COURT MARTIAL

Citation: *R. v. Leading Seaman C.M. Ritchie*, 1997 CM 39

Date: 17 November 1997
Docket: C199739

Standing Court Martial
Washington State, United States of America
Maritime Pacific Headquarters Detachment Whidbey Island

Her Majesty the Queen

- and -

Leading Seaman C.M. Ritchie, accused

Before: Commander R.F. Barnes, M.J.

Warning

Subject to sub-section 486(3) and 486(4) of the *Criminal Code* and section 179 of the *National Defence Act*, the court has directed that the identity of the complainant and any information that would disclose the identity of the complainant shall not be published in any document or broadcast in any way.

CHARTER DECISION

(Orally)

[1] Please be seated. Now, this is a decision to an application by the defence for the remedy of exclusion of an alleged confession on the basis of an infringement of the

Section 10 *Charter* rights of Leading Seaman Ritchie. The first issue to be determined under Section 10 is whether there has been a detention.

[2] In *R. v. Therens*, a 1985 decision, the Supreme Court of Canada dealt with the situation of a Breathalyser demand under the criminal code. The majority judgement on the issue of detention was written by Justice Le Dain. Starting at page 641 of the Supreme Court Report, he adopted a proposive approach to interpretation of Section 10 of the *Charter* in holding that the situations of arrest and detention are situations in which the restraint of liberty might otherwise effectively prevent access to counsel. He held as follows, quote:

> In its use of the word "detention", s. 10 of the *Charter* is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
>
> In addition to the case of deprivation of liberty by physical constraint, there is in my opinion a detention within s. 10 of the *Charter* when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.

[3] Continuing further on, on the same page, Mr Justice Le Dain held again:

> There can be no doubt that there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action that amounts to a detention within the meaning of s. 10 of the *Charter*. The issue, as I see it, is whether that compulsion need be of a physical character, or whether it may also be a compulsion of a psychological or mental nature which inhibits the will as effectively as the application, or threat of application, of physical force. The issue is whether a person who is the subject of a demand or direction by a police officer or other agent of the state may reasonably regard himself or herself as free to refuse to comply.

[4] And continuing on page 644 of the Supreme Court Report, Justice Le Dain finally stated:

> In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of

> freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

[5] In *R. v. Moran*, a 1987 decision of the Ontario Court of Appeal, Mr Justice Martin dealt with the issue of detention of persons at an interview at the police station. He suggested that the following list of factors were relevant but not exhaustive nor was any one factor or combination of factors or absence of a factor necessarily determinative of detention. The factors were as follows:

> 1. The precise language used by the police officer in requesting the person, who subsequently becomes an accused, to come to the police station and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station rather than at his or her home.
>
> 2. Whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request.
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> 3. Whether the accused left at the conclusion of the interview or whether he or she was arrested.
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> 4. The stage of the investigation, that is, whether the questioning was part of a general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from an accused.
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> 5. Whether the police had reasonable and probable grounds for believing that the accused had committed the crime being investigated.
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> 6. The nature of the questions, whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt. Lastly, number seven.
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> 7. The subjective belief by the accused that he or she is detained, although relevant, is not decisive because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.

[6] And still on the law I note that the - in the case of *R. v. Hawkins*, a 1993 case, the facts were not dissimilar to the case at bar and as Mr Stewart pointed out, the Supreme Court of Canada in a rather terse decision found no detention in those circumstances.

[7] Now, with respect to the evidence. I found that much of the evidence was not in any real dispute. The video tape speaks for itself. I found that the witnesses were credible and their testimony was generally accepted as accurate.

[8] With respect to the issue of detention, the evidence from the video tape, Exhibit 4, and the testimony of Leading Seaman Ritchie and Chief Petty Officer Slade is most relevant. From the video tape it is evident that after Leading Seaman Ritchie stated that he wished to exercise his rights to counsel and while Master Corporal Todd was arranging for the call to the duty counsel, Master Corporal Todd advised Leading Seaman Ritchie to the effect that firstly, he was not under arrest or detention and secondly, that he was free to get up and leave at anytime, that if the door to the interview room was closed, it was only for privacy. Leading Seaman Ritchie acknowledged this information by stating "Okay."

[9] Master Corporal Todd continued to advise that the door would not be locked and that Leading Seaman Ritchie could stop the interview at any time. Leading Seaman Ritchie then asked a question to clarify his right to leave at any time and his right to silence during the interview. Master Corporal Todd responded by repeating the standard police caution concerning not being obliged to say anything. After going through the supplementary caution concerning other persons in authority and still prior to the call to counsel, Master Corporal Todd again reminded Leading Seaman Ritchie that he was not under arrest and he was not detained and suggested to Leading Seaman Ritchie that his lawyer will probably ask about that.

[10] After the call to the lawyer, Master Corporal Todd went through what appears to be the form which is now at Exhibit 7. During this process, Leading Seaman Ritchie was again given the essence of the standard police caution about not being obliged not to say anything but anything he does say may be given in evidence, once informally and once in formal language. After Corporal Gillis entered, there was an additional review of the supplementary caution which included Leading Seaman Ritchie stating his understanding of that caution.

[11] At the beginning of the actual interview, when Leading Seaman Ritchie was about to speak about the matter under investigation, Leading Seaman Ritchie stated that he had a statement that he would like to make, and he produced a paper whereupon Corporal Gillis stated that he didn't have to read from that. What then followed is mostly a monologue from Leading Seaman Ritchie which appears to be exculpatory up to the point when Corporal Gillis started to play the bad guy and left the interview room.

[12] Just prior to Leading Seaman Ritchie producing the prepared statement, Corporal Gillis while talking about finding out what really happened and that this was the chance for Leading Seaman Ritchie to give his version of events, Corporal Gillis ended by saying, "You have to tell us". This statement is capable of two interpretations when viewed on paper. One, that there is some sort of legal compulsion to require Leading Seaman Ritchie to remain in the interview room and to tell his story; or two, that if Leading Seaman Ritchie wants to provide his side of the story and ensure an accurate report, then his version of events can only come from him.

[13] In listening to the video, it's clear that the latter interpretation is the correct one from the inflection in Corporal Gillis's voice. It is also the only reasonable interpretation in view of the numerous cautions and explanations up to that point in the interview which stressed that Leading Seaman Ritchie did not have to remain, that he could leave at any time and that he did not need to say anything.

[14] Chief Petty Officer Slade indicated in her testimony that on the 19th of June she called Leading Seaman Ritchie into her office to discuss the situation. During this meeting she testified that she advised Leading Seaman Ritchie that he would be moved to the recycling station and she believed that he had received a letter from Lieutenant-Commander Greenwood ordering Ritchie to stay clear of the victim. She also indicated that Leading Seaman Ritchie's weekend leave would be restricted, so he couldn't go home to British Columbia until the interview was finished, but that he did go home on Sunday after the interview with her concurrence.

[15] Chief Petty Officer Slade indicated that she advised Leading Seaman Ritchie that she would call him with a time and place for the interview. He could go out and eat but he should keep her informed of his whereabouts during the weekend. She also gave evidence that with respect to the wedding on the 28th of June, Leading Seaman Ritchie could take his leave and go home, but he should not go to the wedding to avoid contact with persons associated with the incident. She also indicated that Leading Seaman Ritchie's house hunting trip, I believe during early July, was cancelled as she did not know at that time what might occur regarding the allegation of sexual assault. Chief Petty Officer Slade indicated earlier in her testimony that she had called the career manager of Leading Seaman Ritchie to delay his upcoming posting.

[16] In cross-examination, she testified to the effect that, with respect to the weekend prior to the interview, Leading Seaman Ritchie was free, I believe that would be the weekend of the interview, Leading Seaman Ritchie was free as long as she knew where he was. He was not confined to barracks. Her concern was being able to get a hold of him

for the investigation. She also stated that he wanted, that is, Leading Seaman Ritchie wanted to tell her the story to get it off his chest but she did not let him.

[17] In re-examination, Chief Slade confirmed that Leading Seaman Ritchie called her a number of times regarding when he would be called and one of the calls concerned going out for dinner.

[18] Leading Seaman Ritchie indicated in his testimony that he was relieved of duty on the 18th of June 1997, and he reported to Chief Slade's office on the morning of the 19th of June. He testified that she advised him that his house hunting trip was cancelled and his place of employment was changed from the NOPF to the recycling station. He indicated that he signed a memo to keep his distance from the victim, X., even through third parties. According to Leading Seaman Ritchie, Chief Slade advised him in this interview that the military police will be arriving and he was told to stand by the phone as interviews will be conducted on Friday and Saturday.

[19] Leading Seaman Ritchie testified further that on Saturday he waited inside the house and he called Chief Slade a couple of times. She agreed that it was okay for him to go dinner with his family. A significant item of Leading Seaman Ritchie's testimony as to a detention was his evidence in chief to the effect that, around 0900 hours on Sunday morning, Corporal Gillis called him and asked him, Ritchie, if he still wanted to come in and make a statement. To this question, Leading Seaman Ritchie testified that he replied yes, and he drove himself to the station for that purpose. Leading Seaman Ritchie indicated that the expression, "not arrested, not detained" meant that there was still a chance for him to explain his side of the story. He indicated that when he was told in the interview that he was free to go, he felt that if he left, the situation would be a lot worse. After the interview, he asked for and received Chief Slade's consent to go home, presumably to his parents' home in the Vancouver area and he reported his return to the recycling station by phone the next morning.

[20] In cross-examination, Leading Seaman Ritchie stated that on the 22nd of June, in the interview, he knew that he did not have to say anything to the military police and that he could have left the room. He testified to the effect that the situation was stressful leading up to the interview and that he welcomed the arrival of the military police as this was his chance to get things in perspective; to tell his side of the story. He again stated that he knew he did not have to speak to the police or even stay in the room, but he still felt that he had to tell them his side despite all the warnings and two conversations with lawyers.

[21] He stated that the military police did not pick him up and he admitted that he came to the interview of his own free will. In the interview, he stated that he sat closest to the door and he knew the door was not locked, however, he did not think it would be that easy to get up and leave because it was a frightening situation and at the time he did not think it would be that simple. He then confirmed again however, that he knew he could leave and he knew he did not have to say a word. After his call to duty counsel he agreed that he called the military police back into the room. He testified that he was prepared to continue talking and he talked to the police because he wanted his side of the story out.

[22] In re-examination, Leading Seaman Ritchie indicated that he cancelled his leave in order to save some days and that one does not need a leave pass to go to Canada and that he intended on attending the wedding in any event.

[23] Now, with respect to findings. The normal incidents of military life and administration do not constitute detention within the meaning of Section 10 of the *Charter*. The house hunting trip is provided for in the military regulations and orders and it is basically a military duty trip in advance of a posting to a new geographical area. Both the house hunting trip and the posting itself are militarily ordered duties and are paid for by the military.

[24] The fact that these administrative details of military life were altered in the face of a serious allegation of sexual assault against a member who was about to be posted is not surprising. Life in the military means that you follow lawful orders and you are required by law to show up for work wherever ordered. Failure to do so without a lawful or at least a compassionate excuse will likely lead to some sort of administrative or disciplinary action up to and including a charge or AWOL or even desertion.

[25] This requirement to show up for work, to follow lawful orders and the inability to quit or refuse to work does not mean that all members of the Canadian Forces are being detained constantly within the meaning of Section 10. If the military police are themselves detained under the same regime, who would be left to read us our rights? The fact is that these features of military life are accepted when members volunteer for service. The cancellation of a house hunting trip and the delay of a posting do not involve any legal consequences for members being investigated for an alleged offence, nor do they impede access to counsel.

[26] The requirement that Leading Seaman Ritchie stay in the local area to facilitate an investigation in which he was the only suspect, was an action from which no significant legal consequences would flow with respect to that investigation and which would not impede access to counsel in a significant way. The general requirements of

military life must be differentiated from the orders or demands or directions of policemen or superior officers concerning a specific investigation into an offence which could have significant legal consequences and which could impede access to counsel. To hold otherwise would mean that the whole system would break down and military members would do nothing but continually recite Section 10 *Charter* rights to each other all day long.

[27] It is evident from the evidence of Leading Seaman Ritchie that he wanted to go to the interview and that he drove himself there of his own free will to tell his side of the story. This is confirmed again in his own evidence to the effect that Corporal Gillis called him on Sunday morning and asked if he, Ritchie, still wanted to come in and make a statement to which Leading Seaman Ritchie said that he replied in the affirmative. It is apparent from this that not only did Leading Seaman Ritchie want to go to the interview, but that this desire on his part was somehow communicated to the police and that explains why Corporal Gillis phrased his question on the telephone as he did.

[28] Furthermore, at the commencement of the actual discussion of the allegation of sexual assault, it is apparent that Leading Seaman Ritchie had a prepared statement to read, which is at least consistent with the finding that he wanted to go to the interview to tell his side of the story. The fact that his subsequent initial monologue in the interview was essentially exculpatory supports this conclusion. This puts a different light on the apparent restriction of Leading Seaman Ritchie to the local area on the weekend of the interview as it does on the calls between Leading Seaman Ritchie and Chief Petty Officer Slade as to the timing of the interview and his whereabouts. I find that this was not so much a one-sided restriction on Leading Seaman Ritchie's movements in order to compel him, or, at least, to ensure his attendance at the interview, but rather, it appears to have been a mutual arrangement to facilitate Leading Seaman Ritchie's desire to tell his side of the story to the investigators as well as to facilitate on behalf of the superior officers a speedy conclusion to the investigation by continuing interviews during the weekend without undue delays in locating persons.

[29] Even if the restriction of Leading Seaman Ritchie to the local area and subject to telephone contact can be viewed as an imposed restriction by military authority, it is very clear from Leading Seaman Ritchie's testimony that he understood very well at the interview that he was under no obligation to say anything and that he was free to get up and leave at any time. While Leading Seaman Ritchie indicated in his testimony that he did not think it would be that simple or that easy to leave, no explanation was offered for this belief, reasonable or otherwise.

[30] With respect to the seven factors set out in *R. v. Moran*, I note that the language of *Therens* as to a demand or direction by the police has been softened by Mr Justice Martin to "the precise language of a request to come to the police station." In any event, in answer to the first factor, there was no demand or direct request from the police to Leading Seaman Ritchie to come in for an interview, rather, the police inquired if Leading Seaman Ritchie still wanted to come in and make a statement.

[31] Furthermore, Leading Seaman Ritchie testified that he wanted to tell his side of the story. This language is about as far removed from a demand or direction as one can imagine and it is strongly indicative of the absence of compulsion or detention. Factors two and three of *Moran* also favour a lack of detention or the absence of detention. The evidence with respect to factors four, five and six tend to favour detention. With respect to the seventh factor, the evidence of Leading Seaman Ritchie indicates that he wanted to tell his side of the story, that he had no belief that he was detained, nor did he reasonably believe that he was detained. Leading Seaman Ritchie was very clear that he knew he did not have to say anything and he could leave at any time. He expressed the thought that he did not think that it would be that simple, but this reservation does not turn his clear understanding that he could leave at any time into a reasonable belief that he was detained.

[32] I conclude that there was no detention of Leading Seaman Ritchie at the police interview and therefore the rights at Section 10(a) and 10(b) of the *Charter* were not triggered. While this is sufficient to dispose of the application and I need not say more, I feel that a few comments on the circumstances of the case in relation to 10(a) and 10(b), assuming that there was a detention, would be in order in view of the time and effort of counsel in addressing these issues.

[33] With respect to Section 10(a), it is apparent from the video that Leading Seaman Ritchie not only knew why he was being interviewed before he went to the interview, but the police also advised him that he was subject to an investigation into a sexual assault on X.. The law looks to the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the words used with respect to the 10(a) rights.

[34] The information as to the reasons for a detention, had one existed, must be sufficient to permit the accused to make reasonable decisions as to submission to the detention and as to exercising his right to counsel. The information provided under Section 10(a) must permit the accused to understand in a general way the sort of jeopardy he faces, but he need not be aware of the precise charge to be laid or of all the factual details of the case.

[35] In my view the information given to Leading Seaman Ritchie at the start of the interview would have been sufficient to meet the requirements of Section 10(a) had there been a detention.

[36] Concerning the informational component of Section 10(b), the alleged offence here took place outside Canada as did the police investigation including the interview with Leading Seaman Ritchie. A review of CFAO 56-5 reveals that it and the reciprocal arrangements in the last paragraph of that order relate to legal assistance in civil matters generally and not to legal aid or advice in disciplinary proceedings under the Code of Service Discipline or in criminal proceedings. Paragraph six of the order reads in part as follows:

> a. in cases involving Code of Service Discipline, except where the legal officer is acting as a defending officer for a court martial, as counsel for a member who is a respondent to an appeal by the minister from a court martial or is duty counsel for a person subject to the Code of Service Discipline who have been arrested or detained or are being detained by service authorities; and
>
> b. with respect to criminal offences; ...

[37] At section six, I should point out, were the exceptions, were exclusions from the definition of legal assistance.

[38] In the circumstances of this case, the only Canadian jurisdiction is the Canadian Forces disciplinary jurisdiction. There was no requirement under *R. v. Bartle* to provide information as to legal aid or civilian duty counsel services in another jurisdiction such as British Columbia or any other province. While there was some connection to the province of British Columbia in this case due to the proximity of the province and the fact that the military police both came from Victoria, that connection is really illusory. If one moves the scenario farther south, for example, into Texas or overseas, there would be no particular connection to any province and no reason to give out legal aid or duty counsel information concerning any such other jurisdiction. I make no comment on the situation when the alleged offence and the investigation occur within Canada.

[39] So having said that, the application for exclusion under Section 24(2) is not granted.

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