Citation: *R. v. Lafreniere*, 2021 YKTC 34

Date: 20210712
Docket: 20-00451
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

BRAD JOSEPH LAFRENIERE

Appearances:
Jane Park — Counsel for the Crown
Malcolm E. J. Campbell — Counsel for the Defence

RULING ON *CHARTER* APPLICATION AND REASONS FOR JUDGMENT

[1] CHISHOLM T.C.J. (Oral): Mr. Lafreniere is charged with driving while prohibited contrary to s. 320.18(1)(a) of the *Criminal Code* (the "*Code"*). The defendant has filed a Notice of Application seeking a judicial stay of proceedings based on alleged breaches of his rights pursuant to the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[2] Mr. Lafreniere applies, pursuant to s. 24(1) of the *Charter,* for a judicial stay of proceedings, alleging that he was arbitrarily detained and that he was denied his right to retain and instruct counsel.

Summary of the Relevant Facts

[3] On August 20, 2020, Cpl. Hutton was driving an unmarked police vehicle on Centennial Drive in Whitehorse when he saw a black pickup truck which he believed was being operated by the defendant. As the officer observed the vehicle for a brief period of time, he was unable to confirm that the driver was Mr. Lafreniere. He also noted a passenger in the vehicle. He turned his vehicle around and followed the suspect vehicle. It parked across the street from Jack Hulland Elementary School. It was busy in this area as school was being let out.

[4] Cpl. Hutton testified that as he drove by the black pickup truck, he noted Mr. Lafreniere exiting the driver's side door and walking towards the school. The defendant looked somewhat different than he had in the past when the officer dealt with him, because, on this occasion, he was wearing glasses and had very short hair, whereas in the past he had not been wearing glasses and had longer hair. Nonetheless, the officer believed it was him.

[5] The officer parked his vehicle, but did not exit it, as he believed it was too busy in the area to interact with the defendant. Subsequently, the officer left his parking spot and drove around the block. As he passed the vehicle a second time he noted its licence plate number. He parked again, in the same area as before, and provided the licence plate number to dispatch. He also requested that dispatch run the defendant's name through the police information system. Although the officer confirmed that the defendant was disqualified from driving, he did not request a criminal record check for him.

[6] Cpl. Hutton did not exit his vehicle to attempt to locate Mr. Lafreniere. Instead, he circled the block again, and noted that the suspect vehicle was no longer parked near the school. Around this time, he testified that he received a call to return to the office with respect to an important matter. This was at approximately 3:00 p.m. The officer agreed in cross-examination that he had written in his notes about having attended Mr. Lafreniere's residence on multiple occasions between 3:00 p.m. and 9:30 p.m.

[7] The officer ultimately located Mr. Lafreniere near his residence at approximately 9:30 p.m. The truck that he had earlier seen at the school was in the driveway of Mr. Lafreniere's residence. He located Mr. Lafreniere in the back yard of one of the residences nearby. He arrested Mr. Lafreniere and had the truck towed. Mr. Lafreniere said to the officer that the vehicle had not moved all day, and then said that the officer may have seen his cousin, who looks a lot like him, driving.

[8] Cpl. Hutton indicated that he knew that Mr. Lafreniere had a criminal record. He decided to hold Mr. Lafreniere for court based on what he understood to be the initial convictions that led to the driving prohibition, and, on his belief that Mr. Lafreniere had other, more recent, driving while prohibited convictions. He also testified that he wished to prevent a continuation of the offence. He had another officer transport the defendant to the Arrest Processing Unit ("APU").

[9] When Cpl. Hutton arrived at the APU, he learned that Mr. Lafreniere was being placed in a cell because he had started to cough. The officer learned that due to the COVID-19 pandemic, Mr. Lafreniere was obligated to wear a mask while being taken to

the room where he could contact a lawyer. As Mr. Lafreniere refused to don a mask, Cpl. Hutton was unable to facilitate having the defendant exercise his right to counsel.

[10] Cpl. Hutton returned to the police detachment where he performed his queries to determine the defendant's criminal record. It turned out that he only had one driving related conviction. The officer ultimately returned to the APU and released Mr. Lafreniere at 10:43 p.m.

Craig Gagnon

[11] Mr. Gagnon testified that he is the defendant's cousin and has known him all his life. They are the same age and grew up in Mayo. Mr. Gagnon is often in Whitehorse when he is not working. He spent time in Whitehorse in August 2020 and recalls spending time with Mr. Lafreniere on the day that he was arrested for this matter. Mr. Gagnon indicated that he had spent a good deal of time with the defendant until late afternoon. He had driven the defendant around that day since Mr. Lafreniere did not have a licence. He recalls taking the defendant to the Jack Hulland school to pick up three of his children.

[12] Mr. Gagnon described the vehicle he was driving as a two-door black Dodge Dakota truck with bucket seats, separated by a console, in the front, and with a bench seat in the back. The passenger side door was not operable. He indicated that the defendant was seated in the front passenger seat on the way to pick up the children. When he parked the truck at the school, he pulled the driver's seat forward to allow Mr. Lafreniere to get around him to exit the driver's side door.

[13] Mr. Gagnon explained that he weighed in the range of 220 to 240 pounds in August 2020, similar to what the defendant would have weighed. His head was shaved at the time, similar to the hairstyle of the defendant. Additionally, they are both the same age. In cross-examination, he stated that people had mistaken him for Mr. Lafreniere in the past, even though his complexion is darker. He indicated that he is fairly sure that he was wearing his glasses that day, although he does alternate between glasses and contact lenses.

[14] Mr. Gagnon testified that he was not with the defendant when he was arrested for driving while prohibited, but that he received a call from him later in the evening explaining what had happened. When asked whether the phone call was before or after midnight, he indicated that he was unsure.

Analysis

Alleged Charter breaches

[15] The first question to be answered is whether Mr. Lafreniere was arbitrarily detained.

[16] Section 495 of the *Code* reads as follows:

> **Arrest without warrant by peace officer**
>
> 495 (1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> (b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

Limitation

(2) A peace officer shall not arrest a person without warrant for

(a) an indictable offence mentioned in section 553,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction,

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, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

Consequences of arrest without warrant

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and

> (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

[17] Although there have been conflicting interpretations of the interplay of the subsections of s. 495, I prefer the extensive reasoning of Justice Sullivan in the recent decision of *R. v. Veen*, 2020 ABQB 99. In that decision, the Court interpreted subsections 495(2) and (3) by assessing the words in their entire context in light of the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. The Court in *Veen* held that the plain reading of these subsections leads to ambiguity, one of which is contrary to common sense and which does not accord with the intention of the legislature.

[18] As set out in *Veen,* at para. 28, the intent of Parliament in 1970 when introducing *Amendments of Provisions of the Criminal Code Relating to arrest and bail* ("Bill C-218") was to make substantial changes to the *Code* provisions dealing with "arrest, detention, and release from custody, including significant changes to the provision giving police officers the power to arrest without a warrant". The objectives of Bill C-218 included remedying the issue of unnecessary pre-trial arrest and detention. In terms of s. 495(2), the Court in *Veen,* at para. 40*,* noted the words of the then Justice Minister:

> …Notably, Justice Minister Turner also stated, in reference to subsection (2), that the "provisions of Bill C-218 place an onus on police officers not to arrest a person where the public interest can be satisfied by less stringent measures": *HOC Debates, Second Reading* at 3116.

[19] When concerns were raised at the Committee stage with respect to protecting police officers from criminal and civil liability, it became clear that subsection (3)(a) was

enacted to protect police officers from liability in criminal proceedings, and (3)(b) to offer some protection from civil liability.

[20] As Justice Sullivan stated in *Veen*:

> 48 To conclude, the *Bail Reform Act* was enacted primarily to reduce unnecessary arrests and detentions. Subsection (2) was enacted to advance this goal, by limiting the power to arrest without a warrant, and by placing a duty on police officers not to arrest where the public interest can otherwise be satisfied. Subsection (3) was not enacted to override subsection (2), it was a direct response to the concern that police officers would be held liable for committing errors in exercising their subsection (2) duty. Subsection (3)(a) protects police officers from criminal liability, while subsection (3)(b) offers some protection to police officers from civil liability.
>
> …
>
> 55 In conclusion, the legislative scheme reflects the legislature's intent to reduce unnecessary arrests and detentions, while offering some protection to police officers charged, by virtue of subsection (2), with deciding whether an arrest is necessary and in the public interest.

[21] I agree with the conclusions in *Veen* that subsection (2) imposes a duty on police officers not to arrest in certain circumstances, enumerated in that subsection, and that when an arrest takes place, "it must be shown that there were reasonable grounds to believe that it was necessary in the public interest; or that the failure to arrest would result in a failure to attend court". This is a limitation on the powers of arrest, and police officers must turn their minds to the necessity of an arrest, or, alternatively, whether the public interest can be satisfied without an arrest.

[22] Cpl. Hutton agreed that he had the ability to provide Mr. Lafreniere with an Appearance Notice when he located him near his house. He testified that he did not do so because of his belief that the defendant had a number of related convictions, and because he wanted to prevent continuation of the offence.

[23] It is important to remember that the offence before the Court is complete when it is determined that the suspect has been driving a motor vehicle while disqualified. Further investigation, as in the case at bar, is often unnecessary. Although there may be cases where the arrest and detention of an accused is appropriate to prevent the commission of further offences, this was surely not one of those cases.

[24] When Cpl. Hutton located Mr. Lafreniere, he was not driving a motor vehicle, and, indeed, six and one-half hours had elapsed from the time of the alleged offence. The officer arranged for a tow truck to come to impound the truck that Mr. Lafreniere had been allegedly driving. The factors enumerated in s. 495(2) of the *Code* had been satisfied or were not present because Cpl. Hutton had established the defendant's identity; no evidence existed to be secured; and, as I have noted, no reasonable grounds were present for the officer to believe that the defendant would repeat the alleged offence once his vehicle was secured. Additionally, the officer did not suggest that he had reasonable grounds to believe that the defendant would fail to attend court. In terms of other public interest factors, it should be reiterated that the offence was complete, the investigation did not continue, court process could have been issued at the scene, and Mr. Lafreniere was close to his home. If he had been released, the defendant could have contacted counsel at his convenience.

[25] Accordingly, the public interest could have been satisfied without the arrest and further detention of the defendant, and therefore he should not have been taken into custody. Subsection (3) does not override s. 9 of the *Charter*. As stated in *R. v. Carlick*, 2016 YKTC 7, the provisions of s. 495(3) do not "*Charter*-proof" the detention.

In fact, those provisions are in place to assist in protecting police, as opposed to authorizing a detention.

[26] Considering the circumstances of this case, I have come to the conclusion that Mr. Lafreniere was arbitrarily detained. An unlawful arrest does not automatically lead to an arbitrary detention (*R. v. Willis*, 2003 MBCA 54 at para. 18). However, when looking at the circumstances of the case at bar, the arrest of Mr. Lafreniere was clearly unjustifiable. Not only was Cpl. Hutton mistaken with respect to his belief that the defendant had other similar convictions to the one the officer believed he had committed, he had ample opportunity to confirm this belief. He made no attempt to do so, despite ample time. In fact, he could have done so when he had dispatch run the defendant's name around 3:00 p.m. I do not accept his explanation that he preferred to search the police data base himself. In any event, the search was not done before the arrest.

[27] There was no valid reason for arresting and detaining Mr. Lafreniere. Even if there had been a valid reason to arrest him without a warrant, he should have been released pursuant to s. 498 of the *Code*, because there was no public interest in continuing to detain him.

[28] Accordingly, I find that there was a breach of Mr. Lafreniere's s. 9 *Charter* right.

[29] Regarding the allegation that s. 10(b) of the *Charter* was breached by Cpl. Hutton, counsel for Mr. Lafreniere did not argue this point forcefully. Due to the COVID-19 pandemic, there was good reason to have Mr. Lafreniere wear a mask while being

taken to the telephone room at the Whitehorse Correctional Centre. He refused to so. I do not find that there was a *Charter* breach in these circumstances.

[30] In terms of an appropriate remedy for the s. 9 *Charter* breach, I do not find this to be the clearest of cases justifying a stay of proceedings. The detention of the defendant was for a period of 71 minutes. Although the officer should have had a criminal record check done before the arrest, he completed one soon thereafter. As stated in *Carlick* at para. 27:

> A stay is the most drastic remedy available and should only be invoked "in the clearest of cases;" where no other remedy would suffice, and where the state conduct is so offensive that proceeding to trial in the face of such conduct would seriously harm the integrity of the justice system. It is a very high threshold.

[31] Although the breach in this matter is serious, in my view, it does not meet the very high threshold required under s. 24(1). If there is a conviction, the more appropriate way to deal with this breach is to take it into consideration at the time of sentencing.

Trial Judgment

[32] The defence concedes that Cpl. Hutton observed Mr. Lafreniere exiting the driver's side door of the vehicle at the school. However, based on the evidence of Mr. Gagnon, I am urged to find the defendant not guilty. In these circumstances, I must analyze the evidence of Mr. Gagnon and determine if I accept it. If I believe his evidence, I must acquit Mr. Lafreniere. If I do not believe Mr. Gagnon's evidence, but am left in a reasonable doubt by it, I must acquit. Even if Mr. Gagnon's evidence does

not raise a reasonable doubt, I must consider, on the evidence I do accept, whether I am convinced beyond a reasonable doubt of the defendant's guilt.

[33] The defence does not dispute that Mr. Gagnon's evidence was replete with gaps. However, it is submitted that there was nothing special about that day for him to remember all the specific details of what he did that day. It must be remembered, though, that Mr. Gagnon testified to learning about the defendant's arrest on the day of the event, although he had no memory as to exactly when he received this information. Although his evidence was unclear as to the details he received from the defendant in terms of his arrest for this offence, he testified in some detail as to his stop with the defendant at the school to pick up three of the defendant's children.

[34] Based on the fact that his cousin was arrested for driving while disqualified, at a time when Mr. Gagnon says he was driving, I would have expected Mr. Gagnon to remember more details about that day, although as he noted, the incident occurred over a year and a half before trial.

[35] In considering the evidence of Cpl. Hutton, I note that there were some discrepancies. For example, he initially testified that he was called back to the office on an urgent matter around the time that he was waiting to intercept Mr. Lafreniere. He stated that he continued his shift dealing with that separate matter, and when it was concluded, he went to the defendant's residence at which time he arrested him. It became clear in cross-examination that he had never indicated in his notes or police report that he had been called away on an urgent matter. In fact, he had written in his

general report that he had conducted patrols for the defendant after losing sight of the suspect vehicle, but did not locate him or the vehicle.

[36] Also, the officer's police report indicated that he went to the defendant's residence multiple times before locating and arresting him, in contrast to his recall at the time of trial of only attending the residence on one occasion.

[37] The officer also testified that he did not ask for a criminal record check while he was at the school because it is a more onerous search than asking dispatch whether a driver is disqualified. He indicated that he likes doing the criminal record check himself to make an assessment and decision as to how to deal with an individual when they are ultimately detained or arrested. Yet, in the 6 and ½ hours between the alleged offence and arrest, he made no such effort, even though he agreed in his evidence that he would likely have had time to do so.

[38] The officer also agreed that when he was driving by the parked suspect vehicle at the school, he was conscious of other moving vehicles, as well as the movement, on foot, of students and parents. In other words, his attention was not solely on the suspect vehicle.

[39] Although I do have some difficulty conceptualizing the manner in which the defendant would have been able to move from the passenger seat to the driver's side door with Mr. Gagnon still in the vehicle, I also have concerns with the problems that I have highlighted in the evidence of Cpl. Hutton. I am therefore concerned with the reliability of the officer's evidence in this matter. On the whole of the evidence, I have a

reasonable doubt as to whether Mr. Lafreniere was driving the truck on the day in question.

[40] Accordingly, I acquit him of the offence of driving while prohibited.

_____

CHISHOLM T.C.J.