

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

*IN THE MATTER OF AN APPLICATION FOR A REMEDY PURSUANT TO SECTION 24 OF THE CANADIAN
CHARTER OF RIGHTS AND FREEDOMS*

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CAMERON UNKA

RULING NUMBER 2 ON *VOIR DIRE*
of the
HONOURABLE JUDGE CHRISTINE GAGNON

Heard at: Yellowknife, Northwest Territories
July 14, 2011
January 27, 2012
May 17, 2012
June 15, 2012

Date of Decision: August 17, 2012

Counsel for the Crown: Duane Praught

Counsel for the Accused: Shannon Prithipaul

[s.7, 8, 9, 10(b), 24(1), 24(2) of the *Canadian Charter of Rights and Freedoms*]

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“The Charter is not intended to defeat the criminal process but to protect citizens from conduct that is contrary to those rights therein described.”¹

[1] On June 15, 2012 I found that the police violated the rights and freedoms of Cameron Richard Unka by detaining him arbitrarily on June 25, 2010, by seizing clothing pursuant to an unreasonable search in his house, and by taking a photograph of his face in breach of his right to speak to counsel. This photograph was not tendered on its own, but as part of photographic lineup packages.

[2] I also ruled that a portion of a warned statement obtained from him while he was detained was involuntary and I declared it inadmissible in the trial proper. Following this ruling², I received written submissions from counsel on the issue of what should be the appropriate remedy to these violations.

¹ R. v. Simpson, (1994) 29 C.R. (4th) 274

² Reported at 2012 NWTTC 09

[3] The evidence tendered during a voir-dire was marked as follows:

VD-2: Photo lineup package viewed by Al Digness

VD-3: Photo lineup package viewed by Mary Ann Digness

VD-6: Video Recorded Statement of Cameron Unka

VD-7: Transcript of the Video Recorded Statement of Cameron Unka

[4] The most serious breach is the violation of the right not to be arbitrarily detained, which resulted in the obtention of evidence. This arbitrary detention is the background against which the search for an appropriate remedy will be conducted. The nature of the remedy is largely influenced by the consequences of the violation, and as the Supreme Court of Canada stated in *R. v. Simpson*:

“In order to determine what is “just and appropriate”, a court should consider, among other things, what is the *objective* of the remedy and whether or not the proposed disposition in a judicially logical manner remedies the damage done to the Charter guaranteed right or freedom”³.

[5] I find that the clothing items, the picture of Mr Unka’s face, and the warned statement are elements of evidence that were collected by the police while Mr. Unka was arbitrarily detained.

[6] I find that aside from the clothing items, this evidence did not exist prior to Mr. Unka’s arrest. The police were only able to obtain this evidence as a result of Mr. Unka being detained at the RCMP detachment. All these elements were obtained as a result of the arbitrary detention, and some of them were also tainted by a violation of either section 7, 8 or 10b) of the Charter.

³ Idem

[7] I find that this evidence was obtained “in a manner that infringed or denied any right or freedom guaranteed by (this) the Charter.”⁴ I therefore need to engage in an analysis with the view of determining whether or not admitting this evidence in the proceedings would bring the administration of justice into disrepute.

[8] Counsel for both the Accused and the Crown focused their submissions on the clothing items, the picture of Mr. Unka’s face and the warned statement. Counsel for the Crown conceded in its written submissions that the clothing items and the warned statement should be excluded under section 24(2) of the Charter, but argued that the picture of Mr. Unka’s face should be not.

[9] Counsel for the Defense also focused on the picture of Mr. Unka’s face and suggested that the circumstances favored its exclusion.

Application of the Grant test to the facts of this case

A) The seriousness of the breach

[10] There were several distinct violations which all occurred while the Accused was arbitrarily detained.

[11] Constable Flatt unlawfully arrested Cameron Unka in front of his house at 20:45 on June 25, 2010 for disturbing the peace and he arbitrarily detained him for eight minutes until Corporal Dreilich arrived. Cpl Dreilich unlawfully arrested Mr. Unka for “flight, dangerous driving, theft and impaired operation of a motor vehicle.” Mr. Unka was taken to the detachment of the Royal Canadian Mounted Police, where he was held arbitrarily until 15:25 on June 26, 2010.

⁴ Section 24(2) Canadian Charter of Rights and Freedoms

[12] While Mr. Unka was being taken to the detachment, Cpl Dreilich and another officer conducted an unreasonable search of his bedroom and seized 3 t-shirts and a baseball cap. Cpl Dreilich, upon arriving at the detachment at about 21:25, took pictures of scratches on Mr. Unka's legs, arms and chest. At 22:25, she took a photo of Mr. Unka's face in violation of his right to counsel. She prepared a photographic lineup in which she used this picture and arranged for two potential eye-witnesses to attend the detachment and review it. At 00:15, she noted that the photo lineup identification was completed and she filled an unconditional promise to appear in Cameron Unka's name.

[13] At 7:00 on June 26, 2010 Cpl Dreilich ended her shift and passed along the request for a warned statement from the Accused. This task was then forwarded to Cst Watson at about 7:30 and he started the interview of the Accused at 14:45.

[14] Prior to arresting Mr. Unka, the police had only suspicions that he was involved in the taking of Mr. Clouter's vehicle based on Mr. Clouter's assertion that he had left Mr. Unka at the Yellowknife River with his vehicle and that upon his return, the vehicle and Mr. Unka were no longer there. They may have had partial identification from the eyewitnesses at the Yellowknife River and had no evidence of the identity of the driver from any of the witnesses who reported seeing a vehicle matching the description of Mr. Clouter's truck. They had no direct evidence connecting the Accused to the truck or showing that he was in possession of the truck any time.

[15] Instead of pursuing their investigation in order to obtain information that would provide this connection, the police decided to arrest Mr. Unka on the spot for the offence of disturbing the peace which none of the officers had seen him commit and to detain him until Cpl Dreilich arrived so that she could place him under arrest this time for a number of indictable offences which she had no reasonable grounds to believe he had committed.

[16] Over the course of the 18 hours of Mr. Unka's arbitrary detention, the police attempted to secure evidence by taking a picture of his face and by introducing this picture in a photo-pack lineup, in the hope of getting a positive identification from Mr. and Mrs Digness. When that evidence was not found to be conclusive enough, the police endeavoured to obtain a confession from Mr. Unka, by proceeding to an interview during which Cst Watson denied Mr. Unka the opportunity to consult with a lawyer when he falsely put to him that they had positive eyewitness identification. The interrogating officer further pressured the Accused by telling him that he was detained and that he was not free to leave notwithstanding the fact that he knew that Cpl Dreilich had directed that Mr. Unka be released on a promise to appear without conditions, and notwithstanding the repeated assertions by the Accused that he did not wish to speak to the police and that he wanted to leave.

[17] There are no extenuating circumstances. These actions were deliberate. The police knowingly unlawfully arrested him not once, but twice; they detained Mr. Unka while the circumstances of the alleged offences did not require it in order to prevent the destruction of evidence or the continuation of any offence; there was no need to detain him for identification purposes as the police were familiar with him; there was no concern for him not attending court since it had been decided that he would be release on a promise once the warned statement had been obtained and there were no concerns for public safety. The police tricked Ms Norinda Unka in convincing her to let them into her house to get not one, but three t-shirts and a baseball cap; Cpl Dreilich took Mr. Unka's picture for the specific and unique purpose of using it in a photo line-up. She consulted with a superior prior to taking this picture. This was a deliberate and thought-out action. There were repeated violations to sections 7, 8, and 10b) of the Charter over the length of the time while Mr. Unka was arbitrarily detained contrary to section 9 of the Charter.

[18] There needs to be a balance between society's interest in the resolution of crimes and everyone's right not to be deprived of their right to

life, liberty and security of the person except in accordance with the principles of fundamental justice. This is why the power of the police to arrest a person without a warrant is subordinate to the requirements of section 495 of the Criminal Code. Section 495 of the Criminal Code and sections 7 and 9 of the Charter exist to prevent abuses of this power.

[19] While the police may continue to investigate after they lawfully⁵ arrested a suspect, they should not arrest a person for the sole purpose of creating the conditions that will enable them to obtain identification evidence which did not otherwise exist, or to coerce a suspect into making a confession.

[20] I conclude that the breaches were numerous and they were egregious. The evidence of the picture of Mr. Unka's face was obtained through a willful and reckless disregard of Charter rights which, if the police were allowed to repeat this conduct, would taint the public confidence in the rule of law and diminish the authority of the police rather than to maintain it.

B) The Impact on the Charter-Protected Interests of the Accused

[21] The photograph of the Accused's face can be characterized as Non-bodily Physical Evidence. The police did not tell Mr. Unka that they intended to take a photo of his face so they could use it in a photo line-up. This was a non-routine procedure. The Accused was not given the choice to agree or disagree to collaborate with the police in the obtention of this picture. Because he was detained at the RCMP detachment, as the Supreme Court put it in *R. v. Hebert*, he could not simply "walk away" ...⁶ I find that the actions of the police directly impact his interest in not being deprived of his freedom without just cause.

⁵ *R. v. Storrey*, 1990 1 S.C.R. 241

⁶ [1990] 2 S.C.R. 151 at pp 179-180

[22] He was not offered the option to discuss this with a lawyer. He was detained and completely under the control of the police. The police were not authorized by law to take the picture of the Accused as he had not yet been charged with an offence. As the seizure of a representation of his face occurred while he was arbitrarily detained, and I find that this impacted his liberty interest as well as his right to choose whether to collaborate or not with the authorities.

[23] The use of the picture in a photo lineup was potentially incriminating. The taking of his picture was an unreasonable seizure and it also violated his right to be protected against self-incrimination. In summary, one action by the police (the seizure of the picture) resulted in the violation of four Charter-protected rights. I find that the impact on the Charter-protected interests of the Accused is important.

C) Society's Interest in an Adjudication of the Case on the Merits

[24] As the Crown conceded that the warned statement in its entirety should be excluded from the evidence, the picture of Mr. Unka's face becomes more important to the Crown's case, as the admission of this picture may allow the Crown to prove that at least one eyewitness recognized Mr. Unka from this picture which was inserted in a photo lineup. Without this picture, the Crown may have no positive evidence identifying the driver of the black Dodge Ram. Indeed, the Crown acknowledged in its written submissions that "the inability of the prosecution to tender the evidence obtained with the use of the picture taken of the Accused would weaken the prosecution's case substantially, perhaps fatally."

[25] This evidence may, to some extent, "facilitate the discovery of the truth and the adjudication of a case on its merits", however, if as the Defense suggests, this evidence is unreliable, its admission "serves neither the

Accused's interest in a fair trial nor the public interest in uncovering the truth.”⁷

[26] The Supreme Court in *Grant* said that with Non-bodily physical evidence and Derivative evidence, since this evidence was usually real evidence, it was usually found to be reliable thus favoring its inclusion⁸.

[27] The picture itself is reliable evidence, but the purpose of this picture being tendered is to jog a witness's memory with respect to the appearance of a suspect. The picture in and of itself is of no value. It is through its use in a photo line-up that the Crown wants to establish the identity of the driver of the Black Dodge Ram. In that sense, the most important evidence may be the “derivative evidence” of the photo-lineup, which includes Mr. Unka's picture, and any evidence of prior identification by an eye witness.

[28] The Defense qualifies this derivative evidence of “unreliable” because two important eye-witnesses purportedly provided conflicting testimonies with respect to the identification of the suspect after reviewing the photo-pack.

[29] Upon weighing these factors, I find that the violations were egregious and their impact on the Charter-protected interests of the Accused was significant. This outweighs the interest of society in the adjudication of the case on its merits.

[30] Given the circumstances in which the evidence was obtained, I find that admitting it in the trial proper would banalize the conduct of the police and send the message out to the community that the police may unlawfully arrest a person in order to perfect their otherwise weak investigation. To permit the inclusion of this evidence means that there is no purpose to section 495 of the Criminal Code because the police may disregard it

⁷ R. v. Grant, 2009 S.C.J. No 32, at p. 21, paragraph 81

⁸ Ibidem, at paragraph 115

without concern for the integrity of the administration of justice. To permit the police to pursue this manner of proceeding would potentially weaken their authority rather than to enhance it. Admitting this evidence would bring the administration of justice into disrepute.

[31] I find that the picture of Mr. Unka's face must be excluded from the evidence. Given that Crown conceded that the warned statement obtained by Constable Watson should be excluded in its entirety, I also declare that this evidence should be excluded accordingly. I take act of the fact that the Crown ultimately did not seek to tender as evidence the three t-shirts and the baseball cap and I don't need to pronounce on the admissibility of this evidence.

[32] Turning now to the argument put forth by counsel for the Accused suggesting that section 24(2) is very limited in the scope of remedial action because while many violations occurred, they resulted in the seizure of only one relevant element of evidence. As a result, instead of suggesting that the exclusion of the picture of Mr. Unka's face is the appropriate remedy, she rather seeks a stay of proceedings under section 24(1) as a remedy for the arbitrary detention as well as for all the breaches that would not result in any evidence being ultimately excluded. She added that "to allow the prosecution to continue would further the harm done to Mr. Unka and would amount to an abuse of process".

[33] The Crown responded that an order made under section 24(1) of the Charter must be made to remedy the violations of the Charter that have been found to have occurred, which requires a careful assessment of the actual prejudice caused to an Accused's ability to have a fair trial. The Crown also points out that a stay of proceedings should not be ordered if there are other reasonable remedies such as possible exclusion of the evidence obtained in breach of the Accused's rights and freedoms.

[34] A careful reading of section 24 suggests that paragraphs (1) and (2) do not apply alternatively but rather that paragraph (2) is subordinate to paragraph (1) and that it actually has no independent life.⁹ The analysis starts with determining what remedy would be just and appropriate and in so doing, if it appears that evidence should be excluded, there is no need to pursue the analysis.

[35] I also find that in an analysis required to determine what remedy would be appropriate, the court would not always equate one remedy to each breach. In our particular case, there were many breaches, which were actually committed under the cover of one main violation which was the arbitrary detention of the Accused.

[36] A stay of proceedings is a drastic measure, but so is the exclusion of evidence. A judicial stay of proceedings is generally ordered in the context of prosecutorial misconduct, which is not the case here.

“There is a residual discretion in a trial court judge to stay criminal proceedings where compelling an Accused to stand trial would violate those fundamental principles of justice which underlie a community’s sense of fair play and decency, and to prevent the abuse of a court’s process through oppressive or vexatious proceedings”.¹⁰

[37] The criteria for ordering a stay of proceedings are that

“(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
(2) no other remedy is reasonably capable of removing that prejudice”¹¹

⁹ Re *R. v. Seigel* (1982) 29 C.R. (3d) 81

¹⁰ *R. v. Jewitt* [1985] 2 S.C.R. 128

¹¹ *R. v. Nixon* [2011] 271 CCC (3d) 36

[38] And further,

“The employment of the judicial stay, except in delay and duplication cases, ought to be confined to those “clearest of cases” contemplated by the law of abuse of process. The detention of an Accused who was arrested for the matters raised in the indictment is not an issue sympathetic to the use of the judicial stay of proceedings.”¹²

[39] When applying the theory of prejudice to the determination of whether or not a stay of proceedings is an appropriate remedy, I find that the main prejudice resulting from the police conduct is the fact that they obtained evidence from the Accused while he was arbitrarily detained which they otherwise would not have been able to obtain.

[40] The compounded circumstances of all the violations create the context in which to assess the seriousness of the breach of the right not to be detained arbitrarily, its impact on the Charter-protected interests of the Accused and Society’s interest in the adjudication of the case on its merits.

[41] To redress the prejudice caused to the Accused, I find that he should be put in the situation in which he was prior to his arrest, which means that the police should not be permitted to use what evidence they gathered over those 18 hours during which they arbitrarily detained Mr. Unka. This is more appropriately achieved by the exclusion of this evidence rather than by a judicial stay of proceedings.

¹² *R. v. Cutforth* (1987), 61 C.R. (3d) 187

CONCLUSION

[38] Consequently, the application for a stay of proceedings is dismissed, the application for the exclusion of evidence is granted with respect to the picture of Mr. Unka's face and the warned statement and exhibits VD-6, VD-7, Picture 6 out of VD-3 and Picture 4 out of VD-2 are declared inadmissible at trial.

Dated at Yellowknife, Northwest Territories, this 17th day of August 2012.

Christine Gagnon, T.C.J.

R. v. Cameron Unka, 2012 NWTTC 11

Date: 2012 08 17
File: T1-CR-2010-001150

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

*IN THE MATTER OF AN APPLICATION FOR A REMEDY PURSUANT TO SECTION
24 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CAMERON UNKA

RULING NUMBER 2 ON *VOIR DIRE*
of the
HONOURABLE JUDGE
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