Citation: *R.* v. *Lamarche*, 2010 YKTC 28

Date: 20100212
Docket: 09-00627
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

PHILLIPE ANDREW LAMARCHE

Appearances:
Jennifer Grandy — Counsel for the Crown
Keith Parkkari — Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY C.J.T.C. (Oral): Phillipe Lamarche stands charged with uttering a threat to cause death and with obstructing justice by threatening a witness.

[2] The facts of this case are rooted in another case wherein Mark Pahtayken is charged with break, enter and commit assault, and assault with a weapon. Garth Brown is the alleged victim of the offences.

[3] Mr. Lamarche is alleged to have threatened Mr. Brown over the telephone in an attempt to dissuade him from testifying against Mr. Pahtayken. At issue is the reliability of Mr. Brown's evidence, in particular, his identification of Mr. Lamarche as the caller.

[4] The evidence at trial consisted of *viva voce* testimony from Mr. Brown and from Clara Northcott, Deputy Superintendent of Programs at Whitehorse Correctional Centre, along with an Agreed Statement of Facts and a number of documents filed as exhibits.

[5] In his testimony, Mr. Brown stated that on Friday, November 13, 2009, he received a call forwarded to his room at the Chilkoot Trail Inn, just before lunch. The caller identified himself as Phillipe and asked Mr. Brown if he was going ahead with charges against Mr. Pahtayken. When Mr. Brown indicated that proceedings had already been started, the caller advised, “You better stop them or I will take you out in a body bag.” Mr. Brown asked if the caller was threatening him, to which the caller replied, “I don’t have to do it, I’ve got friends that’ll do it for me.”

[6] According to the Agreed Statement of Facts, both Mr. Lamarche and Mr. Pahtayken were in custody at Whitehorse Correctional Centre November 11th through the 13th of 2009. Both were housed in the N.C.B. unit, which consists of two sides, each with four cells, known as N.C.B. Front, housing cells 1 through 4, and N.C.B. Back, housing cells 5 through 8. Each side has a separate telephone accessible only to the prisoners on that side as there is no access for prisoners between the two sides. However, the units are not soundproofed.

[7] On November 11th, both Mr. Lamarche and Mr. Pahtayken were housed in N.C.B. Back. Mr. Lamarche was moved to N.C.B. Front at some point on November 12th, and was resident in N.C.B. Front on the 13th of November.

[8] A Whitehorse Correctional Centre telephone log, filed as Exhibit B to the Agreed Statement of Facts, indicates that a telephone call was made from the N.C.B. Front

telephone, extension number 157, to the Chilkoot Trail Inn on November 13, 2009 at 11:55 a.m. The log does not indicate to whom the call was made and the Chilkoot Trail Inn does not maintain a log of incoming calls.

[9] As is established by the Whitehorse Correctional Centre Master Location Sheets, filed as Exhibit A to the Agreed Statement of Facts, there were four prisoners housed in the N.C.B. Front unit on November 13th, including Mr. Lamarche. The evidence of Clara Northcott, along with the Body Receipt filed as Exhibit 3, indicates that one of the four prisoners was absent from the unit at the time of the telephone call as a result of a scheduled court appearance, leaving Mr. Lamarche and the two other remaining prisoners as the only individuals who could have placed the call from the N.C.B. Front unit to the Chilkoot Trail Inn.

[10] Defence has raised a number of concerns with the evidence in this trial, arguing that some irregularities in the Whitehorse Correctional Centre's phone log calls its reliability into question, that the evidence of Mr. Brown is unreliable due to significant memory issues and inconsistencies, and that the identification evidence is insufficient to establish beyond a reasonable doubt that Mr. Lamarche was the caller.

[11] Turning to the first issue of the reliability of the Whitehorse Correctional Centre phone log, as noted by counsel, there are two irregularities in the document. At 11:12 a.m. the log lists two calls as having been made from extension number 157, the first being two minutes and 27 seconds long and the second being 10 seconds long. Similarly, at 11:35 a.m., the log shows two calls, the first being two minutes and 11 seconds in duration and the second being 27 seconds. Clearly, it would be a practical

impossibility for these calls to have occurred in the order in which they are listed on the log.

[12] There is no evidence before me to explain this irregularity. However, having considered the document at length, I am satisfied that the irregularities as pointed out by counsel are minor in nature and insufficient to warrant a rejection of the document in its entirety, particularly when I note that there is no such irregularity relating to the call placed to the Chilkoot Trail Inn at 11:55 a.m., it having been the only call made at that specific time. Based on the document, I find that I am satisfied beyond a reasonable doubt that a call was placed at 11:55 a.m. on November 13, 2009, from extension number 157 in the N.C.B. Front unit at Whitehorse Correctional Centre to the Chilkoot Trail Inn.

[13] Having so found as a fact, the next question for me to determine is whether I am satisfied beyond a reasonable doubt, firstly, that the call placed to the Chilkoot Trail Inn was to Mr. Brown and not some other resident, and, secondly, that Mr. Lamarche was the caller.

[14] Mr. Brown testified that he received the call just before lunch, consistent with the timing of the call placed from extension number 157. The evidence of Mr. Brown was uncontradicted on this point. He further testified that the caller identified himself as Phillipe, who he knew to be Mr. Lamarche, and that he recognized the caller's voice to be that of Mr. Lamarche.

[15] Counsel for Mr. Lamarche argues that Mr. Brown's evidence was unreliable due to issues with his memory. In considering the evidence of Mr. Brown, it was clear to me

that he was an unsophisticated witness, often angry and frustrated, who clearly wanted nothing to do with the justice system. He conceded that he does have some memory issues, which he attributes to a bullet to the head in 1977, and the beating he received earlier in 2009. When asked about the impact on his ability to recollect the details of the call he received on November 13th, he indicated that in general he experiences some fogginess with his recollection, particularly with numbers, but that he has no fogginess with respect to Mr. Lamarche calling him on the 13th.

[16] Clearly, Mr. Brown was not an ideal witness for the Crown. He displayed definite limitations in his ability to recall some events in detail, particularly details about the frequency and timing of his past interactions with Mr. Lamarche. However, his evidence overall had a ring of truth to it, and I am not satisfied that his memory difficulties were sufficient for me to conclude that his evidence is entirely unreliable. Indeed, given Mr. Brown's lifestyle, involving the abuse of both drugs and alcohol, an ability to recall such events in minute detail would have been much more suspect than his observed memory lapses.

[17] Defence counsel also points to inconsistencies in Mr. Brown's evidence as a basis for its rejection. The inconsistencies complained of are three-fold. Firstly, that Mr. Brown provided conflicting statements as to when he first met Mr. Lamarche. Secondly, that Mr. Brown did not advise the police that the caller identified himself as Phillipe. Thirdly, that the wording of the threat as described in the statement to the police differs from that described to the Court.

[18] With respect to the first inconsistency, in evidence Mr. Brown indicated that he first met Mr. Lamarche four to five years ago, and then, on cross, he indicated five to six years ago. In his first statement to the police he indicated four to five years; in his second statement he indicated, three, four, five or six years ago. I am not of the view that this represents an actual inconsistency as much as it is a reflection of Mr. Brown's aforementioned memory difficulties, particularly with dates and time. Furthermore, when asked to relate his first meeting with Mr. Lamarche to his residency, he was able to clarify that he first met Mr. Lamarche when he was residing at 802 Wheeler, where he lived from November 2003 to August 2004, a period roughly five to six years before the offence. In any event, this is not an issue which causes me concern with respect to Mr. Brown's credibility.

[19] Inconsistency number two is similarly not of particular concern to me in assessing Mr. Brown's credibility. The evidence does indicate that Mr. Brown did not advise the police in either of his two statements that the caller identified himself verbally as Phillipe, as he indicated in his evidence at trial. However, there is no indication that the police asked him if the caller identified himself. Again, Mr. Brown was an unsophisticated witness. It would be highly unusual for there not to be some variation in his evidence, depending on how he is questioned. I am satisfied that his failure to advise the RCMP that the caller identified himself as Phillipe was an unintentional oversight which does not, in my view, undermine his overall credibility.

[20] The third inconsistency with respect to the wording of the threat, however, is a clear inconsistency which demands more consideration and has indeed taken more time for me to resolve in coming to my decision. In his statements to the police, Mr.

Brown advised that the caller said he better not be willing to testify or else he had better make out his will, which differs from his trial evidence wherein he stated that the threat was that he would be taken out in a body bag. When asked about this inconsistency, Mr. Brown stated it was a slip in his vocabulary.

[21] In considering this inconsistency, it is clear that the actual words differ considerably. However, the substance or intent of both phrases is essentially the same. Both are implied threats to cause death. In this way they are not, in essence, incompatible or contradictory. In other words, they amount to much the same thing. For this reason, the inconsistency in wording, if not in substance, does not cause me to have concerns with respect to Mr. Brown's credibility. Furthermore, notwithstanding the fact that the actual words spoken may remain forever obscure, I am nonetheless satisfied, based on Mr. Brown's evidence, that he did in fact receive an implied threat to cause death should he pursue the case against Mr. Pahtayken.

[22] In coming to my conclusion that Mr. Brown was a credible witness whose evidence can and should be accepted, I must also note that I considered the fact that his evidence was, in several respects, consistent with other evidence before me. These include the following: His description of the call received as being shortly before lunch and lasting not even five minutes is consistent with the Whitehorse Correctional Centre's phone log, denoting a call made to the Chilkoot Trail Inn at 11:55 a.m. and lasting two minutes and 38 seconds. His evidence that Phillipe, the caller, indicated that he was in the joint but getting out next week is consistent with the Whitehorse Correctional Centre Location Sheets, indicating Mr. Lamarche was in custody at the time of the call, and Exhibit 4, the memorandum from Sharon Van Der Meer, Sentence

Administrator, indicating that Mr. Lamarche was released from custody on November 18th, the week following the telephone call. His description of meeting and associating with Mr. Lamarche first during the time period he was residing at 802 Wheeler from November 2003 to August 2004, followed by a gap of several years before encountering Mr. Lamarche again, while he was residing at 59 Prospector, sets out a time frame consistent with Exhibit 5, which indicates that Mr. Lamarche was in and out of custody outside of the Territory between April of 2005 and April of 2008.

[23] Having been satisfied beyond a reasonable doubt that Mr. Brown did indeed receive a telephone call on November 13th, during which the caller uttered words amounting to a threat to cause death to Mr. Brown should he testify against Mr. Pahtayken, I must still address the issue of identity.

[24] Counsel for Mr. Lamarche argues that the evidence is insufficient to satisfy me that the caller was Mr. Lamarche, citing the differences and the descriptions of Mr. Lamarche's accent or lack thereof, Mr. Brown's difficulties in recalling when he had last spoken with Mr. Lamarche before the call, the fact that most of the dealings between Mr. Brown and Mr. Lamarche occurred at parties where drugs and alcohol were being used, and the fact that Mr. Brown had never before spoken with Mr. Lamarche over the telephone.

[25] It is my conclusion that the evidence clearly establishes that Mr. Lamarche was indeed the caller. With respect to the issue of accent, Mr. Brown described Mr. Lamarche as having a slight French accent but not very prominent. Ms. Northcott indicated that Mr. Lamarche does not particularly have an accent. In my view, these

two descriptions are not necessarily inconsistent. Ms. Northcott did not say that Mr. Lamarche has no accent; she said he does not particularly have an accent. Such wording allows for the slight accent described by Mr. Brown, in my view.

[26] With respect to Mr. Brown's ability to identify Mr. Lamarche's voice over the phone, even though Mr. Brown had difficulty giving specific details about the timing and frequency of his dealings with Mr. Lamarche, I am satisfied, based on his evidence, that he was sufficiently familiar with Mr. Lamarche to be able to recognize his voice, including over the telephone, provided the telephone exchange was more than merely perfunctory. I am not of the view that the use of drugs and alcohol during many of their encounters would necessarily negate Mr. Brown's ability to recognize Mr. Lamarche's voice. In any event, any concerns with respect to Mr. Brown's ability to identify Mr. Lamarche's voice are offset by evidence which supports the finding that Mr. Lamarche was indeed the caller. This includes the fact that the caller identified himself as Phillipe; the caller was clearly familiar with Mr. Brown, having asked him why he had moved. The caller indicated that he was in the joint and due to be released the following week. There was a call from extension 157 in the N.C.B. Front unit at Whitehorse Correctional Centre to the Chilkoot Trail Inn at the same time Mr. Brown says he received the call. Mr. Lamarche was in custody in the N.C.B. Front unit when the call was made and was released the following week. There were only two other inmates who could have made the call, one of whom had a distinctly different voice from Mr. Lamarche. Mr. Pahtayken was clearly known to Mr. Lamarche, as it was Mr. Lamarche who first introduced Mr. Pahtayken to Mr. Brown in the spring of 2009 and the three had partied together. When one considers these factors together, in my view, it would stretch credulity to suggest

that anyone other than Mr. Lamarche made the call to Mr. Brown in an attempt to dissuade him from testifying against Mr. Pahtayken.

[27] I am satisfied that both offences are made out on the evidence before me in this case. However, it raises the issue of *R.* v. *Kienapple*, [1975] 1 S.C.R. 729, for me and I wanted to give counsel opportunities to make submissions as to whether or not they feel -- Ms. Grandy, what we have are two - I am inclined to think that they are *Kienappled*, quite frankly - what we have is one offence for uttering a threat to cause death and one offence for obstructing by threatening a witness.

[28] MR. PARRKARI: Your Honour, before putting Ms. Grandy on the spot, if I could have a moment to talk to my client?

[29] My instructions from Mr. Lamarche are that he does want to proceed to sentencing today.

[30] THE COURT: Okay. But I have not formally entered the convictions. We have a question as to whether or not the two offences are *Kienappled*, effectively.

[31] MR. PARRKARI: Yes.

[32] THE COURT: I am inclined to think that they are, given that the obstruction is particularized as threatening.

[33] MS. GRANDY: Yes, I'm absolutely not in a position to make a comment on either of those issues, and I don't even believe that the trial counsel is available, which is why I think --

[34] MR. PARRKARI: No, he's away.

[35] MS. GRANDY: -- they sent me. So I'm not sure whether both of those issues can be tabled for a period of time until the appropriate people can be here.

[36] THE COURT: Okay. Your client wants to get this done?

[37] MR. PARRKARI: That's correct. My instructions are to ask the Court to proceed to sentencing, deal with the *Kienapple* issue, and then deal -- proceed to sentencing.

[38] THE COURT: Okay. I think I can deal with the *Kienapple* issue. Given the way that the offences are particularized, I am satisfied they would be *Kienappled*. So what I would do is direct that a conviction be entered with respect to s. 139, the more serious of the two offences, and that a judicial stay be entered with respect to the uttering threats.

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RUDDY C.J.T.C.