

CANADA / JUDGMENT

R. v. Ali

2022 BCSC 1910

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1910 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2022 BCSC 1910

Date: 20220527

Docket: 29405

Registry: Vancouver

Regina

v.

Ibrahim Ali

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Corrected Judgment: The cover page of the judgment was corrected on December 18, 2024

Before: The Honourable Mr. Justice L.W. Bernard

Oral Ruling on Application #31

re s. 10(b) Charter rights

Counsel for the Crown:

D.J. Porte

I.A. Keeley

Counsel for the Accused, appearing by teleconference:

K. McCullough

B.S. Lynskey

Place and Date of Hearing:

Vancouver, B.C.

March 3, 7-11, 14-16, 28, 30, 31

April 1, 4, 5 and 14, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 27, 2022

[1] THE COURT: In this pre-trial application, the applicant argues that his s. 10(b) Charter right to consult with counsel in private upon his arrest was breached in two ways:

- a) by the video-recording of his telephone call with his counsel, through the CCTV security system in the cellblock; and
- b) by the police informing him that his consultation with legal counsel would not be video-recorded.

These issues arise from the applicant's arrest on September 7, 2018, for the murder of MS. Upon arrest, the applicant was given his Charter rights with the aid of a prepared arrest script. It included the caution that he "may be subject to audio and video recording at any time while in police custody, except during communication with his legal counsel."

[2] The applicant speaks Arabic, and this was the language used in his arrest. The arrest was audio-recorded and later translated and transcribed into English. The transcript shows the following exchange between the applicant and Constable Alam, the Arabic-speaking arresting officer, in relation to the audio and video recording caution:

[Constable Alam]: . . . It is possible that you will be video and audio recorded.

[Applicant]: Okay.

[Constable Alam]: While you are detained by the police except when you are talking to a legal counsel. Do you understand? Meaning except when you are talking to a *lawyer*, other times you might be recorded on video uh...

[Applicant]: ...Okay.

[Constable Alam]: ...video, you know what's a video? A camera.

[Applicant]: Okay.

[Constable Alam]: Or audio recording, do you understand?

[Applicant]: I understand you.

. . .

[Constable Alam]: . . . Can you explain to me what I had just told you...

[Applicant]: ...Meaning like uh ...

[Constable Alam]: ...About the recording.

[Applicant]: About the recording. It means everything is recorded by us, like your voice and everything will be recorded by us.

[Constable Alam]: Audio and video.

[Applicant]: Okay and video too.

[Constable Alam]: Except? Except the time when you are communicating with your lawyer.

[Applicant]: Okay.

[Constable Alam]: Or *Legal Aid* or legal counsel.

. . .

[Constable Alam]: Can you repeat that for me?

[Applicant]: I swear I'm like...

[Constable Alam]: You already told me, I just want you to repeat it for me, do you understand?

[Applicant]: Like the audio and camera will be on.

[Constable Alam]: Except?

[Applicant]: Except the telephone calls that you make.

[Constable Alam]: Who with?

[Applicant]: With the lawyer.

[Constable Alam]: Right.

- [3] At the arrest scene, the applicant informed Constable Alam that he wished to exercise his right to consult with counsel. He was transported to the cellblock of the RCMP detachment in Burnaby, where the police facilitated telephone access to counsel and his interpreter. (Neither of these persons were physically present at the detachment for the consultation). To initiate the consultation itself, the police placed the applicant into the secure telephone room in the cellblock and then transferred to the telephone room the telephone connection they had with the applicant's counsel and his interpreter.
- [4] The telephone room is a small, unfurnished, rectangular room with a telephone affixed to the narrow strip of wall adjacent to the door, and with a CCTV camera mounted in a far upper corner of the room where the wall meets the ceiling. As is the case throughout all areas of the cellblock, the CCTV security camera in the telephone room passively video-records continuously, and feeds to monitors elsewhere in the cellblock. It does not audio-record.
- [5] The short receiver-cord on the telephone in the telephone room requires the user to stand very near to it. The door to the room has a clear window which is approximately 30-inch by 30-inch in size; it allows the detainee and the police to see one another during the telephone call. Through this window the detainee can get the attention of the police, and the police are able to monitor the detainee for safety and to ensure no issues, such as a "dropped call", arise in relation to the exercise of the right to consult with counsel.
- [6] Constable Alam was one of the two officers responsible for the applicant's safety and for ensuring that he was able to exercise his right to consult with counsel; accordingly, during the course of the applicant's 16-minute telephone call, he made periodic observations of the applicant through the door window. He said the applicant appeared to be in no distress and in conversation on the telephone during the call; he could not hear what was being said.

- [7] The existence of audio privacy in this room is not in question. Indeed, the applicant testified that he "felt that he had privacy on the phone" and "felt comfortable saying whatever he had to say; he said words to them and they said words to him." He agreed that he and his movements/gestures could not be seen by his lawyer or the interpreter, and that, in any event, they meant nothing other than showing that he was in conversation.
- [8] Constable Alam's partner, Corporal Lali, also conducted brief periodic visual checks through the window of the door to the phone room during the applicant's call, to ensure that he was engaged in conversation and that there were no safety issues.
- [9] During the applicant's telephone call, the CCTV camera passively recorded his image from behind him. It captured his body-position and movements as he stood facing away from the camera with the telephone receiver to his ear. At no time during the telephone call did the applicant turn his face fully towards the camera, and there is no evidence or suggestion that anything he said while on the telephone could be discerned from the video-recording. There were brief periods when the applicant turned sideways and the camera captured him in profile, and at various times throughout the call the applicant made gestures with one hand while holding the telephone receiver to his ear with the other hand. This video-recording was used by the Crown in the context of a "voluntariness" voir dire, without objection, to challenge the applicant's testimony that he did not speak to his counsel during the 16-minute call.
- [10] The evidence in the instant voir dire establishes that the CCTV security system in the cellblock is operated and maintained by the City of Burnaby; it passively video-records "24/7" and is not controlled from within the detachment (i.e., a CCTV camera cannot be selectively turned off by the police or the jail guards at the detachment). Inspector Turner testified that the cellblocks in all RCMP detachments across Canada have CCTV security systems in place. He explained that the presence of CCTV cameras in cellblocks is vitally important because it provides an objective record of what occurred, thus protecting the members of the public who are in police custody and the police who are responsible for their safety. He said it serves both liability and accountability purposes, and enhances safety for everyone.
- [11] Inspector Turner referenced an Inquiry into the death of Ian Bush and its recommendations, in his evidence. Mr. Bush was a young man who died while in police custody in Northern British Columbia. One of the recommendations from the Inquiry was that the RCMP install automated CCTV video-recording equipment in every RCMP detachment, in all areas where prisoners are dealt with. As for the specific need for this passive video-recording system in the telephone rooms within the cellblock, Inspector Turner testified that the post-arrest consultation with legal counsel is a "high risk" event: detainees are uncuffed and alone and often experience psychological changes when the gravity of their predicament is explained to them. Inspector Turner and a number of other police witnesses testified to having witnessed detainees becoming aggressive or attempting to self-harm while uncuffed and alone in the telephone room.

- [12] The police witnesses testified that there was no discussion or plan among the investigators to video-record the applicant in the telephone room, and no plan to mislead the applicant into thinking he would not be video-recorded; a video record of the applicant was made simply as a result of the existing passive CCTV recording system in place within the cellblock, which was neither operated nor controlled by the police. I accept this evidence is true. With this system in place throughout the cellblock, there would be no purpose to discussing video-recording the applicant during the consultation with his counsel, even if the police had reason to believe that such a record would somehow serve their investigative objectives or interests.
- [13] The applicant testified that the police told him he would not be video-recorded during the call with his lawyer, and, that if he had known he would be video-recorded, he would not have spoken with the lawyer or have made any body movements, including hand and arm gestures. In cross-examination, he agreed that he could see Constable Alam and Corporal Lali through the window of the door, looking towards him at various times during the telephone call. In other words, the applicant knew he did not have visual privacy from the police during the telephone consultation. He agreed that he was moving his arms and hands while Constable Alam and Corporal Lali were looking through the window and that he felt comfortable doing so. He did not explain why, given the obvious absence of visual privacy, video-recording him raised concerns. The applicant agreed that he felt that he had enough privacy to speak on the phone and that at the end of the call, he knocked on the telephone room door, called Constable Alam over, and passed the phone to Constable Alam so he could speak to the lawyer. He also agreed that shortly after the call he confirmed with Constable Alam that he had spoken with a lawyer and then reconfirmed this with Sergeant Harfouche during the first post-arrest police interview later the same day.

Legal framework

- [14] Section 10(b) of the Charter provides that:

10 Everyone has the right on arrest or detention

...

- (b) to retain and instruct counsel without delay and to be informed of that right;

- [15] This right is to be understood in light of its purpose. In *R. v. Bartle*, [1994] 3 S.C.R. 173 at 191, Chief Justice Lamer explained the purpose of s. 10(b) 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: *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233, at pp. 1242-43. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of

liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: *Brydges*, at p. 206; *R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, at pp. 176-77; and *Prosper*. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in *Clarkson v. The Queen*, 1986 CanLII 61 (SCC), [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.

[16] The Court in *Bartle* (at 191-192) also stated that s. 10(b) places certain obligations on the state, which have both an informational component and an implementational component:

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).

(See, for example, *Manninen*, at pp. 1241-42; *R. v. Evans*, 1991 CanLII 98 (SCC), [1991] 1 S.C.R. 869, at p. 890; and *Brydges*, at pp. 203-4.) The first duty is an informational one which is directly in issue here. The second and third duties are more in the nature of implementation duties and are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel.

[17] In *R. v. Willier*, 2010 SCC 37 at para. 27, the Supreme Court of Canada further explained that together, ss. 7 and 10(b) "ensure that a suspect is able to make a choice to speak to the police investigators that is both free and informed" (citing *R. v. Sinclair*, 2010 SCC 35 at paragraph 25).

Informational obligation

[18] The informational component of s. 10(b) includes informing the detainee of his or her right to retain and instruct counsel without delay, and of the existence of legal aid and duty counsel: see *Bartle* at 191. The informational component is "comprehensive in scope" because "[u]nless they are clearly and fully informed of their rights at the outset, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as the right to silence" [emphasis in original]: see *Bartle* at 193. The police must play an active role in providing this information to the accused. If the circumstances suggest a detainee may not understand the s. 10(b) caution, the police "will have to take additional steps to ensure that the detainee

comprehends his or her s. 10(b) rights": see *Bartle* at 193. However, absent circumstances indicating a detainee may not understand the s. 10(b) caution, "police are not required to assure themselves that a detainee fully understands the s. 10(b) caution", though "it is important that the standard caution given to detainees be as instructive and clear as possible": see *Bartle* at 193. Thus, the police cannot fulfil the informational obligation by passive reliance solely on the standard caution; they must take active steps to facilitate comprehension where the circumstances suggest an accused person may not understand. The obligation does not, however, go so far as to require the police to ensure that an accused comprehends the caution where there are no circumstances to suggest otherwise.

Right to private consultation

- [19] It is well-settled law (and common ground here) that a fundamental aspect of s. 10(b) rights is the right of detainees to consult with counsel in private and to be informed of such prior to choosing whether to exercise the right to consult with counsel. Detainees need to know that they can have a full and frank discussion with counsel about their predicament. At issue here is what the right to privacy means in the context of the s. 10(b) right to retain and instruct counsel upon arrest or detention; in particular, whether it includes visual privacy.
- [20] In *R. v. Miller*, 1 C.R. (4th) 57, 1990 CanLII 6514 (Nfld. C.A.), the appellant argued his s. 10(b) rights were infringed because he did not have privacy during his call with a lawyer. During his call, a police officer was 10-to-12 feet away from the booth in which the appellant made his call. The officer testified that while he did not overhear the appellant's conversation, "he probably could have heard it if the applicant had spoken loudly": *Miller* at para. 4. The court explained that the right to privacy in the consultation with counsel is the right not to be overheard:
- [13] . . . A right to privacy does not mean a right to absolute privacy. The purpose of the Charter is to protect the rights of individuals and, if an accused person maintains that a particular right has been violated, the onus rests on that individual to demonstrate that such has occurred. As stated by Crown counsel, there is no generally accepted (or acceptable) definition of what amounts to a failure to provide an accused person with privacy in conferring with counsel. The test is whether in a particular set of circumstances an accused was afforded privacy, in the sense of not being overheard, and of being free to discuss his case without the fear of being overheard, in the exercise of his right under s. 10(b) to retain and instruct counsel. If an accused can establish through the evidence, on a balance of probabilities, that he did not receive such privacy, then a breach of s. 10(b) has been established and an appropriate remedy may be sought under s. 24.

. . .

- [15] It is fair as well to say, without finding it necessary to quote from cases heard in other jurisdictions, that this approach is the one generally accepted across Canada. Privacy in the context of the right to consult counsel means only that an accused person who has been detained has the right to consult with counsel under circumstances where the conversation cannot be overheard and there is no reasonable apprehension by him of being overheard.
- [21] The court's analysis in *Miller* focused on the fundamental purpose of the right to private consultation: i.e., ensuring detainees are free to engage in an unguarded and frank discussion with counsel about their situation, without fear of being overheard. Notably, the court held that sounds escaping from the phone room do not undermine the right to private consultation with a lawyer, if the content of the conversation itself cannot be overheard:
- [17] Obviously, that a telephone booth may not be absolutely soundproof, in the sense of preventing all sounds from escaping therefrom, does not establish that a conversation carried on within the booth can be overheard. Any speculation as to under what circumstances the appellant could have been overheard is irrelevant. It is clear that no infringement of the appellant's rights under s. 10(b) of the Charter has been established.

Accordingly, while overheard sounds might indicate to a listener that a conversation is taking place, if the words are indiscernible then there is no infringement of the s. 10(b) right to privacy. By logical extension, observed gestures that suggest conversation but not its contents should not impinge upon the privacy right.

- [22] In *R. v. Cairns*, 2004 CanLII 17588, 115 C.R.R. (2d) 373 (Ont. C.A), at paras. 13 to 15, the court confirmed that the right to consult with a lawyer in private under s. 10(b) protects the privacy of the content of the conversation, and that the presence of a video camera in the room does not, without evidence that the accused had a reasonable belief that the video camera "allowed officers to overhear the conversation", constitute either a privacy breach or a reasonable belief in a privacy breach.
- [23] In *R. v. Farquharson*, 2014 ONSC 6641, at paras. 40-41, the court noted that an accused can prove his right to privately consult counsel was breached either by showing an actual invasion of privacy or by showing that he or she had a reasonable belief that he or she could not consult with counsel in private; the mere presence of a video camera which records a detainee during their phone call with counsel is not sufficient to find either a privacy breach or a reasonable belief in a lack of privacy. As to the latter, there must be some evidence regarding the impact of the video-recording on the accused, and the extent to which the presence of it impaired the accused's ability to retain and instruct counsel.
- [24] In *R. v. Sampare*, 2006 BCSC 1756, the court, in considering an alleged s. 10(b) Charter breach on the right to privacy, cited the following passage from *R. v. Greene*, [1999] N.B.J. No. 230 (N.B.C.A.):

- [9] It has further been held in *R. v. Greene*, [1999] N.B.J. No. 230 (NB C.A.), that the [applicant's] right to counsel has not been violated where he is placed in a private room and from which private room the conversation could not be [over]heard, but his actions are monitored by a video camera, and the video camera, if it has an audio function, that audio function is turned off.
- [25] Many other cases have held that video-monitoring and video-recording without audio do not infringe the right to consult counsel in private: see, for example, *R. v. Veness*, 2007 ABQB 283 at para. 20; *R. v. Felsbourg*, 2014 ONCJ 328 at paras. 18 and 22; *R. v. Sirelpuu*, 2011 ONCJ 368 at para. 14; *R. v. Hume*, 2013 ONCJ 380 at paras. 35-36; *R. v. Bhullar*, 2013 ONCJ 326 at paras. 14-17; *R. v. Miller*, [2014] O.J. No. 2214 (C.J.) at paras. 19-20.

Applicant's position

- [26] The applicant submits that s. 10(b) of the Charter enshrines the positive right of a detained person to form a solicitor-client relationship for the purposes of getting legal advice. He says a detainee's rights under s. 10(b) must, therefore, be interpreted in a manner that gives full effect to fostering that relationship: i.e., detainees "must be given a zone of privilege in order to speak freely with their counsel about the facts of the case and their legal options". He notes that solicitor-client privilege is "zealously protected within the legal system" and extends to protect information such as lawyers' bills that relate to the retaining of a lawyer, because they may divulge why the client was seeking legal advice.
- [27] Under this overarching framework, the applicant's position is that the police infringed his s. 10(b) rights by: (a) breaching his rights to privacy and solicitor-client privilege when they video-recorded him during his telephone consultation with counsel; and (2) lying to him, at the post-arrest informational stage, about the conditions of his access to counsel by telling him that he would not be video-recorded during his telephone consultation with counsel.

The right to private consultation

- [28] The applicant acknowledges that "many cases have interpreted the term privacy to permit visual monitoring", but argues that in this case, "a video-recording was wholly unnecessary and amounted to a breach of his s. 10 right as an unreasonable encroachment on his privacy and an unreasonable encroachment on solicitor-client privilege."
- [29] The applicant says the video-recording of his access to counsel was an intrusion of privacy and solicitor-client privilege because it captures "granular detail that can be later micro-analyzed in the context of other evidence." He contrasts this with a police officer's periodical visual checks during a detainee's call, and says the latter is "limited by their attention, their focus, their ability to recall, and any notes that are made". The applicant adds that an accused's access to counsel should only be visually monitored to the extent such is necessary to ensure safety; thus, an officer conducting brief visual checks "would likely only note concerns related to that objective", whereas a video-recording would capture

other details that can be used later for other purposes.

- [30] The applicant notes that the video-recording was used to infer information about his access to counsel: i.e., that he received legal advice (when he testified that he did not) and the actual content of these communications. He says this inferred information is protected by solicitor-client privilege, and the police cannot be allowed to undermine that privilege or the purposes of the Charter unless there is a valid and pressing reason to do so. He says there was no such reason to video-record him in this case, or to give that recording to the Crown as part of the police disclosure package.
- [31] In support of his position, the applicant cites *R. v. Keast*, [2006] O.J. No. 5920 (C.J.), an Ontario Court of Justice decision in which the accused was arrested for impaired driving, and a video-recording of his conversation with counsel (which showed his physical movements and motor skills) was used as evidence of his impairment. The court found that the video-recording violated the accused's s. 10(b) rights because it denied him a private consultation with a lawyer:

22 One of the charges faced by the defendant is impaired driving. The video monitoring of his conversation with counsel shows his motor movements, standing, and moving about in the room. In other words, in the course of exercising his Section 10(b) right, the gathering of evidence and the recording of that evidence on video continued to be later submitted to the Court. The reason advanced for the use of the camera is to protect valuable equipment, and to protect the safety of the defendant - each necessitates a monitoring of the defendant while he speaks to counsel. No one provided an explanation as to why the defendant needed to speak to counsel in the presence of that valuable equipment. Orangeville Police apparently determined that the way to accommodate the access of a defendant to a private telephone was to put the telephone in the area of valuable equipment that they then needed to protect.

...

25 It is perhaps not unreasonable to maintain an ability to check on a defendant's condition while he speaks to counsel to make sure he or she is safe. Doubtless some defendants are in a state of impairment such that they could injure themselves and require help. Audio privacy must of course be present, and the call must be on an unmonitored and unrecorded telephone line. What happened here was different, an apparent practice of video routine recording, and monitoring of a private telephone conversation such that its use as evidence in the case becomes inevitable. This is no longer a private setting, and the right to consult with counsel in private has been breached by the police. Privacy is not a difficult concept for most people to contemplate. Being continually video recorded while doing something is the antithesis of privacy. The idea that the police found no difficulty in the process is frankly shocking. The turning off of the audio apparently requires an express act by an officer in the breath room. One can only contemplate the calamity resulting if the officer forgot to turn off the sound.

26 The defence has established on a balance of probabilities on the evidence presented by the Crown alone in chief, and after cross-examination, that there has been a Section 10(b) Charter breach here.

- [32] The applicant argues that Keast demonstrates that the "live visual privacy addressed in Miller is very different from the creation of a video-recording of an interaction" and that this is particularly the case where the recording was tendered into evidence, as in Keast and the case at bar.
- [33] While Keast appears to stand alone within Canadian jurisprudence as authority for the proposition that the video-recording of detainees during their consultation with counsel is a breach of the s. 10(b) right to privacy, the applicant notes that in most of the cases cited by the Crown in which video-recording was not found to violate s. 10(b), there were actual concerns for safety. In this regard, the applicant says the police in the instant case had no specific concerns about his safety while he was in custody, notwithstanding police testimony that the exercise of s. 10(b) rights is specifically a time when detainees who have been compliant and cooperative may become violent and attempt self-harm when they learn the extent of their legal jeopardy. The applicant also notes that the CCTV video-feed could not be viewed in the booking area where Constable Alam and Corporal Lali waited and watched during the applicant's time in the telephone room. He says any safety concerns were thus addressed by live visual-monitoring and rendered the video-recording unnecessary for safety purposes.
- [34] As for the liability and accountability concerns described by the police, the applicant says these do not justify "endangering solicitor-client privilege", but he cites no authority for this proposition. He also says that he could have been afforded privacy by being allowed to make the call in a different room at the detachment; one that did not have a video-recording device, or where the video-camera could have been turned off or obscured.
- [35] Finally, the applicant says that even if video-monitoring was necessary, the creation of a permanent video-record was not; moreover, the police could have limited who viewed the video and flagged it for the defence as a potential source of privileged information, rather than providing it to the Crown.

Breach of informational obligation

- [36] The applicant asserts that Constable Alam inserted false information into the arrest script to the effect that he would not be video-recorded during his call with a lawyer, knowing that the telephone room was equipped with a CCTV camera. He alleges that the police wanted the video-recording because it would be probative of the fact that the applicant spoke with counsel. He also says the police created an arrest script that was purposely deceitful; in this regard, he points to the evidence of the care and coordination that went into the applicant's arrest, and evidence that the arrest script was prepared with input from senior officers.

- [37] The applicant submits that because the informational component of s. 10(b) is necessary to ensure a detainee can make an informed decision about whether to exercise the right to counsel, a detainee cannot make a fully-informed decision "if that decision is based on incorrect information". The applicant says the degree of privacy afforded to a detainee during his access to counsel has an impact on the detainee's decision to speak with counsel. He notes that while the police were not required to advise him about the degree of privacy they would afford him at the detachment, they chose to do so and, in so doing, misinformed him. The applicant says the state should not be allowed to benefit from this "lie", which was, at best, negligence and, at worst, a tactic calibrated to undermine solicitor-client privilege and gain evidence for the prosecution.
- [38] As has already been observed herein, the applicant testified that if he had known he would be video-recorded when he was in the telephone room, he would never have spoken with a lawyer nor made arm gestures while on the telephone. The applicant submits that the court cannot sanction the sort of police conduct that has police incorrectly advising detainees of the terms of their access to counsel, because "if an accused cannot trust constitutionally mandated information, the entire access to counsel process and the subsidiary rights it is designed to facilitate crumble and become illusory."
- [39] The applicant cites *R. v. Hugh*, 2014 BCSC 1342, and *R. v. Ector*, 2018 SKCA 46, as examples of cases which address the effect of police misinformation on s. 10(b) rights. In *Hugh*, the police gave the accused a proper s. 10(b) caution. The accused told the police officer that if he was going to be released, then he would wait to speak to his lawyer, but that if he was being held, then he wanted to exercise his right to speak to a lawyer. Mr. Justice Schultes found that the officer told the accused he would be released in five hours, although the officer had in fact been told that the accused would be held for court, and that this inaccurate information interfered with the accused's s. 10(b) rights because it effectively dissuaded the accused from exercising his right to access counsel:
- [34] Once it is found as a fact that Mr. Hugh did receive the information about being released in about five hours, his subsequent refusal to exercise the right as offered by Cst. Chan makes perfect sense, as does his explanation to Cst. Strikwerda that his lawyer was out of town but he would speak to him when he returned.
- [35] Crown counsel is quite correct that it is not part of an officer's duty to advise a detainee about whether or how to exercise his right to counsel. Despite this, if a detainee responds to being informed of the right with a contingent request to exercise it that is determined by certain facts being true, and the officer mistakenly provides incorrect facts which support the option under which no counsel is required, the officer can have been said to have dissuaded the detainee from exercising his rights, or interfered with the exercise of them, in a manner that will constitute a breach. That is what I find happened here.

- [36] If Mr. Hugh had simply made a statement about wanting to speak to a lawyer if he was to be held and received no information either way, it would have been difficult for him to lay his subsequent choices at the feet of the police. A perfectly acceptable response would have been, "I don't know" or "it is not up to me". But having answered the question incorrectly, the police become responsible, I find, for the inhibiting effect of that wrong information on his subsequent choices.
- [37] Put more simply, beyond advising them of their s. 10(b) rights and making sure they understand them, the police do not have to tell detainees anything. However, if they choose to give information and it turns out to be incorrect information that dissuades the detainee from exercising his or her rights, that can be a violation.
- [40] In Ector, the accused asked to speak to his parents to obtain the name of legal counsel. The police officer refused to let him speak with his parents, but called them herself. The officer then provided the accused with the name of a law firm the mother had provided, but not the specific lawyers the mother had named. While the court found that it was not clear whether the accused's mother had provided the officer with the name or names of specific lawyers as the mother claimed, it found that if the mother had provided the officer with the names of specific lawyers and the officer had not passed that along, then the accused would have been denied the right to his choice of counsel:
- [63] When a police officer decides to take control over the process of contacting counsel or, as it was in this case, act as an intermediary with a third party for purposes of obtaining the name of counsel of choice, it stands to reason that the police must, at a minimum, convey accurate information back to the detainee. In these circumstances, the police are acting on the detainee's behalf, and, the detainee, who is under the complete control of the police, has to rely on the content and accuracy of the contact information provided to them by the police. The detainee has no other means to obtain contact information and is thus entirely reliant on what the police officer tells him or her. [Emphasis in original]
- [64] Thus, where a police officer, serving as an intermediary, deprives a detainee of counsel of choice by misinformation, a s. 10 breach occurs. Viewed in this way, it is hard to see how this satisfies the duty imposed on the police to provide a detainee with a reasonable opportunity to exercise his or her access to counsel. In my view, it matters not whether the misinformation was purposefully conveyed or if it was simply a good faith error on the part of the police officer. What matters, rather, is the result, that is, was the detainee prevented from exercising his or her right to counsel of choice because the police conveyed inaccurate information.

Crown's position

Right to private consultation

- [41] The Crown's position is that a lack of visual privacy by video-recording or otherwise, does not infringe s. 10(b) of the Charter; section 10(b) rights ensure that the content of the communication between an accused and counsel is private, but do not require the state to refrain from observing detainees in the exercise of their rights to consult with counsel. While the Crown agrees that solicitor-client privilege keeps communications between a lawyer and client private and confidential, it says the fact of an accused communicating with counsel in the exercise of his s. 10(b) rights cannot be protected by this privilege because the police are responsible for ensuring that such a communication occurs when detainees choose to exercise their right to counsel.
- [42] The Crown also submits that the applicant's physical movements during the telephone call with his lawyer cannot be considered part of his communications with counsel because a communication is an exchange between two individuals and, in the instant case, the applicant's hand gestures could neither have been seen by his lawyer nor have been intended to be seen by him.
- [43] The Crown noted that confidential communications are intended only for the recipient and are not privileged if they are communicated in the presence of a third party. Thus, to the extent that the applicant's movements imply to third-party observers that he is speaking, these gestures are not privileged communications; moreover, vis-à-vis the lawyer, they are not communications at all.
- [44] The Crown also argues that while this application should be dismissed solely on the basis that video-recording does not infringe the s. 10(b) right to privacy, the courts have recognized that there are valid reasons that justify video-monitoring detainees' consultations with their lawyers, including to ensure the accused's safety and to provide an accurate record in the event something untoward happens in the telephone room. The Crown says a detainee's compliant behaviour prior to the call is not determinative of whether there are valid purposes for video-recording the detainee in the telephone room.
- [45] The Crown also says the police were not required to take steps alternative to video-recording the applicant--such as turning off the video camera or placing the applicant in a different room--because video-recording the applicant was not a breach of the applicant's s. 10(b) privacy rights; therefore, there was no need for the police to seek out a more minimally impairing alternative.

Informational obligation

- [46] The Crown argues that in relation to any misinformation as to video-recording, the applicant's expectation of visual privacy is not determinative, particularly given that he was well aware the police were able to visually monitor him through the window in the telephone-room door. The Crown says that any misrepresentation in the s. 10(b) caution to the effect that he would not be video-recorded when he spoke to a lawyer does not constitute

a s. 10(b) infringement, "as it did not in any way affect the private nature of the communication between the applicant and his counsel, nor did it in any way affect the applicant's exercise of his right to counsel."

Discussion

Right to private consultation

- [47] It is well settled (and not contentious here) that s. 10(b) of the Charter ensures that detained persons have the opportunity to consult with counsel in relation to their situation so that they can make informed choices regarding the exercise of their legal rights and obligations. The courts have recognized that a detained person is in a vulnerable position compared to that of the state and that the right to access legal advice immediately is necessary to ensure that the legal process is fair.
- [48] Similarly, there is no question that audio privacy during a detainee's communications with counsel is necessary for the right to counsel to be meaningful. The courts have consistently held that in order for the access to counsel to be considered private for the purposes of s. 10(b), the conversation between the detainee and the lawyer must be private, in the sense that it cannot be overheard by the state; this allows for candid conversations between detainees and their lawyers: see *Miller* at para. 17.
- [49] As for visual privacy, the courts have widely held that the right to private access to a lawyer does not mean that detainees cannot be visually observed and/or video-recorded during their access to counsel: see *Veness, Greene, Felsbourg, Sirelpuu, Hume, Bhullar, Miller, Farquharson*.
- [50] In *Farquharson*, the propriety of video-recording the accused while he was in private consultation with counsel, was before the summary conviction appeal court. The appellant's position was that the police practice of videotaping all a detainee's activity--including while they are exercising their right to speak to counsel in private--was a breach of s. 10(b) of the Charter. In dismissing the appeal, the court made the following apposite remarks:
- [40] In determining whether or not an accused was afforded a reasonable degree of privacy in consulting counsel, the totality of the circumstances should be examined (*Bartle*, *supra*, at para. 24). Even where there was no actual invasion of privacy, an accused may still be able to prove, on a balance of probabilities, that his or her s. 10(b) rights were infringed by establishing that he or she believed that he or she could not retain and instruct counsel in private and that such a belief was reasonable in the circumstances (*R. v. Cairns*, 2004 CanLII 17588 (ON CA), [2004] O.J. No. 210, 115 C.R.R. (2d) 373 (C.A.), para. 10).
- [41] Furthermore, the mere presence of a video camera is insufficient to find a s. 10(b) Charter breach in fact or a reasonable belief in a breach by an accused.

- [42] Applying these principles to the facts of this case, I conclude that the trial judges in *R. v. Miller* and *R. v. Hume* were correct in their conclusion that the appellants' rights to counsel under s. 10(b) of the Charter were not infringed. The officers did not hear the conversations between the accused and their respective counsel. There was no evidence adduced at trial by either accused that he believed that he could not retain or instruct counsel in private and that such a belief was reasonable in the circumstances.
- [43] As the Court of Appeal noted in *Cairns*, the mere presence of a video camera is insufficient to find a Charter breach. There must be some evidence regarding the impact of the video on the accused and the extent to which the presence of the video impaired the accused's ability to retain and instruct counsel. Absent such evidence, this ground of appeal must fail.
- [51] I accept the foregoing passages of Farquharson as an accurate statement of the law; accordingly, in the instant case, the video-recording of the applicant while in private consultation with counsel was not a breach of his s. 10(b) right to privacy. The act of video-recording, per se, was not a breach. Moreover, there is no evidence or suggestion that the applicant did not believe his communications with counsel would be private in the sense that they would not be overheard, such that it negatively affected his decision to consult with counsel; indeed, the applicant's evidence is that he believed he had both audio and visual privacy, in the sense that there would be no audio or video recording of his private consultation.
- [52] The applicant argues that a video-recording--as opposed to mere periodic visual observation conducted by police officers--is a violation of his s. 10(b) right to privacy because it captures "granular detail that can be later micro-analyzed in the context of other evidence". However, he does not explain how any amount of micro-analysis at a granular level could compromise the privacy of his communication with counsel, or how video-recording him as he spoke to counsel in any way hindered his ability to obtain legal advice. Here, the video-recording of the applicant's telephone call with his lawyer captures his back as he stands immediately in front of the wall-phone with the receiver to his ear. There is no audio-recording and no suggestion that lip-reading is possible. No amount of analysis of the video-recording could disclose the content of what was said and, thus, breach his right to privacy of the content of his communications with his lawyer.
- [53] I am unable to agree with the applicant that the police required a valid and pressing reason to video-record him during his consultation with counsel and, thus, were under an obligation to observe the applicant in a minimally-impairing manner. If there is no right to visual privacy, there is no need to take minimizing steps. In any event, the collective evidence of the police establishes compelling safety, security, and liability reasons for maintaining observation of detainees during their access to counsel and for the creation of a video-record.

- [54] The applicant argues that his right to privacy in his communications with counsel was infringed because the video-recording of his gestures while on the telephone was used to infer that he was speaking to counsel during the 16-minute telephone call, and to challenge his testimony to the contrary. In this regard, the applicant relies upon solicitor-client privilege. He submits that s. 10(b) provides a detainee the opportunity to establish a solicitor-client relationship, and that solicitor-client privilege has been interpreted robustly, such that even a lawyer's bills that show the lawyer was retained have been found to violate the privilege because it discloses that the client sought legal advice in relation to a particular matter or area of law.
- [55] Despite this fervently advanced submission, it is clear the privacy right protected under s. 10(b) does not import with it all aspects of solicitor-client privilege; it is, therefore, an unsound basis for claiming that the applicant's gestures were protected by it. The right to privacy under s. 10(b) does not have the breadth and scope of solicitor-client privilege; some protections afforded by solicitor-client privilege are clearly not encompassed within the s. 10(b) right to privacy. For example, the fact and nature of the lawyer-client consultation and the reasons for the consultation do not fall within it; indeed, the state not only knows the when, where, why, and who, in relation to these communications, but is also required not only to facilitate them but to question detainees subsequently as to whether they were able to exercise their right to counsel during the telephone call.
- [56] Moreover, because detainees are in the custody of the state during the consultation, the police must be able to observe them during the consultation for reasons of safety, security, and the facilitation of access to counsel. To be suitably accountable to the public and also to address liability concerns, everyone in the cellblock including the police and the detainees, are captured on CCTV security videotape everywhere within the cellblock including the phone room where private consultations between counsel and detainees occur.
- [57] Even if there were no such recording system in place, the applicant's telephone call with counsel took place within the view of the police and the applicant was well aware that he and his gestures could be seen by them; in other words, he knew that he did not have visual privacy during this call. Notably, there has been no suggestion that the police were not permitted to watch him, or to testify to their observations if an issue arose in relation to this time period of the applicant's detention.
- [58] The applicant put this period in the telephone room in issue in the voluntariness voir dire, when he testified that he did not speak to his lawyer while in the telephone room, despite having confirmed otherwise shortly after the telephone call ended. The CCTV video-footage of the applicant's time in the telephone room is essentially the same as testimonial evidence of the police officer's observations, but in another form. It is of no moment to the privacy question that one form of the evidence might be more reliable or comprehensive than the other, if nothing is revealed about the content of the communication.

[59] As for the provision of the video-recording (of the applicant's time in the cellblock) to the Crown as a routine aspect of the police disclosure package, the potential relevance of this evidence to trial issues such as "voluntariness" is obvious and may support either the Crown or defence position. For reasons already given, it is not protected by solicitor-client privilege; thus, the applicant's position that the video-recording of the consultation with counsel should not have been disclosed to the Crown without flagging it as a source of privileged information, is not sustainable.

The effect of misinformation regarding video-recording

[60] The applicant submits that he was informed by the police that he would not be video-recorded during his lawyer consultation, and that this was evidently not true. He says this misinformation infringed his s. 10(b) rights because he relied on it when he chose to exercise his right to consult with counsel, and when he made hand and arm gestures in the course of the telephone call.

[61] It is not contentious that the video/audio caution the applicant received was misleading. Given the existence of the CCTV passive and continuous video-recording system throughout the cellblock, it was known to the police that the applicant would be captured in video at all times he was within the cellblock, including during the exercise of his access to counsel. Accordingly, an accurate caution would, presumably, have been one that informed the applicant:

- a) that the RCMP cellblock where he will be taken is equipped with a continuously operating CCTV security system that will video-record him at all times while he is in police custody in the cellblock, including while he is exercising his right to consult with legal counsel;
- b) that the CCTV security system does not have audio-recording capability; and
- c) that he may be subject to audio-recording by other means at any time while he is in police custody, except while he is in consultation with his legal counsel because these communications are private.

[62] The question that arises is whether misleading the applicant, intentionally or otherwise, to believe that he would not be video-recorded during his consultation with counsel, breached his s. 10(b) rights.

[63] To the extent that anything turns on whether the police intentionally misled the applicant into believing he would not be video-recorded during his consultation with counsel, I am not persuaded that such has been established. I accept the police evidence that this particular wording regarding video and audio recording was part of IHIT's standard arrest script. I am satisfied that they did not turn their minds to its accuracy, let alone intend it to be misleading. Similarly, I am not persuaded that Constable Alam's addition of the word "video" to the Arabic version of the arrest script was anything more than a correction to make it conform to the English script.

- [64] The suggested inference of the applicant that Constable Alam was part of a police conspiracy to undermine his right to privacy is based on suspicion that finds no support in the evidence. I am unable to discern what the police could have reasonably hoped to gain by misleading the applicant into thinking he would not be video-recorded during his consultation with counsel; moreover, the police knew that it would be evident to the applicant from the outset of his private consultation with counsel that he did not have visual privacy from the police during this consultation.
- [65] In support of the applicant's position that the misleading information in question is a breach of his s. 10(b) rights, he relies on cases that are materially distinguishable from the case at bar. In *Hugh*, the accused told the officer who gave him his s. 10 rights that he wanted to speak to counsel if he was going to be held, and if he was not, then he would wait to speak to a lawyer. The officer misled the accused by telling him he would be released. Mr. Justice Schultes found that the effect of this misinformation was to dissuade the accused from exercising his s. 10(b) rights.
- [66] In *Ector*, the court recognized that once the police decide to act as an intermediary between an accused and the person the accused wishes to contact to obtain the name of counsel, the failure of the police to provide that obtained information to the accused will be a denial of the accused's right to legal counsel and thus infringe their s. 10(b) rights.
- [67] In the case at bar, the applicant testified he would not have spoken to a lawyer or made gestures had he received accurate information about being video-recorded during the consultation, but he did not explain the reasoning behind his assertions. In the absence of some explanatory evidence lending some coherence to them, they can be given virtually no evidentiary weight. The applicant suggests that this testimony must be accepted as true because it was not challenged in cross-examination, but our jurisprudence does not support such a hard-and-fast rule: see *R. v. Mete*, [1973] 3 W.W.R. 709 at 712, 1971 CanLII 1422 (B.C.C.A.), and *R. v. Neilson*, 2019 ABCA 403 citing *Mete*. In *Neilson* at para. 37, the court said:
- [37] Choosing not to cross-examine a witness, but instead asking the trier of fact to disbelieve a witness based on other evidence adduced in the trial, is a valid exercise and does not invoke the rule from *Browne v Dunn*. It is illogical for a trier of fact to be expected to accept evidence which they disbelieve just because it has not been subject to cross-examination: *R v Mete* . . .
- [68] The applicant submits that he was deprived of making a fully-informed decision about whether to exercise his right to counsel because he was misinformed that he would not be video-recorded in his consultation with his lawyer. However, not only did the misinformation have no bearing on the applicant's right to consult privately with a lawyer because there was no right to visual privacy in that consultation, it did not cause him to decline to exercise his s. 10(b) right to consult with counsel. The words the police used may have been misleading to the applicant, but they simply do not give rise to the sort of

concerns raised by either Hugh or Ector, i.e., dissuading or preventing an accused from exercising either the right to counsel or the right to counsel of choice. The cases relied upon by the applicant are not helpful in advancing his position. They are not similar on their facts or legal principles; they certainly do not stand for the proposition that any misconduct or misstatement of the police, no matter its effect upon the detainee's s. 10 Charter rights, will be a breach of those rights. Accordingly, I am not persuaded that the misinformation in the case at bar had the effect of breaching the applicant's s. 10(b) rights.

- [69] As for the applicant's gestures, even if it were accepted that the applicant, knowing that his gestures were in full view of the police, would have chosen--albeit for reasons not readily understandable or explained--to refrain from making them if he had known he was being video-recorded as well as watched, that choice has no bearing on the sort of privacy to which he is entitled in the exercise of s. 10(b) rights.
- [70] Finally, the applicant submits the state should not be allowed to benefit from providing misinformation to the applicant about the conditions of his access to counsel because it undermines the accused's ability to trust in constitutionally-mandated information. Section 24 of the Charter expressly provides for the remedy of exclusion of evidence gathered in breach of a person's Charter rights, if allowing the state to benefit from the breach would bring the administration of justice into disrepute. This aspect of the applicant's argument is, however, academic. He must first prove a breach of his s. 10(b) Charter rights and, for reasons given, I find that he has not done so here.

Disposition

- [71] For all the foregoing reasons, I conclude that the applicant has not established, on a balance of probabilities, that his s. 10(b) Charter rights were breached by the police video-recording him in the exercise of his right to a private consultation with legal counsel following his arrest, or by the audio/video caution given by the police to the applicant upon his arrest. The application is, therefore, dismissed.

"Bernard J."

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