

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

**BETWEEN:**

**HIS MAJESTY THE KING**

**-and-**

**ARCHIE VITAL**

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**REASONS FOR JUDGMENT**  
**of the**  
**HONOURABLE CHIEF JUDGE ROBERT GORIN**

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Heard at: Yellowknife, Northwest Territories  
Date of Decision: October 31, 2022  
Date of Written Judgment: December 5, 2022  
Counsel for the Crown: J. Zuniga  
Defence Counsel: D. Sprake

[S. 498 of the *Criminal Code*, and ss. 9 and 24(1) of the  
*Canadian Charter of Rights and Freedoms*]

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**A. INTRODUCTION**

[1] The accused, Archie Leonard Vital, is charged with common assault contrary to s. 266 of the *Criminal Code*.

[2] He alleges that following his arrest he was unnecessarily overheld in custody at the RCMP detachment in Deline. He says that his right not to be arbitrarily detained or imprisoned guaranteed by s. 9 of the *Canadian Charter of Rights and Freedoms* was violated and requests that this court grant a stay of proceedings pursuant to s. 24(1) of the *Charter*. He applies for no other form of *Charter* relief other than a reduction in sentence should the stay not be granted.

[3] The Crown concedes that Mr. Vital was overheld but submits that a stay of proceedings is not appropriate under the circumstances. However, the Crown concedes that a reduction in sentence would be an appropriate remedy.

[4] For the following reasons I agree with both Mr. Vital and the Crown that his s. 9 *Charter* rights were violated. I agree with the Crown that a stay of proceedings is not warranted given the nature of the breach. I find that a reduction in sentence is the appropriate remedy.

## B. ANALYSIS

[5] The accused was found guilty after trial. The Crown's evidence consisted primarily of the testimony of L.B., who observed the assault and the circumstances leading up to it, as well as the testimony of Constable Greg Ellis of the RCMP on the circumstances leading up to Mr. Vital's arrest, his actual arrest, and subsequent detention.

[6] The assault as described by L.B. was relatively minor in comparison to the matters that this court typically deals with. While playing Bingo at a private residence, Mr. Vital called his spouse, T.M., derogatory names over a protracted period of time. At one point T.M. went to use the bathroom. Mr. Vital proceeded towards her and pushed her hard in the chest with both hands. She stepped back in order to maintain her balance. After that, she began to cry.

[7] No one else testified about the actual circumstances giving rise to the assault charge. Mr. Vital called no evidence. I accepted L.B.'s version of events and found Mr. Vital guilty on that basis. Mr. Vital then applied to have his charge stayed pursuant to ss. 9 & 24(1) of the *Charter* relying on the evidence of Constable Ellis concerning his arrest and detention.

[8] Constable Ellis was the only member of the RCMP to provide evidence during the trial. His colleague, Constable Parnell, was not called by the Crown. Constable Ellis testified that he and Constable Parnell responded to a complaint from dispatch that Mr. Vital had pushed T.M. When they arrived at the residence in where the incident had occurred, T.M. had no observable injuries and did not want to provide a statement. They then spoke to L.B. and another individual who was present. However, only L.B. indicated that he was willing to provide a statement. Mr. Vital was no longer present.

[9] Constable Ellis and Constable Parnell were advised of the house where Mr. Vital had gone. They proceeded to that residence but were unable to locate Mr. Vital while they were there. They then returned to the residence where the alleged assault occurred and L.B. provided them with a statement. He also advised them of another residence where Mr. Vital might be. The two officers proceeded to that residence where they located Mr. Vital and arrested him for assault. At that point, Mr. Vital was properly advised pursuant to ss. 10(a) and 10(b) of the *Charter*. Constable Ellis stated that Mr. Vital appeared intoxicated. His face was red and he was slurring his words when he spoke.

[10] Constable Ellis and Constable Parnell took Mr. Vital to the detachment, which was only two or three minutes away from where he was arrested. The two officers searched Mr. Vital prior to lodging him in cells. Near the end of the search Mr. Vital became agitated and would not allow them to complete the search. He put up his hands and told them to stay away from him. He backed into cells on his own and was held there overnight.

[11] Constable Ellis testified that they arrested Mr. Vital at 9:46 p.m. and released him the following morning at 9:27 a.m., a period of just under eleven and a half hours. Constable Ellis testified that he and Constable Parnell kept Mr. Vital in custody because they had other matters to deal with. They had another prisoner along with a guard. They decided to release Mr. Vital and the other prisoner at the same time the following morning so that they could go home and sleep and also allow Mr. Vital some time to sober up. The next morning Constable Ellis released Mr. Vital without recourse to a bail hearing. There was no evidence that he ever felt the need for one.

### ***S. 9 of the Charter***

[12] S. 9 of the *Canadian Charter of Rights and Freedoms* provides:

9. Everyone has the right not to be arbitrarily detained or imprisoned.

[13] Section 498 of the *Criminal Code* states:

498 (1) Subject to subsection (1.1), if a person has been arrested without warrant for an offence, other than one listed in section 469, and has not been taken before a justice or released from custody under any other provision of this Part, a peace officer shall, as soon as practicable, release the person, if,

- (a) the peace officer intends to compel the person's appearance by way of summons;
- (b) the peace officer issues an appearance notice to the person; or
- (c) the person gives an undertaking to the peace officer.

(1.1) The peace officer shall not release the person if the peace officer believes, on reasonable grounds,

- (a) that is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, 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,
  - (iii) prevent the continuation or repetition of the offence or the commission of another offence, or
  - (iv) ensure the safety and security of any victim of or witness to the offence; or
- (b) that, if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

[14] In this case it is apparent that there was no concern that Mr. Vital's release would endanger the public. Moreover, Constable Ellis at one point testified that he was held in order for him to sober up, he did not articulate any concern that the accused's safety would be endangered if he were released. Rather, it appears that the RCMP held Mr. Vital so that they could return home and go to sleep. While it is important for the community that the RCMP be at their best when they are on duty, that does not justify depriving Mr. Vital of his s. 9 *Charter* rights.

[15] The Crown concedes that Mr. Vital was overheld. In that regard, I agree with both Mr. Vital and the Crown. He was not released as soon as practicable as required by s. 498(1). Instead, the police detained him for close to 11 and a half hours. The delay was not justified and I find that his s. 9 *Charter* right not to be arbitrarily detained or imprisoned was violated.

### ***S. 24(1) of the Charter***

[16] However, while I agree that the breach was significant, my view is that a stay of proceedings under s. 24(1) of the *Charter* is not justified. S. 24(1) states:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[17] A stay of proceedings can be properly granted as a remedy pursuant to s. 24(1) only as a last resort in the "clearest of cases": *R. v. O'Connor*, [1995] 4 SCR 411, at para 68 and 82; *R. v. Carosella*, [1997] 1 S.C.R. 80, 52 – 56. A stay of proceedings is the ultimate remedy that is available to a court under s. 24(1): *Canada (Minister of Citizenship & Immigration) v Tobiass*, 1997 SCC 322, at para 86. Since a stay will in effect prevent a court from adjudicating the charge to its conclusion, a high threshold is required: *R v Regan*, 2002 SCC 12, *per* LeBel J.

[18] A stay may be issued to remedy the maltreatment of an accused by law enforcement personnel where the mere fact of going forward with the trial in light

of it would be offensive and undermine the integrity of the judicial process: *R. v. Bellusci*, 2012 SCC 44, paras. 21 – 31; *R. v. Paterson*, 2017 at para. 22. (See also *O'Connor*, *supra*, at para. 73.)

[19] As noted in *O'Connor* at para. 78:

. . . Consideration must be given to the seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence. . . .

[20] The overholding of Mr. Vital was a serious violation of his s. 9 rights. He was kept in cells for the entire night following his arrest. Although he was charged with having assaulted his spouse, he was held in order to convenience the police and not in order to protect the public or himself from criminal offences or harm.

[21] However, in my assessment this matter is not the clearest of cases. While the physical nature of the assault was not necessarily on the more serious end of those that come before this court, it was against an intimate partner and followed the accused verbally abusing her for a protracted period of time in front of other people. The police overheld the accused for what was certainly a significant amount of time – almost eleven and a half hours. However the overholding was not so lengthy that only a stay of proceedings will suffice as a remedy. In my assessment, the *Charter* violation can be fully addressed through the lesser remedy of a reduction in what would otherwise be an appropriate sentence. As stated, Crown counsel in conceding the s. 9 breach submitted such a remedy would be appropriate. Mr. Vital also, suggested reducing his sentence would be an appropriate remedy in the event his application for a stay was unsuccessful.

[22] It is noteworthy that Mr. Vital has not requested the exclusion of evidence under s. 24(2) of the *Charter* as an alternative remedy. However, my view is that his position in this regard makes sense.

[23] The recent case of, *R. v. Sabourine*, 2022 NWTTC 02, in which Malakoe J. ordered the exclusion of evidence under s. 24(2) of the *Charter*, certainly bears some similarities to the present case. That said, there are also important differences in the facts that must be kept in mind.

[24] In *Sabourine*, the court stated:

[42] The failure to implement Mr. Sabourine's right to counsel and the arbitrariness of his period of detention indicate either a lack of understanding by the two officers of the importance and the substance of these two *Charter* rights; or alternatively, an indifference to them. Whatever the reasons for these breaches, the Court has to send a message that the lack of understanding or indifference cannot continue. In my view, a

reduction in Mr. Sabourine's sentence, should one be imposed, does not carry that denunciatory message.

[43] The only appropriate remedy is an exclusion of evidence or a stay of proceedings. Although, either would be appropriate in this situation, I have chosen to exclude the evidence of Cst. Carriere. Given that the Crown has closed its case, this would exclude the only evidence of the alleged assault.

[emphasis added]

[25] As emphasized, Malakoe J. stated that either exclusion of evidence *or* a stay of proceedings would have been appropriate in the circumstances of the case. However, unlike the present case, the court held that not only had Mr. Sabourine's s. 9 *Charter* rights been violated, so to were his rights under s. 10(b).

[26] Mr. Sabourine had been arrested immediately after he was observed by the police committing an assault on his intimate partner outside of their home. After arresting Mr. Sabourine the police advised him of his ss. 10(a) and 10(b) *Charter* rights. Mr. Sabourine indicated a desire to speak to a lawyer. He was lodged in cells at approximately 4:00 a.m. No attempt was made to put him in contact with the police until almost 4 hours later at 7:48 a.m. After further unsuccessful attempts were made at 9:02 a.m. no additional attempts were made during the following 10 hours. The violation of his rights under s. 10(b) were serious. Unlike Mr. Sabourine, there was no s. 10(b) violation in the present case of Mr. Vital.

[27] Moreover, the violation Mr. Sabourine's s. 9 rights were significantly more serious of that of Mr. Vital. Mr. Sabourine was held in cells from the time of his arrest at 4:00 a.m. until 7:42 p.m., close to sixteen hours as opposed to under eleven and one half hours.

[28] Mr. Vital's decision to not request excluding any of the evidence against him pursuant to s. 24(2), is eminently logical since the only evidence of Mr. Vital committing an assault was within the testimony of L.B. It is very difficult to see how the "obtained in a manner" requirement of s. 24(2) could be made. Like *Sabourine*, there was no causal nexus between the *Charter* violation and the eye-witness evidence of the assault. However, unlike *Sabourine* it is apparent that there was also no temporal or contextual nexus; see *R. v. Edwards (appeal by Pino)*, [2016] O.J. No. 2656, at para. 72.

## C. CONCLUSION

[29] I find that the RCMP violated Mr. Vital's right to be right not to be arbitrarily detained or imprisoned, as guaranteed by s. 9 of the *Charter*. However, his application for a stay under s. 24(1) is denied. Mr. Vital has suggested reducing what would otherwise be an appropriate sentence as an alternative. The Crown has conceded that doing so would be a fit remedy. In all the circumstances, I agree and pursuant to s. 24(1) grant his request that his ultimate sentence be reduced.

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Robert Gorin  
Chief Judge of the  
Territorial Court

Dated at Yellowknife, Northwest Territories,  
this \_\_\_\_\_ day of December, 2022.



*R. v. Vital*, 2022 NWTTC 06

*Date: 2022 12 05*

*File: T-1-CR-2022-000943*

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