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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

LORNE MATTHEW LAPOLEON

EXCERPTS FROM PROCEEDINGS
RULING ON VOIR DIRE
OF THE
HONOURABLE JUDGE G. M. RIDEOUT

Counsel for the Crown:	R. Beram
Counsel for the Defendant:	E. Cooper
Place of Hearing:	Vancouver, B.C.
Date of Judgment:	September 17, 2007

[1] THE COURT: Oral reasons for ruling on voir dire.

INTRODUCTION

[2] On or about February 16th of 2006, a fax was received via e-mail at the headquarters for the Integrated National Security Enforcement Team (INSET) in Ottawa in which it was disclosed that there was a plot to blow up the Danish and American Consulates in the Lower Mainland. This fax galvanized a substantial police response both nationally and internationally.

[3] As a result of this fax and subsequent police investigation, it was determined that the accused was the author of the fax. He was arrested and interrogated. During the interrogation he admitted to writing and sending the communication, and that much of what was in the fax was based upon conjecture, or lies, or both. As a result, the accused has been charged with various offences, including a terrorist hoax charge, pursuant to s. 83.231(2) of the ***Code***.

[4] A voir dire was declared to determine, firstly, whether the statement was voluntary, and secondly, whether the accused's rights were breached under s. 10(a) and (b) of the ***Charter***, and if there was a breach, what would be the appropriate remedy.

BACKGROUND

[5] In the aftermath of the tragedy of September 11th, 2001, the RCMP, in concert with police forces across the land, established the Integrated National Security Enforcement Team (INSET). The mandate for INSET is to monitor individuals and groups who may pose a terror threat to our nation. As part of that mandate, INSET also assesses and investigates all communications and tips of potential terrorist activity to determine the legitimacy of that information. INSET has access to substantial manpower and other resources nationally and internationally in the exercise of its mandate.

[6] On or about the 16th of February, 2006, a fax via e-mail was received at INSET headquarters in Ottawa. That fax transmission has been marked as Exhibit B and reads in part as follows [as read]:

Hi, I am a Muslim and I have information on Islamic terrorist cell operating in Vancouver, B.C. The cell members is plotting to blow up the Royal Danish Consulate in North Vancouver, the United States Consulate General, 1075 West Pender Street, Vancouver. I am not sure what time this will happen but here are bits and pieces in Arabic and Kurdish at some meetings and a few parties the time I have been hanging out with them. I am not sure where the explosives are being kept. I think at some storage room out in Burnaby close to the Rupert SkyTrain. I want just to tell you this, I am not good at spelling English, and I want to be kept out of it, just to let you know, stop mohsen.

[7] The transmission indicated names of several individuals along with addresses and places where these individuals may work. There are numerous spelling mistakes in the communication which were done on purpose.

[8] A behavioural science expert with INSET reviewed the communication and determined the risk threat to be low. Investigation, as well, revealed that this communication came via New York, Staten Island. Notwithstanding the low threat risk, a substantial investigation commenced. Surveillance of the three named plotters was put into place. A grand jury subpoena was secured in New York to seize domain records from a server which linked the fax transmission through

various computer re-routes. As a result of the investigation, it was determined that the internet protocol (IP) was linked to the accused.

[9] The Danish Consulate and the American Consulate were advised of the communication and the police increased their presence of both consulates. A dog team was deployed to investigate a storage location near the Rupert Street SkyTrain station with negative results. At the same time, local RCMP and Vancouver City Police resources were brought into the investigation loop by INSET. The person placed in charge of the Vancouver team was Staff Sergeant Coyle. He was assisted by other investigators in what is called the project team, including Sergeant Kenny and Constable Lamont.

[10] Once it was determined that the accused was the principal suspect, surveillance was established on Mr. Lapoleon. The plan at the time was to surveil the accused to his residence, secure a search warrant, then arrest the accused and seize computer equipment which could or may be found at his residence. The problem with this plan was the accused appears to have not had a fixed residence and was essentially homeless, or on the street. Surveillance did establish that Lapoleon's access to computers was through several internet cafés and coffee bars in Vancouver.

[11] In the afternoon hours of February 22nd of 2006, the project team met in Vancouver. At that meeting, a plan was put into place to have the accused arrested by two uniformed police officers for use of a credit card and that he would be chartered and warned in relation to that charge only. Thereafter, Sergeant Kenny and Constable Lamont would arrange to have the accused taken to the Vancouver City Police station. Then, with the benefit of audiovisual equipment in place, either Constable Lamont or Staff Sergeant Coyle would advise the accused of the terrorist hoax charge, charter and re-warn the accused. With respect to the interrogation itself, it would be handled by Staff Sergeant Coyle.

[12] This plan had two objectives: first with audiovisual equipment in place there would be an accurate record of the interrogation; and two, to observe the reaction of the accused when told of the hoax charge.

[13] Assisting the project team were various police members who were carrying out the surreptitious surveillance of the accused. When all units were in place on the 22nd of February of 2006, Sergeant Kenny and Constable Lamont, in plainclothes, attended at the Stadium SkyTrain station where the accused had been located by surveillance cover.

[14] The SkyTrain Stadium facility is a highly public facility and is one of the main SkyTrain stations serving the Lower Mainland. While initially the uniform members were to arrest the accused, it was Sergeant Kenny who came upon the accused first in the second level of the SkyTrain station. Sergeant Kenny had testified in the voir dire that he had prior dealings with the accused and that they knew each other. Sergeant Kenny called out to the accused. There was no unusual response by the accused. Sergeant Kenny then arrested the accused for fraudulent use of a credit card and chartered and warned the accused at 9:13 p.m.

[15] After reading the accused his rights to counsel and reason for arrest, the secondary warning was communicated to the accused, and the accused was asked what he thought his rights were in relation to the ***Charter*** and the secondary warning. The accused responded that he understood what had been told to him. Sergeant Kenny explained that the fraud charge arose from an investigation from approximately one week prior to the 22nd of February.

[16] The accused then asked Sergeant Kenny if he could speak in private to Sergeant Kenny about that charge. Sergeant Kenny determined that a highly public area like the SkyTrain station was not the proper venue for such a private conversation.

[17] Shortly after the arrest and search of the accused, Constable Lamont arrived on scene and he had some incidental dealings with Mr. Lapoleon. Other members were also present at the time. The accused testified during the voir dire that he thought it was odd that so many police, at least five, both in uniform and in civilian clothes, would be present all for a minor fraud charge.

[18] In relation to the search of the accused, various articles were located which linked the accused to the fax communication.

[19] At 9:30 p.m., the accused was transported to 312 Main Street and taken directly to an interview room. Sergeant Kenny and Constable Lamont arrived at the detachment a short while later. Sergeant Kenny's role was to operate the audiovisual equipment and Constable Lamont and Staff Sergeant Coyle would conduct the interrogation.

[20] At 9:57 p.m. Constable Lamont enters the interview room and tells the accused about the new charge. The following exchange which is recorded on the audiotape and reduced to transcript form takes place. This is found at page 2 of 62 commencing at line 41 through 55 of the transcript exhibit [as read].

LAMONT: Okay, Lorne. Okay, it's 10 o'clock February 22nd. Sorry for the delay there. I'm gonna read you some stuff here, all right? I just want you to get all this stuff straight.

LAPOLEON: Yep.

LAMONT: So you know what's going on. You understand you've been arrested right now, right?

LAPOLEON: Yeah.

LAMONT: So let me read you a few things. First of all your charges are, number 1, fraudulent use of a credit card, number 2, terrorism hoax.

LAPOLEON: What?

LAMONT: Section 83.231 of the Criminal Code of Canada, terrorism hoax, that's your second charge, okay? So let me just read this stuff to you, if you don't mind.

LAMONT: Yep.

[21] Thereafter, the accused is re-chartered and asked if he understands what he is being arrested for, to which he responds, "Yeah." He is also told, "Okay, so you don't have to tell me anything, right?" Answer, "Yep." The accused is also re-advised of the secondary warning or caution, in response of which the accused indicates that he understands he does not have to say a word.

[22] Thereafter, in relation to the ***Charter*** communication, the accused is taken to a private room and he spoke to a ***Brydges*** duty counsel. That duty counsel was called by Constable Lamont. Conversation between the accused and duty counsel, Nan Aulakh, takes place in private over several minutes.

[23] At one point, Constable Lamont observes that the accused is off the phone and he enters the phone room. The following exchange takes place as noted in the audio and within the transcript at page 6 commencing at line 207 [as read].

Are you done? Talked to a lawyer, okay? Just hang on a second. What's that? There's noise in the background.

[24] Line 211 [as read].

Q Would you like to go into the same room 8? Sorry, are you good? Okay.

Okay, it's 2215 or 10:15 p.m. Lorne is back in the interview room number 8. He's finished with the lawyer.

Q You did talk to a lawyer?

A Oh, yes, I did.

Q And that was a lady who identified herself to me as Nan Aulakh, is that right?

A Uh, yep.

Q Okay. So um just have a seat.

A Yeah.

Q Try to make yourself comfortable if you can. You need anything? Things okay?

A Well, I wouldn't mind having a smoke.

[25] Approximately four minutes later, Staff Sergeant Coyle enters the interrogation room. Officer Coyle tells the accused that the police know what is going on and that the police need to know if what happened is "legitimate". Officer Coyle tells the accused that all he wants is the truth and reminds the accused that the police cannot threaten people to tell the truth, rather it must be voluntary.

[26] I note the following exchange from the transcript at page 8 commencing at line 285 [as read].

Q What we're here for is just the truth and for you to talk to us. That has to be of your own free will.

A I see.

Q So I think bottom line is no one has threatened you, have they.

A Threatened me?

Q Yeah, to talk to us, like you'd better talk to us.

A No. Not right now, no, I don't feel threatened.

Q You don't feel threatened, not right now, no one's said that to you. Good. And no one's made any promises to you or suggested that things would go better for you.

A No.

Quote ends at line 297.

[27] Absent any protest from the accused, Officer Coyle asks him to start from the beginning and tell him in chronological order what took place when he sent the fax transmission from a computer. The accused did exactly that. In a spontaneous and even tempo, the accused gave details of the fax and his motivation for sending that fax.

[28] The bottom line appears to be this. The accused did not like the three named individuals. He believed they were involved in different criminal activities and something should be done about it.

[29] The accused lamented that in the past he had "sponsored" or volunteered information to the police about various people involved in criminal activity, and potential terrorist activity, and no one ever did anything about it. Additionally, while he did not know exactly what kind of terrorist activity the three were up to, it was his opinion that with their Arabic names, their possible criminal activity, that they "might" or "could" pose a threat. He felt if he sent the communication or fax about the possible terrorist threat to the Danish Consulate and the American Consulate via INSET as an anonymous tip that the police would take this tip seriously and do something about it.

[30] The total time of the interrogation was one hour and four minutes. At the end of the interrogation, the accused was asked if he would show the police various locations where he used computers and to identify the computers in question. Lapoleon assisted the police, identified various internet cafés and various computers that he had used. These computer units were seized and submitted for forensic analysis. Examination of several of the seized computers was confirmatory of the information given to Staff Sergeant Coyle by the accused.

POSITION OF THE PARTIES

[31] Counsel for the accused first argues that the issue of whether the statement was voluntary must be dealt with by the court, and, secondly vigorously argues that the ***Charter*** rights of the accused pursuant s. 10 were breached. In particular, that there was a ploy put in place by the police to have two uniform members arrest the accused for fraudulent use of a credit card, and it would only be at the detachment proper that the accused would be told for the first time about the hoax, thus contrary to s. 10(a) of the ***Charter.*** Following on that argument, that the police further violated the accused's right to counsel by selecting duty counsel rather than letting the accused choose his counsel.

[32] In support of this argument, counsel reminds the court of the surprise registered by the accused in the exclamation "What?" when told by Lamont of the hoax charge, that the accused was unable to properly process what was taking place, and that the selection of duty counsel was essentially rammed down the throat of the accused.

[33] Defence counsel also takes the position that it was Constable Lamont who was in full control of the process, was speaking quickly, would cut off the accused, and that he is a big, imposing individual.

[34] It is argued by counsel that there were no exigent circumstances, there was no valid reason not to tell the accused about the hoax at the SkyTrain station, and that the hold back of that information was designed to startle the accused at the police station and cause him to make an incriminating statement or incriminating body language or gesture.

[35] Counsel asks this court to consider the evidence of the accused given in the voir dire wherein the accused says he was "shocked and surprised" about the new allegation, and that in the result he was unable to make any reasonable decision about a choice of counsel. It is noted with respect to the implementation of contacting counsel that no directories were provided to the accused so he would be able to browse a directory and choose mode of counsel.

[36] In relation to the remedy sought, that the Court must and should apply s. 24(2) in a manner which recognizes that these types of breaches will not be countenanced and that the statement given by the accused must therefore be excluded, and any confirmatory evidence gathered thereafter as derivative also excluded.

[37] The Crown takes the position that s. 10(a) and (b) rights are not so rigid that any apprehension of a breach would invalidate admission of evidence conscripted from an arrestee or detainee. The Crown asserts that the court must look at the full context of what took place and that in a contextual approach, having regard to all of the facts of this case. The accused knew why he was ultimately being arrested. He told Lamont he did not have a lawyer. He agreed to talk to ***Brydges*** duty counsel. He was afforded privacy, confirmed he had spoken to "a lawyer" and that he made no indication he was dissatisfied with the advice. It is also noted the accused was made clearly aware both at the SkyTrain station and at the detachment on numerous occasions that he did not have to talk to the police.

[38] Ultimately, it is the position of Crown that the accused was well aware of his jeopardy, knew his rights, and elected not to remain silent. Crown also notes there was no bad faith exercised by the police, there was no trickery or oppression, and that the statement ultimately given by the accused was entirely reliable.

[39] In the alternative, the Crown argues were I to find a breach of s. 10(a) or (b), that the admission of the evidence would not bring the administration of justice into disrepute, and indeed, were I to not admit that evidence, right thinking Canadians armed with the knowledge of this case, the context of the evidence, circumstances of the accused, and the fundamental purpose and principles of the ***Charter*** would be startled if the evidence were not admitted.

ANALYSIS

ISSUE 1 - VOLUNTARINESS

[40] It is incumbent on the Crown to establish the statement given by the accused is free and voluntary beyond a reasonable doubt. It is common ground there is no legal obligation on a person, absent statutory compulsion, to say anything to the police, and this right is a general right enjoyed by all citizens of Canada. (***R. v. Turcott***, 2005 SCJ 51 at paragraph 41.)

[41] Historically, the jurisdiction in relation to the confessions rule provided that a confession or statement would not be admissible if the police held out explicit threats or promises to an accused. (***Ibrahim v. The King***, 1914 AC 599.)

[42] This rule has been adopted in Canadian jurisprudence and ultimately modified by the protections now available to accused persons as contained principally in sections 7 through 14 of the ***Charter***. This modification has most recently been explained by the Supreme Court of Canada in ***R. v. Oikle***, [2002] SCR 3. Iacobucci for the majority summarized the modification of the ***Ibrahim*** rule at paragraph 68 of that decision as follows.

While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow Ibrahim rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.

[43] The analysis in relation to determining whether or not a statement is voluntary is by operation of the ***Oikle*** approach contextual in nature. Such an approach is designed to be a check on the prospect that an involuntary confession may be unreliable. This approach was explained by Romilly J. in ***R. v. J.P.F.***, [2002] BCJ 180, paragraph 10 as follows.

Thus, application of the confessions rule is by necessity contextual. A trial judge must review all the relevant factors when reviewing a confession. Such factors include: the existence of threats or promises; an atmosphere of oppression; whether the accused had an operating mind; and the existence of other police trickery. The existence of such factors can operate to render a confession involuntary and thus inadmissible.

[44] In this case, none of the factors set out in the ***Oikle*** decision as interpreted by Romilly J. in ***R. v. J.P.F.*** come into play. I have listened with care to the DVD recording, the audio recording, and reviewed the transcript at length. While there were a few inadvertent technical problems, particularly so in relation to the operation of the video, I am satisfied that I have before me an accurate and reliable record of the interrogation.

[45] The interrogation was not relentless and pressing. Indeed, the opposite flows from the evidence. There is a smooth flow in relation to questions and answers. There is a rapport between Staff Sergeant Coyle and the accused. While the accused claims to have been drinking that day, I find there is no evidence that his operating mind was affected by alcohol consumption.

[46] Overall, I get the sense from the evidence that the accused ultimately decided he wanted to talk to the police, and talk he did. If there was any one thing that was of concern to the accused was when he could have a cigarette.

[47] Accordingly, I find that Crown has established beyond a reasonable doubt that the statement given by the accused is free and voluntary.

ISSUE 2 - ALLEGATIONS OF BREACH OF S. 10

[48] In relation to the ***Charter*** argument, s. 10(a) and (b) reads as follows. "Everyone has the right on arrest or detention to be informed promptly of the reasons therefor; to retain and instruct

counsel without delay and to be informed of that right; and to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

[49] Counsel for the accused relies in part on the Supreme Court of Canada decision in ***R. v. Borden***, [1994] 92 CCC (3d) 404 to support his assertion that the accused's s. 10 rights were breached. I find the factual underpinning of the ***Borden*** case, being one of sexual assault, to be significantly different than the facts of this case. However, ***Borden*** does establish the principled link between s. 10(a) and (b). At page 15 the court notes.

As this court has previously stated, the rights in s. 10(a) and (b) of the Charter are linked. One of the primary purposes of requiring the police to inform a person of the reasons for his or her detention is so that person may make an informed choice whether to exercise the right to counsel, and if so, to obtain sound advice based on an understanding of the extent of his or her jeopardy.

[50] In relation to s. 10(a) the accused was not told fully the reason for his arrest until he was at 312 Main Street. The police held off on that component as they wished to have in place the audiovisual equipment for a reliable recording. When the accused was at 312 Main, he was told in a prompt manner in the interview room the reasons for his arrest.

[51] I find the police did not act in bad faith. They wished to have an accurate and reliable record of what the accused did and said. He was dealt with in a reasonable and humane manner both at the SkyTrain station and at 312 Main Street. In hindsight, it may have been preferable to tell the accused about the hoax charge at the SkyTrain station, but having regard to the context of this case, I do not find that the procedure followed by the police impacted the fairness of the trial such that the administration of justice would be brought into disrepute.

[52] I conclude the accused has not established on a balance of probabilities that his s. 10(a) rights were violated.

[53] With respect to s. 10(b), ***R. v. Bartle***, [1994] 3 SCR 173, establishes the purpose of s. 10(b) and the duties on agents of the state in implementing s. 10(b) rights. Counsel for the accused argues that the conduct of the police defied the very intent and purpose of s. 10(b) and defeated the duties that are imposed on the police.

[54] In relation to the purpose of s. 10(b), the court in ***Bartle*** at paragraph 16 notes as follows.

The purpose of the right to counsel guaranteed by s. 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations.

[55] In relation to duties of agents for the state, the court at paragraph 17 notes as follows.

This Court has said on numerous previous occasions that s. 10(b) of the Charter imposes the following duties on state authorities who arrest or detain a person:

(1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

(2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and

(3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[56] These duties imposed on agents for the state are designed to ensure that a person detained or arrested can make informed choices, and as noted in ***Bartle*** at paragraph 19, to appreciate one's right to silence.

[57] In this case there was no triggering assertion of the accused that he wished to consult with counsel of his choosing. In his evidence he claimed he knew of several lawyers, but when pressed the only name that he was aware of was Mr. Phillip Rankin. Even then he made no request to speak to Mr. Rankin. The accused testified that he acquiesced to duty counsel because he was "shocked" and "nervous" about the hoax charge and was worried if he spoke out he might be sent to the United States of America or even tortured.

[58] The evidence, in my view, is clear that the accused did not have a lawyer at the time his s. 10(b) rights were communicated to him at the detachment. He made no assertions, and while the vocal tempo of Constable Lamont could have been slower, the accused does not appear to have been overridden by events or cashiered into the acceptance of legal aid duty counsel. Again, I reject the accused's evidence that alcohol impacted on his decision making process.

[59] He also curiously testified he was not sure that he was speaking to a "real lawyer" when he spoke to duty counsel. However, he made no complaint to either Staff Sergeant Coyle or Constable Lamont that he was dissatisfied with the advice he received.

[60] The accused further testified he "might" have or "possibly" would have approached the interrogation differently if he had a better choice of counsel. Again, while it may have been preferable to present a legal directory or Yellow Pages to the accused, on the facts before me, and the accused's knowledge of the criminal justice system and process, failure to do so did not defeat his s. 10(b) rights.

[61] Lastly, on this leg of the analysis, I note the testimony of the accused himself during cross-examination that it was himself, after receiving legal advice, that "I kind of made my own decision" to not follow or to disregard the advice of keeping silent. Returning to the ***Bartle*** decision, the court notes that this is one of the most important aspects to legal advice, one's knowledge of a right to silence.

[62] Overall, I found the testimony of the accused to be unreliable. He was evasive and not forthcoming during cross-examination. I reject his suggestion that the police may have tampered with the audiotape to edit or delete things he may or may not have said. I find at the time the accused was at the police station at 312 Main Street, he elected to forego his right to silence and that he was aware of his rights at the station when he reached his decision to talk.

[63] In the past, police authorities had ignored information he volunteered or "sponsored" to investigate criminals of which some may be terrorists. On February 22nd of 2006, Mr. Lapoleon finally had a rapt audience.

[64] For these reasons I find that s. 10(b) rights were not defeated by the police in their dealings with the defendant.

[65] In the alternative, had I found breaches of the accused's s. 10(a) and/or (b) rights, I would not have found the statement given by the accused inadmissible pursuant to s. 24(2). Section 24(2) of the ***Charter*** reads as follows.

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[66] Canadians now live in a new world order. This new world order came shockingly into play the morning of September 11th, 2001. All of us are now aware that there are some highly dedicated and motivated people who would not hesitate to cause death and destruction to Canadians and others on Canadian soil. Police authorities are constantly evolving tactics to assess and deal with potential terror threats. There may be many threats such as the one involved in this case that are of a low risk; however, it is incumbent that all threats be investigated to determine their legitimacy. This must be so, for failure to properly assess a terrorist risk could have a catastrophic result as a result of inaction or lack of action.

[67] I am of the view that the admission of the statement given by the accused would not result in an unfair trial. As was noted in the landmark ruling in ***R. v. Collins***, [1987] 1 SCR 265 at paragraph 45, that the cost of excluding the accused's statement where he is facing serious charges would potentially result in an accused evading conviction.

[68] Reading from that decision at paragraph 45, "Such a result could bring the administration of justice into disrepute." That indeed could be the potential result in this case were I to rule the statement inadmissible.

[69] In the context of this case and the alleged breach of the ***Charter***, that breach cannot trump the significant public interest component which requires the admission of the statement by the accused into evidence.

(RULING ON VOIR DIRE CONCLUDED)