past. In any event, Constables Kosmenko and Vesina located the caller. They found him in a parking lot near the home of where an alleged incident had occurred. The caller was safe, and there was no need for the caller to be escorted back to that home for any purpose connected to his safety. Additionally, the caller does not appear on the evidence to have had any lawful proprietary interest over any aspect of the home located at 632 Williams Avenue. I believe Constable Kosmenko testified that the home was 632 Bigelow, but I prefer the evidence of the other officer and of Mary Mantla that it was 632 Williams Avenue. The street discrepancy is, however, of no consequence.

I return to *Godoy*, paragraph 22:

> The police authority for being on private property in response to a 911 call ends

there. They do not have further permission to search the premises or otherwise intrude on a resident's privacy or property. In *Dedman* at p. 35, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be *reasonable*. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. Each case will be considered in its own context, keeping in mind all of the surrounding circumstances.

I have the *Godoy* principles in mind in assessing and weighing the evidence and issues before me.

In *Dedman*, referred to in *Godoy*, which in turn was referred to in *Sanderson*, at page 119 there is the following principle that I remain alive to. The best I can do is to quote:

> It has been held that at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property, from which is

derived the duty to control traffic on the public roads.

The last part of the principle has more to do with the facts of that case, but the principle at the outset of this quote remains applicable to what I have to deal with.

Another principle that emerges from *Dedman* is the fact that although the subject may comply with the directions of the police, this does not by itself make those directions lawful. People comply for many reasons.

What circumstances did the police face? They received a call from the Operations Centre. The evidence, as I have remarked upon, is not clear as to whether it was an emergency call or otherwise, although they treated it as an emergency. They called it a Code 3 and proceeded with lights, which I take to be emergency lights, and siren activated. They knew that the call had to do with an assault. They believed it had to do with the use of a knife either being actually used or being used to threaten someone.

The complainant was Anthony Mantla. They had information as to where they would find the complainant, and that location was not inside or at that home but in a parking lot not far away.

They arrived there. Anthony Mantla was present. The police did the proper thing by speaking to him to

determine more about what sparked the complaint. When they talked to him, they became clear as to what house it was where the alleged incident upon Anthony Mantla had occurred. Up to this time, they had received conflicting information as to the house number.

After talking to Anthony Mantla, they had reason to suspect the accused. They had reason to believe the accused was still in that home and was in there with one other person. They attended the home. They went to the door. They knocked and announced who they were; these are two of the conditions precedent to lawful entry into a home at common law. It is conceded by the Crown that the police did not have a warrant to enter into the home, nor did they have a warrant for the arrest of the accused.

A further principle of law which flows from this concession by the Crown, is that the entry by the two officers into the home was *prima facie* unlawful because it was contrary to common law and the *Charter*.

At the door, they confirmed the presence of the accused and a woman who became known to them as Mary Mantla. There was no indication of anybody else being there, either by sound or by sight. They had no reason to believe from their call from the Operations Centre or from speaking to Anthony Mantla or from the brief dealings at the door with Mary Mantla, that she had been threatened or assaulted by the accused, or

that she was in any immediate risk of harm from the accused.

Constable Vesina testified that he had heard yelling of an aggressive sort from within the home before the door opened, but that evidence does not go so far as to suggest that the accused was yelling in an aggressive way at Mary Mantla or that she was yelling at him or, as should be apparent, that they were yelling at each other.

By the time the police were at the door, which I accept was partly ajar at the time they knocked, they had no evidence of any aggression by the accused toward Mary Mantla nor toward anyone else in the home, there being nothing to indicate that there was a third person there. When Constable Kosmenko knocked on the door, it opened a bit further and Mary Mantla opened it the rest of the way. At no time did the police have express permission from her or from the accused to enter. Mary Mantla testified that she remained at the door until the police removed her from the home, after she had told the police to leave. She testified that she said this in Dogrib to the accused. There is no suggestion that the RCMP understood Dogrib. She says, however, that she did not want the police to come in and that she was argumentative with them. That's when they removed her from their home.

Constable Kosmenko testified that neither she nor

the accused objected to the presence of the police.

Here, I am reminded of the *Dedman* principle, that the fact that somebody fails to object does not amount to a concession, nor does it convert unlawful behaviour by the police into lawful behaviour.

In particular, insofar as the circumstances before me are concerned, the failure of Mary Mantla or the accused (to take the evidence at its best from the Crown's perspective) to object to the presence of the police within their home does not make the presence lawful.

Constable Kosmenko testified that because Mary Mantla did not close the door on the police or otherwise object, it suggested to him that she did not object to their presence in the home. He conceded that she did not give permission for them to enter. She was agitated but not at the accused, and not apparently by anything the accused had done to her, but rather, according to Constable Kosmenko, by their pursuit of the accused inside the home. This evidence of Constable Kosmenko I find to be troubling. I trust that it is not local RCMP policy to regard every unclear objection as permission to enter into a home. They have to follow the law by using a warrant or relying upon the common law. I repeat again for the sake of emphasis because it is very important: The failure to object is not to be equated with express

consent. Leaving a door open is not, as Crown counsel has suggested, an implied invitation to enter. The sanctity of our homes is one of our most important and cherished rights and freedoms. It would be a tragic state of affairs in our free and democratic society if it could be successfully argued that by leaving our doors open or partly open, the agencies of the government could enter into our homes and argue implied consent. I know we have not arrived at this stage and I trust that this country will never get to that point. It would be an affront to our *Charter of Rights and Freedoms*.

I conclude up to this point in my judgment that (a) as conceded by the Crown, the entry was without warrant and therefore *prima facie* unlawful, and (b) the entry was without consent and at common law unlawful (apart from exigent circumstances).

There is, however, the issue of whether exigent circumstances make the entry lawful, notwithstanding the warrantless entry and notwithstanding the absence of consent. Hot pursuit is not before me. If there is anything to be made of exigent circumstances, it would have to be on the basis that the police, within the *Godoy* judgment, were required to intrude for the protection of life and safety. The two officers indicated in their view that it was a high risk situation and that they had to enter for exactly this

purpose.

Has the Crown satisfied the burden to justify the warrantless entry and entry without consent? That is the issue to resolve at this point.

As I indicated before, the alleged victim was not Mary Mantla but was Anthony Mantla. Anthony Mantla was safe. He was away from the home.

I disagree with the evidence of the high risk characterization as testified to by Constables Kosmenko and Vesina. In my view, the high risk situation was created when the police entered the home unlawfully. They entered the home contrary to the *Charter*, contrary to the *Criminal Code of Canada*, and contrary to the common law. There were not present the sort of exigent circumstances contemplated by the Supreme Court of Canada in *Godoy*. The situation regarding any concerns for the safety of Mary Mantla or of the accused could easily have been clarified at the doorway. They had nothing to indicate that anybody else was present. The opportunity to determine if anybody else was jeopardized could have been dealt with at the doorway. The Operations Centre communication did not indicate to them that any other person was in jeopardy, nor did Anthony Mantla or Mary Mantla, nor was there any indication when the police had a clear view inside the home.

There was also nothing to indicate to the police

that the accused was armed. One officer said that he could not get a clear view around Mary Mantla, and the other officer said that it did not appear that the accused had any weapons on him. Constable Vesina put it this way: The accused was sitting on the stairs that led to the second floor. He had no shirt and no weapon was in sight. He added that only after they entered did they learn that everyone was safe.

But they have another problem on the evidence. (Perhaps they had more information that is not before me.) The problem has to do with timing. I have already alluded to this in exchanges with counsel during submissions. I will tie it together now.

The call placed to them from the Operations Centre did not say when this incident had occurred. The police seemed to guess that it had recently occurred or was ongoing. They didn't know. Surely, if it were ongoing, that message would have been passed on to them. They were, I find, engaged in some high-stakes guesswork at that point. They had the opportunity when talking to Anthony Mantla to ask him when the event regarding the knife had occurred. The evidence does not touch on this in any way. Mary Mantla, whose evidence I do not reject, says that Anthony Mantla was expelled from the home at around 2:00 a.m. The police attended after 2:30 p.m. I do not find a basis to reject her evidence. She was

apparently intoxicated at the time to some degree, but that by itself is not a basis to reject somebody's testimony.

At the door, the accused did not appear to be angry at Mary Mantla nor to be directing any anger towards somebody not in plain view.

For these reasons, I do not accept this to have been an exigent circumstance within the Supreme Court of Canada principles. It may have had an element of urgency to it. I grant the Crown that much as a possibility. But I do not find, given that the onus is on the Crown to justify the reasons for entering the home, the sort of situation in which justification is made out.

After the police entered the home unlawfully, they proceeded to arrest the accused who was starting to move toward his kitchen. The accused apparently did not want the police there, and as soon as they grabbed him when he started to move to the kitchen, the struggle was on. The accused was in these circumstances entitled to regard the police as trespassers. He was entitled to take reasonable steps to eject the police from his home. The one punch to the face of the police officer, given their superior sizes and their numbers, was not unreasonable nor was it excessive. What I conclude from all of this is that when the police were arresting the accused, they

were not engaged in the lawful execution of their duty. The law says that a person who is a trespasser who refuses to leave can be ejected with reasonable force. This is all the accused was attempting to do. I do not know if he was attempting to get a knife in the kitchen. The police feared he might have been. He would not have moved into his kitchen and the situation would not have developed as it did had the police not been there. I most certainly cannot find the arrest to have been lawful merely because the police had a suspicion that the accused may have been going into the kitchen to get a knife to use against them.

I probably do not even have to be analyzing the arrest issue in the detail in which I have been analyzing it, but I am doing so because this is taking me to section 495 of the *Criminal Code*. Defence counsel quickly skirted over section 495. I think it is deserving of more attention. I intend to give it that attention.

Section 495 allows the police to arrest in certain circumstances a person without a warrant. They are not permitted to do that where they lack reasonable grounds. Quoting from 495(2)(d):

> A peace officer shall not arrest a person without warrant for...in any case where
> (d) he believes on reasonable grounds

that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person.

Paragraph (e) is not applicable.

The police knew who the accused was, or certainly had the means to know that from Anthony Mantla and/or from Mary Mantla. They knew where he lived. They did not have to go into the home or arrest him to secure or preserve evidence. They did not have to arrest him, I find, contrary to their testimony, to prevent the continuation or repetition of the offence. Again, the victim as alleged of the previous offence could not have been further victimized by the accused. The police were there. The so-called victim was out of the home and the accused was in the home.

Where am I heading with the discussion of subsection (2)? I am heading into subsection 495(3). This is the significance of analyzing the section.

Subsection (3) provides that notwithstanding the factors I have referred to in subsection (2), a peace officer is "deemed to be acting lawfully and in the execution of his duty". That subsection, however, can be trumped in the circumstances of an appropriate case by the *Charter of Rights*. Where there is a conflict between a provision of the *Charter* and subsection (3), the *Charter*, being the supreme law of the land, prevails. Subsection (3) cannot be argued by the Crown successfully because of the findings I have made regarding the violations under the *Charter*. This is the significance of section 495 and the discussion of it.

I conclude, by way of summary: (a) the entry into the home violated section 8 of the *Charter* and it also amounted to a violation of section 7; and (b) that nothing that happened after the police unlawfully entered converted their trespassing into a lawful presence nor gave them the duty to arrest the accused inside his home.

The remedy options have been argued by counsel. I need not hear from them further.

I agree with Crown counsel that a stay of proceedings would be an exceptional remedy only to be ordered in the clearest of cases. Despite my findings, I do not conclude that what the police were up to in entering the home had in any way to do with

bad faith or any other improper reason. They were well-motivated, but their motivation was misguided and misdirected.

I conclude that a stay would be too exceptional a remedy in the circumstances of this case. The remedy, given that the evidence of the entry and of the arrest was in a *voir dire*, is to exclude the evidence. If all the evidence of the entry and of the arrest and the so-called resist and assault is excluded, the Crown has no case, in which case the matter will be dismissed. That, in my view, is the appropriate way to proceed. Accordingly, I dismiss the charge on the basis that there is simply no evidence for the trier of fact to consider. I do not need in these circumstances a no evidence motion. It follows from the way this matter has proceeded that there cannot be a conviction on either count.

The defence has sought costs. It is open to the accused to commence a civil proceeding for damages and for costs. This is up to him to decide, and it certainly is not up to me to decide what would happen should he pursue that recourse. But it is open to him.

In a criminal proceeding, costs are to be awarded in the context of a punitive message. It is not every case in which where there is a successful *Charter* motion that costs will automatically follow. The

prosecutor says, and I am inclined to agree with her, that for an award of costs there should be something to show improper prosecutorial discretion or some other improper conduct on the part of the Crown. There is not that sort of conduct or exercise of discretion in this case. The Crown also says that the RCMP officers were acting in good faith. I have already remarked upon this. They were mistaken, misguided and misdirected, but they followed good faith and were primarily concerned about doing their duty. They went too far, however, in the execution of that duty. This is not a case in which to order costs against the Crown. And as for the RCMP, I leave it to the accused to decide what he thinks is appropriate, but I do not find it appropriate to order costs in this action.

The defence says this is the clearest of cases of police misconduct. I do not agree.

The charges, Mr. Jeremick'ca, are dismissed for the reasons I have given.

Certified to be a true and accurate transcript, pursuant to Rule 723 and 724 of the Supreme Court Rules of Court

A. Wright

Annette Wright, RPR, CSR(A)
Court Reporter