Citation: ☼ R. v. P.W.P.
2024 BCPC 107

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Registry: Duncan

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REX

v.

P.W.P

BAN ON PUBLICATION
PURSUANT TO S. 486.4(1) OF THE *CRIMINAL CODE OF CANADA*

RULING ON APPLICATION
OF THE
HONOURABLE REGIONAL ADMINISTRATIVE JUDGE C. ROGERS

Counsel for the Crown:	J. Vivian
Counsel for the Applicant:	M. Mulligan
Place of Hearing:	Duncan, B.C.
Date of Hearing:	June 18, 2024
Date of Judgment:	June 21, 2024

Introduction

[1] This is an application brought on behalf of P.W.P. (“Mr. P.”) in relation to his s. 530 language rights. Counsel on behalf of Mr. P. seek to deal with those rights either in writing, or by counsel appearing pursuant to a Counsel Designation Form in accordance with s. 650.01 of the *Criminal Code of Canada*. The Crown opposes the application. They submit that the manner in which Mr. P. seeks to deal with his s. 530 rights is in direct conflict to the guidance of the Supreme Court of Canada in *R. v. Tayo Tompouba*, 2024 SCC 16. They submit that only an in-person attendance before a judge can satisfy the requirements of s. 530.

The Position of the Applicant

[2] Counsel for Mr. P. acknowledges the importance of the judicial role in ensuring that s. 530 rights have been addressed. He accepts that there is clear direction in the *Criminal Code* and the decision of *Tayo Tompouba* that the Court cannot rely on an assumption that these rights have been addressed simply because an accused person has counsel. However, he submits that the Supreme Court of Canada has not directed how a judge should ensure that an accused has been informed of his rights and has not directed that the accused’s attendance in Court is required in order to exercise the necessary judicial diligence. He submits that the obligations of the Court to ensure that s. 530 language rights have been addressed, can be met without having the accused in attendance before the Court, either through a written acknowledgment by the accused, or through an express submission by counsel appearing pursuant to a Counsel Designation Form.

[3] On June 10, 2024, a document signed by Mr. P. was filed with the Court. That document contains the entire text of s. 530 of the *Criminal Code*, signed by Mr. P. The document also includes a signed statement by Mr. P. as follows:

> I, P.P., confirm that I have been advised of my right to a trial in French or in English pursuant to section 530 of the *Criminal Code*.
>
> I do not speak French and wish to have my trial conducted in English.

[4] Mr. P. has not yet set a trial date in this matter.

[5] Counsel for Mr. P. acknowledges that the Supreme Court of Canada in *Tayo Tompouba* concluded that the presence of notice in writing of language rights on an undertaking and promise to appear, which was signed by the accused, was not sufficient for an inference that the accused had timely knowledge of his language rights. Counsel submits that, in coming to this conclusion, the Court relied on the nature of these documents and the circumstances in which these documents were signed. He submits that the document he has submitted is sufficient to remove any doubt about Mr. P.'s awareness and understanding of his language rights given its very different wording and context.

[6] On June 6, 2024, counsel for Mr. P. filed a Counsel Designation Form. Counsel notes that, pursuant to s. 650.01 of the *Criminal Code*, an appearance by designated counsel is the equivalent to the accused being present. He submits that the decision in *Tayo Tompouba* does not preclude the Court relying on an express statement by counsel, acting pursuant to a counsel designation, that they have reviewed the rights set out in s. 530 and that their client wishes their trial to be conducted in English. He accepts that the Court cannot assume that counsel has sufficiently addressed s. 530 with their client, but submits that relying on an express submission of counsel provides the necessary assurance that the rights have been addressed.

The Position of the Crown

[7] The Crown takes the view that the application by Mr. P. is contrary to the clear instructions of the Supreme Court of Canada in *Tayo Tompouba*. They submit that s. 530 language rights are the responsibility of the judge and cannot be delegated to counsel through a form or through counsel designation, as this would be contrary to s. 530(3) and the language of *Tayo Tompouba*. The Crown agrees that, in the circumstances of this case, Mr. P. has been advised of his s. 530 rights by counsel, however submits that this is not sufficient. The Crown advocates an interpretation of s. 530 that requires a direct interaction between the judge and the accused.

The Law

[8] S. 530 of the *Criminal Code* addresses the language rights of accused persons. It clearly sets out the right of an accused, who speaks either French or English, to be tried in either of those languages. Subsection (3) states:

> The judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

[9] In *Tayo Tompouba*, at paragraphs 44 through 46, Justice Wagner discusses the judicial role in relation to s. 530. He states, at paragraph 44:

> Section 530(3) *Cr. C*. states that the judge before whom an accused first appears "shall ensure" ("*veille*" in the French version) that the accused is "advised" ("*avisé*" in the French version) of their right and of the time limit for exercising it. The use of these terms in each language version indicates that Parliament intends judges to "make certain" that every accused is informed of their right and of how it is to be exercised so that the accused can avail themselves of the right in a timely manner…The judge cannot presume what the accused's choice is or assume that the accused has been or will be advised of their right and of how it is to be exercised. The judge must ensure, in a proactive and systematic manner, that the accused is properly informed, irrespective of the fact that the accused seems to be a member of a linguistic minority or that the accused may have been or may be informed of this right by another person, such as their counsel. In short, the judge must take the steps needed to "have no doubt" that the accused is well aware of their right and of how it is to be exercised.

[10] At paragraph 45, the Court notes that "…if the judge finds that the accused has not been properly informed, or if there remains any doubt about this in their mind, the judge must ensure that the accused is informed of their right and of how it is to be exercised." And at paragraph 46, states that "…the slightest doubt must lead the judge to take the necessary steps to ensure that the accused is duly informed".

[11] At paragraph 47, after discussing the legislative amendments to s. 530 that removed the presumption that counsel would properly inform their clients of language rights, the Court states:

> This amendment is important. It amounts to legislative recognition of a principle of caution requiring judges to avoid presuming, without verifying in a diligent and proactive manner, that an accused has been duly informed of their right and of how it is to be exercised prior to their first appearance.

And finally, at paragraph 49:

> It follows from the foregoing that a first appearance judge who fails to actively ensure that the accused has been informed of their fundamental right and of how it is to be exercised, or who fails to ensure, where the circumstances so require, that the accused is informed thereof, contravenes the judge's informational duty.

Analysis

[12] It is clear, and undisputed, that it is the responsibility of judges (or justices of the peace) to ensure that accused persons are advised of their language rights and how they can be exercised. It is also clear, both from s. 530 and from *Tayo Tampouba*, that awareness of language rights cannot be presumed, and particularly that they cannot be presumed because an accused is represented by counsel, with or without a counsel designation.

[13] In paragraphs 43 through 45 of *Tayo Tampouba*, Justice Wagner writes that it is the duty of the judge "to ensure" that the accused is duly informed of their rights and how to exercise them. At paragraph 43, the Court states that the duty to inform the accused arises "where the circumstances so require". And at paragraph 45, the Court states that the duty to ensure that the accused is informed arises "if the judge finds that the accused has not been properly informed or if there remains any doubt about this in their mind". Finally, at paragraph 47 the Court speaks to a "principle of caution requiring judges to avoid presuming, without verifying in a diligent and proactive manner" that an accused has been informed of their language rights.

[14] Neither s. 530 itself, nor *Tayo Tampouba* contain language that directs judges to inform accused of their language rights in each and every case. Section 530 directs judges to "ensure" that the accused is so informed. The Court in *Tayo Tampouba* directs judges to be diligent and cautious in ensuring it has been done, not to make unverified presumptions, and "where the circumstances so require" to undertake the duty of informing themselves.

[15] The Court, in paragraphs 119 to 121 of *Tayo Tampouba,* concludes that the signature of the accused on release documents provided to him by the police after his arrest, was not sufficient to allow an inference that he had been advised of his language rights and had chosen English in a free and informed manner. They find that the circumstances in which the documents were signed, did not make it possible to conclude that the accused had time to read the language rights notices nor that he was in a state of mind to do so given: he was in custody at the time; he had to sign the documents to gain his release; the undertaking had only a small notice exclusively in English; the promise to appear had no notice on the page that was signed, but rather on a different page; and, the purpose of his signature was in relation to the terms of his release and not his language rights. However, the Court does not state that a signed written document would never be sufficient. They state only that, in these circumstances, it was impossible to infer that he had sufficient understanding of his rights such that his silence before the Court with respect to the language of his trial amounted to a choice to have a trial in English.

Conclusion

[16] In the case before me, I am not being asked to presume that Mr. P. has been advised of his language rights because he is represented by counsel. I am not being asked to presume that he read his language rights on a form designed and signed for another purpose. I am not being asked to conclude that silence about his language of choice should lead to a conclusion that he wishes to be tried in English. Rather, I have submissions of counsel which include an express statement that he has informed his client of the provisions of s. 530 and that his client wishes a trial in English, as well as a

written document, signed by Mr. P. to this same effect, which also contains the complete text of s. 530 signed by Mr. P. In these circumstances, I believe that I have verified, in a diligent and proactive manner, that the accused has been duly informed of his rights, and I have no doubt whatsoever in this regard. I conclude that nothing further is required to address the requirements of s. 530, and specifically that a personal appearance by Mr. P. is not required.

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The Honourable Regional Administrative Judge C. Rogers
Provincial Court of British Columbia