IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Dennis*, 2005 YKSC 18

Date: 20050302
Docket: S.C. No. 04-01530
Registry: Whitehorse
Heard: Watson Lake

BETWEEN:

HER MAJESTY THE QUEEN

AND:

MICHAEL JOSEPH DENNIS

Before: Mr. Justice L.F. Gower

Appearances:
Michael Cozens — For the Crown
Edward Horembala, Q.C. — For the Defence

MEMORANDUM OF RULING ON
VOIR DIRE
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is my ruling on what I have characterized as an interior *voir dire.* A particular issue arose in the course of the first *voir dire* in this trial which, I gather, is going to the more general issue of reasonable and probable grounds for a breath sample demand.

[2] The issue giving rise to the interior *voir dire* is the admissibility of statements made by the accused to Constable Wright. The statements were made after Constable Wright attended at the scene of the accident but before Constable Wright gave a direction to the accused to wait by the accused's vehicle while the Constable began his

questioning of the eyewitness, Darlene Porter. At that point, arguably, Mr. Dennis was under a state of detention, and I do not believe that is particularly contentious between Crown and defence counsel.

[3] The evidence of the Constable that relates to the admissibility of these statements is generally as follows:

> 1. He received a report from radio dispatch that the witness, Darlene Porter, had seen a vehicle go into a ditch and she believed a person or persons nearby were intoxicated.
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> 2. The Constable arrived at the scene of the accident about five minutes later. He did not recognize the accused, although he recognized the other individual nearby named Lorraine Porter. He initially observed Lorraine Porter to be intoxicated and began to speak to her in a general fashion about what had happened, but she began walking away from him. Therefore, he placed her in the police vehicle.
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> 3. The Constable then approached and spoke to the accused briefly. He made some notes about that conversation and said different things about those notes. He said that he took some notes contemporaneously at the scene. He said that he generally makes quick notes at the scene of things that are most memorable, but because of the timing, he couldn't write everything down then. Indeed, he was by himself on this particular investigation, which made that more problematic. He continued to take notes while he was in the police vehicle and later on at the detachment.
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> 4. As I understood his evidence, the Constable did not come to the conclusion that he believed the accused was impaired until he had completed his short conversation with him at the roadside. This is the statement sought to be admitted.

[4] There are two sub-issues on this interior *voir dire*. First, whether the entire content of that short conversation has properly been recorded and proven by the Crown. Second, whether Mr. Dennis, the accused, was detained at any point prior to being given the direction to wait beside his vehicle and, if so, whether that triggered a right to a s. 10(b) *Charter* warning.

[5] The Constable said that in his conversation with the accused at the roadside there was no discussion about the accused staying or going. The Constable was in uniform, wearing a sidearm and travelling in a marked police vehicle. He said he did not touch the accused at the start, or at any time during the first thirty seconds of the conversation. He said, and it is important to note, that he was in the initial stages of this investigation. He had not yet spoken to Darlene Porter, who was an eyewitness. At one point in his evidence, he said he did not recall if the accused gave any answers prior to asking the accused to stay by the car. He also said that he had asked the accused what was going on and the accused said, "I don't know. That's not my car." Then the Constable said he told the accused to stand by the car and wait while he went to speak with Darlene Porter.

[6] On cross-examination about the particulars of that initial conversation with the accused prior to the Constable talking with Darlene Porter, the Constable said that he asked the accused whose vehicle it was and the accused said it was "not mine." Then the Constable gave general evidence about the next thing the accused said which was that some other person took it [the vehicle] from him [the accused] and he [the other person] ran away. The Constable clarified that by saying that he believed the accused had said it was something along the lines of someone else driving the vehicle, and that he was not driving the vehicle. He had recorded in his notes, made at the scene, that neither person, referring to the accused and Lorraine Porter, knew whose car it was nor how it got there.

[7] Constable Wright was then asked about a reference in his notes where he had recorded the following (and I am going from my notes of that evidence so it may not be

verbatim): "Dennis states it is his vehicle, but he did not know who was driving. The guy he just went." These are notes that the Constable said he made at the scene and in the police vehicle. The Constable said this initial conversation lasted approximately 30 to 60 seconds. He did not recall the first question that he asked the accused. He did recall the first response of the accused was along the lines that he did not know whose vehicle it was. Constable Wright acknowledged that the accused possibly said something else also, but he did not write it down. The Constable said that he asked general questions during that conversation, but that he did not write down all the questions and all the answers before talking to Darlene Porter.

[8] Interestingly, there was a question asked of the Constable whether he made any reference in his notes made at the time, that the accused said it was not his vehicle. Initially, the Constable said no, that he did not make that reference in his handwritten notes, that it only came up in a report to Crown counsel, which was prepared as much as two days later. He said that he made a mental note of that fact at the time. However, on re-examination, he was reminded that, indeed, he had recorded in his notes at the time the statement, " He advised he did not know whose car it was and did not know how it got there."

[9] Constable Wright conceded that his memory about this incident was not that fresh and that he does not recall things if he does not write them down. He repeated his evidence that he wrote notes of some of the questions and not others.

[10] Crown counsel seeks to have admitted as part of that conversation the evidence that the accused said to the Constable that it was not his car. He does not, as I

understand him, seek to enter any other part of that conversation which may have been referred to in evidence. The importance of that piece of the conversation for the Crown is that it may relate to a subsequent issue on the general *voir dire* about whether the officer had reasonable and probable grounds to believe that the accused had driven while impaired.

[11] The problem with the evidence is that we do not have the entire conversation. There is a reference in the case law, and being on circuit I am limited to referring to the annotations in *Watt's Manual of Criminal Evidence*, 2004, at page 576, on the issue of voluntariness of statements made by an accused to persons in authority. Although voluntariness is conceded here, the principles are analogous.

[12] *R.* v. *Bloomfield*, [1973] N.B.J. No. 43 (QL), a case from the New Brunswick Court of Appeal, stands for the proposition that where the prosecution fails to adduce evidence of the whole of conversations between the accused and persons in authority, the burden of proof has not been met. The same part of *Watt's* text is replete with numerous authorities which talk about the need, on the issue of voluntariness, to call all persons in authority who had any dealings in connection with the taking of a statement. Presumably, part of that rationale is to ensure that any and all utterances made by an accused are elicited, and not just part of those utterances.

[13] The problem that I have with the Crown's submission is that without knowing all of the questions and all of the answers in what was admittedly a fairly short conversation of some 30 to 60 seconds, I do not know the context of the particular statement that the Crown wishes to use. If I do not know the context of that particular statement, then I do

not know whether it is capable of supporting the officer's subjective belief that he had reasonable and probable grounds. Worse, I would not be able to make a determination, in such a vacuum, about whether the statement of the accused is capable of supporting an objective review of the officer's reasonable and probable grounds.

[14] The case of *R.* v. *Storrey*, [1990] 1 S.C.R. 241 (QL), at para. 19, from the Supreme Court of Canada specifies that:

> …an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.

[15] I do not know whether the simple alleged statement of the accused, that he denied ownership of the car or said “That’s not my car” is probative of anything with respect to reasonable and probable grounds because I do not have the context. It is possible that the accused might have been asked questions or given answers which clarified that general statement in some respect or modified it or retracted it. Indeed, we know that later on, or perhaps during that conversation, the accused did say something to the effect that it was his vehicle, but that he did not know who was driving it.

[16] So on its face, it appears that the accused said two different things in the same conversation. He may have said other things. All of that conversation is necessary, both to determine whether the officer had a subjective reason to believe the accused was driving while impaired, and secondly, and more importantly, whether he had an objective and reasonable belief in that regard. It is not onerous, in these circumstances

and on these facts, to expect the officer to have recorded all of the conversation, given that it was only a conversation of some 30 to 60 seconds in duration.

[17] So for that reason alone, I rule that the particular statement of the accused to the officer, as sought by the Crown, that he did not know what was going on and that he denied ownership of the car, is not admissible.

[18] The second issue on this *voir dire* had to do with whether Mr. Dennis was under an actual state of detention and therefore should have been given his s. 10(b) *Charter* rights. Although it is not necessary for purposes of this ruling, given my previous comments, I have referred to the case of *R.* v. *Moran*, [1987] O.J. No. 794 (QL), from the Ontario Court of Appeal in which leave to appeal to the Supreme Court of Canada was refused. I have reviewed the various factors there which are relevant.

[19] I find that it is significant here that the officer was only in the initial stages of an investigation, that he did not yet have reason to believe that the accused was suspected of impaired driving, that he was asking questions of a general nature designed to obtain information, but not to confront the accused with evidence pointing to his guilt. Certainly there is no evidence of any subjective belief by the accused that he was detained, as the accused did not testify. I would not have found, had I been required to do so, that the accused was in a state of detention prior to being directed by the officer to wait and remain by the vehicle while he talked to Ms. Darlene Porter.

[20] That is my ruling.

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GOWER J.