Citation: *R. v. Charlie*, 2009 YKTC 82 Date: 20090723
Docket: 08-00293
Registry: Whitehorse
Heard: Old Crow

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

Regina

v.

Geno Ronald Charlie

Appearances:
Melissa Atkinson — Counsel for Crown
Jamie Van Wart — Counsel for Defence

RULING ON *VOIR DIRE*

Overview

[1] Mr. Charlie stands trial on charges of having committed offences contrary to ss. 266, 267(b) and 348(1)(b) of the *Criminal Code of Canada*.

[2] The trial commenced in Whitehorse on February 3, 2009, with Cst. George Cook providing evidence. During the course of his evidence, a *voir dire* was entered into with respect to the issue of voluntariness, and defence counsel confirmed that there was no *Charter* motion. However, in response to a question from myself regarding any potential *Charter* issue arising from the evidence of the RCMP officers' warrantless entry into Mr. Charlie's residence, defence counsel indicated that, based on new information arising during the *voir dire*, he wished to consider his position and reserve the option of bringing a *Charter* motion in future on the issue of the warrantless entry.

[3] The *voir dire* continued in Old Crow on May 26, 2009. Cst. Eyvi Smith provided evidence by telephone. Mr. Charlie was now represented by Mr. Van Wart, who had not been Mr. Charlie's defence counsel at the time of the February 3 trial commencement. Mr. Van Wart confirmed that, after reviewing the transcript of the earlier proceedings, he was not raising a *Charter* issue regarding the warrantless entry into the residence.

[4] Mr. Van Wart also stated that he was not raising any other *Charter* issues. I presume this to be due to the position of defence counsel at the start of the *voir dire* that there were no *Charter* issues.

[5] Mr. Van Wart maintained the argument, however, that Mr. Charlie's statement to the RCMP should be excluded on the basis that it was not voluntary.

[6] Mr. Charlie was arrested in the early morning hours of July 31, 2008. He spoke to legal counsel and participated in a telephone remand hearing before a justice of the peace later that afternoon. The justice of the peace remanded him in custody to August 1 for a further remand hearing. This hearing was again conducted by telephone from Old Crow. At the August 1 remand hearing, the justice of the peace remanded Mr. Charlie over to a further hearing on August 12, and directed that Mr. Charlie be transported forthwith to Whitehorse Correctional Centre.

[7] After the August 1 hearing, Cst. Cook took a statement from Mr. Charlie. Mr. Charlie was transported by airplane from Old Crow to the Whitehorse Correctional Centre on August 2. Old Crow is a "fly-in" community with no road access.

Issue on the *Voir Dire*

[8] Was the statement Mr. Charlie provided to the RCMP in Old Crow voluntary, particularly given that it was taken after he had been brought before a justice of the peace and remanded into custody at the Whitehorse Correctional Centre?

Evidence

Cst. Cook

[9] Cst. Cook responded to a call-out at approximately 5:00 to 6:00 a.m. on July 31, 2008. He observed Mr. Charlie standing outside Dougie Charlie's residence brandishing a stick in his hand. After observing Cst. Cook, Mr. Charlie ran into the residence. Mr. Charlie did not respond to Cst. Cook's attempts to have him come out of the residence. Mr. Charlie was known to reside at the Dougie Charlie residence at times.

[10] Cst. Smith arrived on the scene and advised Cst. Cook of an alleged assault committed by Mr. Charlie against Edna Kaye. Cst. Cook then spoke through a window to Mr. Charlie, advised him that he was under arrest, and told him to come out of the residence. Mr. Charlie refused to do so and, after further efforts by the police officers to have Mr. Charlie come out failed, the officers entered the residence and arrested and handcuffed a cooperative Mr. Charlie. This occurred at 6:40 a.m.

[11] At the time of the arrest, Cst. Cook formed the impression that Mr. Charlie had consumed alcohol and, although he had some impairment, he did not appear to be intoxicated. At some time while in the residence, Mr. Charlie threw a television set out of the window. On the prisoner report, Cst. Cook noted that Mr. Charlie's speech was "confused" and "slurred" and that under the heading "Consciousness" he noted Mr. Charlie to be "confused".

[12] Cst. Cook testified that either he or Cst. Smith provided Mr. Charlie his *Charter* rights verbally at the time of the arrest. Cst. Cook cannot recall whether Mr. Charlie gave any verbal responses to being provided his *Charter* rights in his residence at the time of his arrest, as he made no notes to that effect.

[13] Mr. Charlie was taken almost immediately from his residence to the RCMP station which was perhaps 100 feet away. Cst. Cook stated that at 6:44 a.m. he then read Mr. Charlie his *Charter* rights from a card prepared for that purpose. Cst. Cook's notes indicate that Mr. Charlie responded "Yeah" to being advised that he was under arrest for assault, to being advised of his right to contact a lawyer and to the police caution. Mr. Charlie indicated that he wished to speak with a lawyer. Cst. Smith then advised Mr. Charlie that he was under arrest for breaching his probation to which Mr. Charlie replied "My probation's over. It's over today. Fuck you".

[14] Cst. Cook testified that Mr. Charlie was immediately lodged into cells. Subsequent to that, Cst. Smith arranged for Mr. Charlie to speak with a lawyer, although Cst. Cook cannot recall when Mr. Charlie was actually able to do so. He recalls seeing Mr. Charlie in the phone booth located in the police cell area speaking with legal counsel.

[15] Cst. Cook saw Mr. Charlie on and off while he was in cells over a period of approximately 34 – 36 hours. The discussion between them was limited to whether Mr. Charlie wanted anything to eat or drink, more blankets, and matters related to ensuring Mr. Charlie was comfortable. Mr. Charlie also had other guards between the time he was lodged in police cells and his transport to Whitehorse. There is no issue as to these other guards' involvement with Mr. Charlie impacting on the voluntariness of his subsequent statement.

[16] Cst. Smith's investigation resulted in additional details being provided by Ms. Kaye. Mr. Charlie was then informed that he was now also under arrest for the additional charges of assault causing bodily harm and breaking and entering the residence of Ms. Kaye and committing therein the offence of assault. Cst. Cook cannot say whether Mr. Charlie made any response to being informed of his arrest on these additional charges. Cst. Cook confirmed in cross-examination that Mr. Charlie had been read his *Charter* rights only at or near the time of his initial arrest. At the time Mr. Charlie was advised of these additional charges, he was not provided his *Charter* rights. He was only advised of the new charges.

[17] At some time on either July 31 or August 1, Mr. Charlie was brought before a justice of the peace for his remand hearing.

[18] At approximately 9:30 or 10:00 p.m. on August 1, 2008, and some time after his remand hearing, Mr. Charlie was brought into the interview room in the Old Crow RCMP Detachment. Cst. Cook stated that he would have set up the recording equipment, gone to Mr. Charlie's cell, advised Mr. Charlie that he wished to speak with him, and returned to the interview room with Mr. Charlie. It would have taken approximately three to four minutes to leave the interview room, and then return with Mr. Charlie. In cross-examination he admitted that he may not have set the interview room up before bringing Mr. Charlie to it.

[19] Upon entering the interview room Cst. Cook advised Mr. Charlie that the conversation was being recorded.

[20] Cst. Cook testified that he again provided Mr. Charlie information about his rights as follows: "And I advised Mr. Charlie that -- I spoke about the rights that we had advised him of, asked him if he still understood those, and advised him that those were all still in effect". Cst. Cook testified that he believed Mr. Charlie made indications to the effect that he understood this.

[21] Cst. Cook agreed, when cross-examined with an excerpt of the transcript of the statement, that he stated to Mr. Charlie the following at the commencement of the statement:

> Yesterday morning when I arrested you I advised you of your rights, so your rights to counsel while you're under arrest and so on and so forth and that you didn't have to speak to us, and all that still applies right now; understand that?

Cst. Cook agreed that Mr. Charlie's response to being told this was "Uh-huh".

[22] Cst. Cook testified in cross-examination that he didn't further explain Mr. Charlie's rights to him or give him an additional opportunity to contact counsel because:

> I felt that Mr. Charlie understood why he was under arrest. He had already spoken to counsel prior to the remand hearing and had been remanded at that point. I felt he understood his jeopardy, and I had already read him his *Charter* rights, so I didn't feel that it was necessary to go through them again.

[23] Cst. Cook stated that Mr. Charlie did not request to leave the interview room. He did not believe that Mr. Charlie made any comments about not wanting to speak to Cst. Cook or that he wanted the interview to stop. Cst. Cook agreed in cross-examination, however, that he had the following exchange with Mr. Charlie after Mr. Charlie responded "Uh-huh" to the information given by Cst. Cook regarding Mr. Charlie's *Charter* rights:

Cst. Cook: Do you feel like telling your side of what…
Mr. Charlie: No
Cst. Cook: …what happened last night? Okay, do you feel like talking about it?
Mr. Charlie: (inaudible)
Cst. Cook: You don't have to talk, I want to tell you. I want you to understand where you stand, so, like to understand the evidence you're facing, okay?

[24] Cst. Cook agreed that this exchange was an indication by Mr. Charlie that he did not wish to talk to Cst. Cook. He continued, however, to speak to or ask Mr. Charlie questions and Mr. Charlie began providing answers.

[25] Cst. Cook described Mr. Charlie's demeanour during the taking of the statement as being "the same" and that he was very cooperative. He stated that during the statement on one occasion Mr. Charlie got out of his chair to demonstrate something, but that Mr. Charlie did not make any motion to leave the room. No-one else entered the room during the taking of the statement.

[26] Cst. Cook testified that if Mr. Charlie had attempted to leave the room, he would have been taken back to his cell.

[27] Cst. Cook stated that during the approximately 36 hour delay between the time of Mr. Charlie's arrest and the taking of the statement, the RCMP concluded their investigation, guarded Mr. Charlie and brought him before the justice of the peace. They also dealt with other unrelated matters.

[28] Cst. Cook and Cst. Smith were the only two RCMP officers in Old Crow at the time of the incident.

Cst. Eyvi Smith

[29] Cst. Smith testified that he arrested, warned and advised Mr. Charlie of his *Charter* rights upon entering the residence Mr. Charlie was in. He stated that the initial arrest was for assault (s. 266), causing a disturbance (s. 175), and consuming liquor contrary to s. 2 of the *Old Crow Liquor Prohibition Regulations*. He believed that Mr. Charlie understood the reasons for his arrest, his *Charter* rights and the police warning that was given to him. He stated that Mr. Charlie said little in response other than making some verbally abusive comments.

[30] Cst. Smith stated that at the time of Mr. Charlie's arrest, he was under the influence of alcohol as evidenced by a strong odour of alcohol, slurred speech and his being "out of sorts".

[31] Cst. Smith stated that once Mr. Charlie was brought to the RCMP Detachment, his behaviour began to escalate and he became verbally abusive, as well as clenching his fists and kicking the cell door. As a result, Mr. Charlie was lodged in cells prior to being given access to legal counsel. He was advised that when he calmed down he could speak to legal counsel.

[32] Cst. Smith guarded Mr. Charlie periodically while he was lodged in cells. His contact with Mr. Charlie was limited to ensuring that Mr. Charlie was not in distress and that he was comfortable.

[33] Cst. Smith testified that Cst. Cook provided Mr. Charlie access to legal counsel. This was done after Mr. Charlie calmed down.

[34] Cst. Smith was not involved in Mr. Charlie's remand hearing before the justice of the peace. He testified in direct examination that he believed this hearing was held the morning after the arrest in order to allow Mr. Charlie time to sober up. He agreed in cross-examination that the initial remand hearing was actually in the early afternoon of July 31. This hearing was conducted from the RCMP Detachment with a telephone connection to the justice of the peace situated in Whitehorse. Mr. Charlie was then remanded to the early afternoon of August 1. The WARRANT REMANDING A PRISONER ("WARRANT") was faxed to the Old Crow RCMP Detachment at 13:40 hours. The WARRANT read, in part, as follows:

> **TO:** The Royal Canadian Mounted Police
>
> **YOU ARE HEREBY COMMANDED** forthwith to arrest, if necessary, and convey to the Whitehorse Correctional Centre at Whitehorse, Yukon

> Territory the persons named in the following schedule, each of whom has been remanded to the time mentioned in the schedule.
>
> …
>
> **AND I HEREBY COMMAND YOU**, the keeper of the said prison, to receive each of the said persons into your custody in the prison and keep HIM safely until the day when HIS remand expires and then to have HIM before me or any other Justice at WHITEHORSE, in the Yukon Territory, at 1:30 in the AFTERnoon of the said day, there to answer to the charge and be dealt with according to law, unless you are otherwise ordered before that time.
>
> …
>
> **Remanded To**
>
> **August 1st, 2008 at 1:30 P.M.**
> **(MR. GENO CHARLIE IS STILL IN OLD CROW)**

[35] At the August 1 remand hearing, again conducted by telephone, Mr. Charlie was further remanded to August 12, 2008 at 1:00 p.m. The only change in the wording of the August 1 WARRANT from the July 31 WARRANT was the date and time of the next hearing and the listing of an additional replacement information with a new s. 348(1)(b) charge.

[36] After the August 1 remand hearing, final arrangements were made with the RCMP plane to transport Mr. Charlie to Whitehorse.

[37] Cst. Smith testified that it was standard practice for officers in the community to give the individuals responsible for scheduling the RCMP plane for prisoner transport an initial “heads-up” that a transport may need to be made. Once a prisoner had been remanded into custody in Whitehorse by the justice of the peace, final arrangements would be made for the RCMP plane to come to Old Crow to bring Mr. Charlie back to Whitehorse. The ability for the police plane to provide prisoner transport would sometimes depend on whether there was an emergency need for the plane elsewhere.

[38] Mr. Charlie was transported from Old Crow to Whitehorse on August 2, 2008. Cst. Smith believes the transport was in the morning.

[39] Cst. Smith testified that he only provided Mr. Charlie his *Charter* rights and the police warning at the time he arrested him, and that he did not do so again at any other point.

[40] He further testified that Mr. Charlie was not treated any differently after he had been remanded by the justice of the peace, than he had been treated before his remand hearing.

Analysis

Positions of Counsel

[41] The main thrust of defence counsel's argument is that Mr. Charlie's custodial status had changed as a result of his remand hearing(s) before the justice of the peace. The RCMP, as a result of this change in custodial status, were obligated to handle Mr. Charlie differently, in particular with respect to his participation in the conduct of their investigation, something that they did not do. This failure significantly impacts upon any argument by the Crown that the subsequent statement taken was voluntary.

[42] Further, in this case there are the additional factors weighing against a ruling that the statement was voluntary. There was the failure to provide Mr. Charlie with his *Charter* rights and an opportunity to contact counsel after the initial charges were elevated to assault causing bodily harm and breaking and enter into Ms. Kaye's residence and commit therein the offence of assault. There was no secondary warning given prior to the taking of the statement and no further opportunity to contact counsel.

[43] Mr. Van Wart concedes that there is no issue that Mr. Charlie was ever threatened or induced to provide a statement, or that he was deprived of any necessities related to his comfort. By all accounts, it appears that Mr. Charlie was treated in a reasonable manner by both Cst. Cook and Cst. Smith with respect to ensuring that he was comfortable and that he was not subjected to any coercive or overtly oppressive treatment.

[44] Crown counsel relies on the absence of the type of coercive or oppressive atmosphere created by police action, that traditionally is relied upon by courts in determining that a statement was not voluntarily provided. Any action by the RCMP in their handling of Mr. Charlie after his remand hearing(s) that may be found to be improper does not create an insurmountable barrier to the Crown proving that the statement was voluntary.

Authorities

[45] The leading case on the issue of whether the change in the custodial status of an accused after being brought before a judge or justice of the peace after arrest is ***R.*** v. ***Precourt*** (1976), 18 O.R. (2d) 714 (C.A.). Mr. Precourt was arrested for robbery and, later that same day, provided an exculpatory statement to the police. He appeared before a provincial court judge the following morning and was remanded in custody for a show cause hearing. The accused was not taken to the provincial jail, but back to cells at the police station. Police officers continued to question Mr. Precourt, and subsequently received an inculpatory statement from him.

[46] The trial judge rejected Mr. Precourt's evidence that he had been physically assaulted by the police between the time that he had been remanded into custody by the provincial court judge and the giving of the inculpatory statement. The trial judge concluded that the inculpatory statement was voluntary.

[47] The Court of Appeal overturned the conviction and ordered a new trial on the basis that "…the voir dire conducted to determine the voluntariness of the appellant's confession was unsatisfactory and in the peculiar circumstances of this case a much more complete investigation was required to discharge the onus which rested upon the prosecution to prove that the confession was voluntary."

[48] The Court of Appeal was particularly concerned with the failure of the police to recognize the change in custodial status of the appellant after he had been remanded into custody by the provincial court judge. Martin J.A. stated:

> [44] When the accused has been taken before a judicial officer and remanded on an information the investigative process incidental to arrest, previously referred to, has terminated, a decision to invoke the machinery of the criminal law to try the accused has been made, and he is thereafter under the jurisdiction of the court. I do not intend to imply, however, that the police may not thereafter, in appropriate circumstances, interview the accused, or conduct procedures involving the accused, for example, an identification parade.
>
> [45] It is implicit, however, in the provisions of the Code and the statutory form of warrant remanding a prisoner that ordinarily where a prisoner is remanded in custody he is to be held in a custodial facility separate from mere holding cells connected with the police function where such a prison is available.

[49] The Court of Appeal recognized that there may be legitimate circumstances preventing a prisoner from being taken "forthwith" to a provincial jail. Even in circumstances where the continued detention of an accused at a police station is unwarranted, a subsequent confession may nonetheless be voluntary.

> [52] The unwarranted detention of the appellant at the police station did not of itself preclude the appellant's confession from being voluntary but it was a relevant circumstance to be weighed by the trial judge in deciding

> whether the onus resting on the prosecution to prove that the statement was voluntary was discharged.

[50] ***Precourt*** was considered by the Supreme Court of Yukon in the case of ***R.*** v. ***Daunt***, 2005 YKSC 34, in para. 134, albeit in the context of whether there had been an arbitrary detention of Mr. Daunt contrary to his s. 9 *Charter* rights. In ***Daunt*** the Crown was seeking to introduce a statement made by the accused after he had been remanded into custody by a justice of the peace. While the statement was ruled inadmissible on several grounds, Veale J. commented on the failure by the police to transport the accused forthwith from Dawson City to the Whitehorse Correctional Center. Veale J. found that the delay in transporting the accused was part of a strategy to facilitate a further interrogation of Mr. Daunt by the police.

[51] Veale J. addressed the ***Precourt*** issue because of what he considered to be "…its importance to the criminal justice system", although he stated that he did not want his comments to be "…considered as a precedent, since the delay in transporting the accused was not argued by counsel as a stand alone issue". (para. 129).

[52] In ***Daunt***, Veale J. was concerned by evidence that the Yukon practice of the RCMP was to delay the transportation of an accused to Whitehorse Correctional Centre until their investigation had been completed, regardless of whether the accused had been remanded into custody at the Whitehorse Correctional Centre by the court. (para. 140). It appears that this concern was in relation to the transport of accused individuals from the outlying Yukon communities, rather than with accused situated in Whitehorse.

[53] Veale J. stated the following:

> [142] There is a vast difference between the investigative custody prior to a remand into the Whitehorse Correctional Centre and the process that

must be followed after a court order has been issued and the accused is in court-ordered custody.

[143] Although counsel made some submissions on what should happen when the accused moves from investigative custody of the police to court-ordered custody, the issue was not fully researched and argued before me. Nevertheless, given the importance of the issue, I make the following *tentative* recommendations:

1. The remand order under section 515(11) of the *Criminal Code,* in Form 8, contemplates that the accused will be transported to a prison and not the police holding cells. This is based upon the principle set out in *Precourt* that the accused is now under the jurisdiction of the court.

2. The general police investigative power to interrogate the accused person has terminated. The right to question the accused in the absence of counsel without his consent and the use of police persuasion to convince the accused to waive his or her right to silence do not exist at this stage, because the accused is under the jurisdiction of the court. The statutory powers, such as executing a DNA warrant, will always remain. A spontaneous utterance of the accused in the course of a DNA warrant may be admissible as in *R.* v. *Portillo*, [1999] O.J. No. 3528 (Ont. Sup. Ct. J.) at paragraph 88.

3. There undoubtedly will be circumstances where the accused cannot immediately be transported to a prison. Reasonable delays caused by lack of personnel or transport, for instance, which result in the accused being held in holding cells at courthouses or in detachments cells in small communities are not breaches of remand orders. However, once the remand order is made, the accused is in court-ordered custody, not investigative custody of the police.

4. It will always be a factual determination as to when delay is reasonable and justifiable. The important principle is that the transportation of the accused is paramount and the investigative custody over the accused's person is terminated.

5. If a circumstance arises where the police are not able to transport an accused in a reasonable time, it is incumbent on the police to bring the matter back to the Justice of the Peace, if it is not raised in the first instance. The accused must have an opportunity to consult and be represented by counsel or duty counsel in person or by telephone. Presumably, counsel will advise the accused that interrogations or interviews are not permitted without the accused's consent. In other words, the police do not have the right to interrogate the accused as if

> the accused is in investigative custody. The accused must be advised that in addition to the right to silence, the accused cannot be interviewed without a full and informed consent.

[54] Further consideration was given to the ***Precourt*** issue, and to Veale J.'s comments in ***Daunt***, in the case of ***R.*** v. ***Ansari***, 2008 BCSC 1492. In ***Ansari***, an accused provided two statements to the police, then appeared before a justice of the peace by telephone, after which a third statement was taken. The accused had spoken to a lawyer immediately after his arrest for murder, but was then denied any further contact with legal counsel until after the third statement was taken. Between the taking of the second and the third statements, the accused participated in a telephone remand hearing before a justice of the peace. This hearing took place approximately 25 hours after the accused was arrested.

[55] There were two issues in the voir dire, voluntariness and arbitrary detention. The judge expressed concern regarding the practical differences between an in-person remand hearing and the practice of conducting telephone remand hearings:

> [38] In this case, the police behaved as if the forum before which the accused would be brought were a matter entirely within their discretion. This might be justifiable if the two proceedings were interchangeable, but in practice there are obvious distinctions between them. Were the accused brought before the provincial court, he would appear in a public forum. He would undoubtedly have been asked if he had counsel and would have been afforded an opportunity to speak to counsel. He would have been given over into the custody of the sheriffs, and out of the control of the police. He would now be under the jurisdiction of the courts.

[56] The judge found that the third statement was not voluntary and was also taken in breach of the accused's s. 9 *Charter* rights. In coming to this finding, the judge made the following comments:

> [48] This was a "hearing" of a very unusual character. The accused was not taken, even momentarily, out of the custody or control of the police. He was not taken to a place that was in any sense public where justice could be seen to be done. The fact that he had come into the judicial

> sphere and out of the hands of the investigating authorities, in the sense outlined in ***R. v. Precourt*** (*supra*), appears to have been completely lost on everyone, including the Judicial Justice of the Peace.
> …
>
> [51] The foregone nature of a hearing in the circumstances does not in any way diminish the fact that, from that moment on, the accused was under judicial supervision, not under the supervision of the police. He was to be turned over to prison authorities to be kept safely. The evidence does not suggest that it was not possible to do so. There are circumstances within which, practically speaking, the only short term means by which an accused can be remanded in custody is to keep him or her in police cells. Where this is so, the accused is, nevertheless, entitled to a different standard of treatment…
> …
>
> [54] What followed [after the telephone remand hearing] was that the police simply took the accused back to cells as if nothing of any importance had happened, and had another go at him at 5:08 p.m…
> …
>
> [62] [The Crown's position] …ignores the fact that post remand, the accused was not subject to the authority of the police and that, properly speaking, they were in no position to allow or refuse the accused anything.
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> [63] As I said earlier, by thwarting the accused's access to counsel in the lead-up to and during the JJP hearing the police conveyed to the accused the completely erroneous impression that he was beyond the reach of his lawyers and indefinitely within complete control of the police. The effect on the accused of not knowing that he was, following the JJP hearing, within his rights to refuse to speak and to be left alone, to speak to his lawyer when he wished to, and to have the whole process and the civics of his situation explained to him (and asserted by his lawyer to the JJP), is incalculable.

[57] The facts found in ***Ansari*** and ***Daunt*** were more egregious than the facts in the present case. There was no request by Mr. Charlie to contact counsel that was denied by the RCMP, and no evidence of any deliberate delay in the transport of Mr. Charlie to Whitehorse Correctional Centre in order to facilitate the taking of the statement. I do not have any particular concerns in this case about the fact that the August 1 hearing was conducted with Mr. Charlie still in Old Crow. Although little in the way of evidence specific to Mr. Charlie's

circumstances was provided to explain the delay in transporting him, it is a known reality that the transport of prisoners from communities on a WARRANT can be delayed on occasion due to availability of air transport and officers to accompany the prisoner.

[58] In this case, Cst. Smith's evidence about not calling the plane until it was known that Mr. Charlie would need to be transported to Whitehorse, is consistent with the possible explanation that it was not until after the August 1 hearing that it was clear that Mr. Charlie would be remanded into custody at Whitehorse, notwithstanding the wording of the WARRANT issued July 31. With respect to individuals in the community of Old Crow who are arrested and brought before a justice of the peace for a remand hearing by telephone, it is not uncommon for there to be a delay in transporting them until it is clear that arrangements cannot otherwise be made to have them released on an Undertaking or Recognizance. If the accused is transported to Whitehorse and then released on an Undertaking or a Recognizance, they are left with the difficulty of finding their own way back to Old Crow. To that extent, in some cases a decision to hold a subsequent remand hearing in the community in a day or so, where it is practical to do so, may work in the accused's favour.

[59] This said, if it is clear that the remand hearing is to be conducted in the same community in a day or so without a transport of the accused to Whitehorse Correctional Centre, the WARRANT should clearly say so.

[60] Although I do not consider it to be of any significant concern in this case, it would be useful in future cases for detailed evidence specific to the case to be provided to the court, where issues arise regarding a delay in conducting the initial remand hearing or in transporting an accused from a community to the Whitehorse Correctional Centre, after being remanded into custody.

[61] As was the case in ***Daunt***, the constables in this case did not appear to have detailed notes or recollection of the circumstances surrounding the remand hearings.

[62] It is clear on the evidence that Cst. Cook and Cst. Smith did not consider whether there had been any change in Mr. Charlie's status after he had been taken before the justice of the peace. As Cst. Smith stated, Mr. Charlie was treated the same afterwards as he had been before.

[63] The problem, however, is that Mr. Charlie's status had changed. He was no longer in the control of the police for investigative purposes, but had passed from their control into the jurisdiction of the court. This change in his status necessitated a change in the way he was being handled by the police. Had Mr. Charlie's remand hearing taken place in Whitehorse at the courthouse, he would have been transferred directly from the courthouse to the Whitehorse Correctional Centre. The police would not have been able to take him from the courthouse to the RCMP Detachment, put him into an interview room, and attempt to obtain a statement from him, prior to taking him to the Whitehorse Correctional Centre.

[64] The fact that Mr. Charlie was remanded while in the community of Old Crow, and thus of necessity held in the cells at the RCMP Detachment there while awaiting transport, does not place him into a different position with respect to his custodial status than if he had been remanded into custody while in Whitehorse.

[65] Cst. Cook had no legal authority to remove Mr. Charlie from his cell and take him into an interview room in order to attempt to obtain a statement from him, without Mr. Charlie firstly providing his consent to allow him to do so. Such a consent would need to be fully informed, including the fact that the RCMP had no authority to even take Mr. Charlie into the interview room without his consent.

In order to facilitate the receipt of a fully informed consent, Mr. Charlie should have been provided an opportunity to speak with legal counsel. Counsel, I presume, would also be aware of Mr. Charlie's change in custodial status and the limitations now in effect on the RCMP investigative powers insofar as direct participation by Mr. Charlie in the investigation.

[66] I fully concur with the tentative recommendations of Veale J. in ***Daunt***. I find that these recommendations establish a basic framework with which the RCMP should comply in similar situations where an accused individual has been remanded by a judge or justice of the peace.

[67] That is not the end of the matter, however. The failure to recognize the change in Mr. Charlie's status in taking the subsequent statement from him is only one factor to consider in determining whether the statement was voluntary. That said, I consider it to be a fairly significant factor.

[68] An individual in police custody in a small community who has not been brought into a public place for a remand hearing, perhaps only speaking to duty counsel over the telephone, who is then returned to cells and subsequently directed to comply with a police request to accompany the officer to an interview room, may well feel that nothing has changed.

[69] The failure by the RCMP to recognize Mr. Charlie's change in custodial status after his remand hearing(s), which appears to some extent to be part of a systemic practice that continues, despite the recommendations in the ***Daunt*** case, is a serious and significant failure.

[70] I also note the following:

- Mr. Charlie's demeanour at the time of the arrest and being provided his *Charter* rights is noted as being "confused" and "out of sorts";

- He had to be placed into cells to calm down before being provided the opportunity to contact legal counsel;
- Mr. Charlie was not provided his *Charter* rights and a further opportunity to speak with legal counsel at the time he was advised he was now being charged with more serious offences than originally arrested for;
- Mr. Charlie was not provided any further opportunity to speak with legal counsel immediately prior to the taking of the statement to discuss whether he should or should not provide a statement, (other than perhaps speaking to duty counsel at the time of the remand hearings. It appears from the evidence of Cst. Cook this may have occurred and, as I note that the practice in the Yukon is to have duty counsel available in Whitehorse at all such hearings, I expect it did); and,
- The information provided to Mr. Charlie at the commencement of the taking of the statement was somewhat minimal and relied upon Mr. Charlie's recollection of what he had originally been told at or near the time of his arrest.

[71] These additional factors, although some would more logically be categorized as potential infringements of Mr. Charlie's *Charter* right to counsel, nonetheless militate against the Crown's position that the statement taken was voluntary.

Conclusion

[72] In all of these circumstances, I am not satisfied that the Crown has met the onus upon it to prove that the statement was voluntary and, as such, rule the statement inadmissible.

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Cozens T.C.J.