SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Sandeson*, 2021 NSSC 378

Date: 20211022
Docket: CRH No. 502777
Registry: Halifax

Between:

Her Majesty the Queen

Respondent

v.

William Michael Sandeson

Applicant

DECISION

Judge:	The Honourable Justice James L. Chipman
Heard:	October 22, 2021, in Halifax, Nova Scotia
Oral Decision:	October 22, 2021
Written Decision Parties Only:	October 25, 2021
Counsel:	Christine Driscoll, Q.C. and Kimberley McOnie, for the Respondent Alison Craig and Gina Igbokwe, for the Applicant

By the Court (Orally):

Introduction

[1] By Notice of Application filed October 14, 2021, based on material changes in circumstances the Accused seeks an Order for judicial interim release (JIR). In support of his application, Mr. Sandeson relies on his counsel's written and oral submissions as well as:

1. his affidavit;
2. the affidavit of Katherine Sandeson (mother);
3. the affidavit of Michael Sandeson (father);
4. the affidavit of David Sandeson (brother);
5. the affidavit of Adam Sandeson (brother);
6. the affidavit of Matthew Sandeson (brother);
7. letter from Northeast Nova Scotia Correctional Facility (NNSCF) dated October 4, 2021;
8. documents from Recovery Science;
9. a map of the Sandeson property;
10. bail plan from the Justice Department of Correctional Services;
11. bail hearing decision dated October 23, 2015;
12. bail hearing decision dated January 22, 2021;
13. Nova Scotia Court of Appeal judgment dated June 17, 2020;
14. excerpts of Crown closing dated June 12, 2017;
15. excerpts of Charge to Jury dated June 15, 2017;
16. transcripts of JIR hearing dated January 20 & 21, 2021;
17. the following authorities:
    a. *R. v. J.A.*, 2020 ONCA 660;
    b. *R. v. Jaser*, 2020 ONCA 606
    c. *R. v. Papasotiriou*, 2018 ONCA 719;
    d. *R. v. Short*, 2017 ONCA 153;

e. *R. v. Manasseri*, 2013 ONCA 647;
f. *R. v. Itwaroo*, 2020 ONSC 4116;
g. *R. v. T.L.*, 2020 ONSC 1885;
h. *R. v. Beals*, 2020 ONSC 6952;
i. *R. v. Hoo-Hing*, 2020 ONSC 6343;
j. *R. v. Savage*, 2018 ONSC 2261;
k. *R. v. CW*, 2020 ONSC 2943;
l. *R. v. McRae*, 2017 ONSC 7145;
m. *R v Langdon*, 2021 ONSC 3423
n. *R. v. Couche-Tard Inc*, 2014 QCCA 1456;
o. *R. v. Bruce Power Inc*, 2009 ONCA 573;
p. *R. v. Myers*, 2019 SCC 18;
q. *R. v. Kuol*, 2013 ABCA 380; and
r. *R. v. Boyle*, [2006] O.J. No. 5094 (CA).

[2] By way of response, the Crown relies on their submissions filed October 18, 2021, and during the last JIR hearing as well as these authorities:

a. *R. v. Sandeson*, January 22, 2021, not released;
b. *R. v. St-Cloud*, 2015 SCC 27; and
c. *R. v. Ledesma*, 2019 ABCA 60.

[3] Today, the Accused called himself, his brothers David and Matthew along with his father, Michael Sandeson to provide oral evidence. There was cross-examination of all except for the Applicant. The Crown did not call any evidence.

[4] Both parties draw on *R. v. J.A.* (the first of the authorities in the above referenced Applicant's list) and I agree that the case sets out the correct procedure that results in this matter now returning to the Supreme Court of Nova Scotia. As noted by Justice Thorburn in the Ontario Court of Appeal's decision at paras. 19 – 26:

Detention

[19] A person charged with s. 469 *Criminal Code* offences is subject to a detention order as provided for in s. 515(11). Thereafter, the accused may bring an application to show why detention is not justified pursuant to s. 522.

[20] The detention of an accused can only be justified on one or more of the following grounds, set out in s. 515(10) of the *Criminal Code*:

> (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
>
> (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
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> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> > (i) the apparent strength of the prosecution's case,
> >
> > (ii) the gravity of the offence,
> >
> > (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
> >
> > (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Bringing a Bail Review Application

[21] An application to vary can be brought pursuant to s. 522 in three circumstances:

> (a) where the decision reflects an error of law;
>
> (b) where the decision was clearly inappropriate, such that "the justice . . . gave excessive weight to one relevant factor or insufficient weight to another"; or
>
> (c) where there is a material change in circumstances: *R. v. St-Cloud*, [2015] 2 S.C.R. 328, [2015] S.C.J. No. 27, 2015 SCC 27, at para. 121; and *R. v. Dempsey*, [2001] B.C.J. No. 561, 2001 BCCA 122, 153 C.C.C. (3d) 311 (C.A.).

[22] Where an applicant concedes the validity of the bail decision but seeks a review on the basis of a change in circumstances, it is customary to bring a second bail application in Superior Court: *R. v. Whyte* (2014), 119 O.R. (3d) 305, [2014]

> O.J. No. 1633, 2014 ONCA 268, at para. 21; *R. v. Robinson* (2009), 95 O.R. (3d) 309, [2009] O.J. No. 1284, 2009 ONCA 205, at para. 5.
>
> [23] In such cases, a court of first instance will review the effect of the new information on the issue of interim release: *Whyte*, at para. 21 and *R. v. Boyle*, [2006] O.J. No. 5094, 2006 CanLII 42662(C.A.), at para. 3.
>
> [24] Where an applicant challenges the s. 515(11) denial of bail on the basis of the correctness of a bail decision, the proper course is to seek review by a court of appeal under s. 680 of the *Code*. This second procedure does not however, foreclose consideration of a change in circumstances on a s. 680 application. In such cases, the Superior Court of Justice and the Court of Appeal have concurrent jurisdiction to decide whether there has been a material change in circumstances warranting judicial interim release: *Whyte*, at para. 22.
>
> [25] Where new evidence is submitted to demonstrate a material change in circumstances, that evidence should be considered together with the considerations that underpinned the first bail judge's refusal of bail to determine whether the alleged change in circumstance is both material and relevant to the case at hand such that a hearing de novo is warranted: *Whyte*, at para. 26; *R. v. C. (A.A.)*, [2015] O.J. No. 3450, 2015 ONCA 483, at para. 56; and *St-Cloud*, at para. 121.
>
> [26] If the alleged change in circumstance is one that could reasonably be expected to have affected the result in this case, the reviewing judge is authorized to conduct a new hearing and conduct a fresh analysis on the bail application as if he or she were the initial decision-maker: *St-Cloud*, at para. 138.

[5] In the case at Bar, Mr. Sandeson relies on the following as a material change in circumstances:

> a. The clarification of the circumstances surrounding the Offender Incident Report from August, 2020;
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> b. The enhancement of the release plan with the addition of a home monitoring system; and
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> c. The dismissal of the Respondent's leave to appeal and trial dates set for 2023.

Mr. Sandeson also submits that the COVID-19 situation should weigh heavily in favor of his release.

[6] In keeping with *R. v. J.A.*, I have considered the new evidence presented during today's hearing along with the considerations that underpinned my decision back in January. Accordingly, I have considered whether the alleged changes in circumstances are both material and relevant to this case. If they are, I will schedule a hearing *de novo*. If not, I will decline to move the matter to the next stage.

The Clarification of the Circumstances Surrounding the Offender Incident Report from August, 2020

[7] Above I refer to "the last JIR hearing". This occurred before me on January 20 and 21 of this year and I delivered my oral decision on January 22 denying Mr. Sandeson bail. I found that Mr. Sandeson did not meet his onus on the secondary and tertiary grounds.

[8] In making this determination, I was concerned about an August 24, 2020 "Disobey Order" and discussed this at paras. 25 – 29 of my decision:

> [25] In addition to these developments in the five years and three months since his original bail application, there has been "detrimental behavior" documented on behalf of Mr. Sandeson, while incarcerated. The Offender Incidents Report details three incidents of what I would characterize as relatively benign poor behavior during his time in jail. Very recently, however, there is a documented incident appearing on Mr. Sandeson's record which discloses this August 24, 2020 "Disobey Order":
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> > SEG 3. WHILE CONDUCTING AN INTERVIEW WITH INMATE HE WAS TOLD HE WOULD BE REMOVED FROM HEALTH CARE CELLS BECAUSE THE HEALTH CARE STAFF HAD NO MEDICAL HOLD ON HIM. HE WAS GIVEN THE OPPORTUNITY TO CHOOSE ANY DAYROOM TO MOVE TO BUT HE REFUSED. HE WAS ORDERED BY THIS OFFICER AND HE STATED HE WAS HOMICIDAL AND WOULD KILL ANOTHER INMATE IF HE WAS PLACED ON A LIVING UNIT. HE STATED HE HAD NO PARTICULAR PERSON HE WAS ANGRY WITH BUT HE WOULD CHOOSE A VICTIM OR MULTIPLE VICTIMS UNTIL STOPPED.
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> [26] The Crown characterizes the above behaviour as "manipulative and threatening". They say it offers "troubling insight into Mr. Sandeson's psyche". The Crown submits that this behavior must be considered in context with the background they submit, as follows:
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> > Despite his apparent pro-social background, Mr. Sandeson was living a double life as a drug dealer. There is compelling evidence that he is responsible for the execution-style murder of Taylor Samson for financial gain. Given the brutal and heinous nature of the offence, the Crown would submit that the Court should be very concerned that the accused will commit a further offence if released, including a violent offence or an offence interfering with the administration of justice.
> >
> > Taylor Samson's body has never been found. Several weeks before his murder, Mr. Sandeson texted one of his friends, Amanda Clarke. Mr. Sandeson was angry with his girlfriend Sonja Gashus. He told Ms. Clark

> that he wanted to kill Ms. Gashus. He said that he would cut off her extremities, put the body in a bucket of lye, and leave it for the coyotes to eat. This is particularly disturbing given the events of August 15, 2015 and the fact that Mr. Samson's body has never been found.
>
> [27] In the result, the Crown argues that "no level of restrictive conditions would be enough to keep the public safe should Mr. Sandeson re-offend".
>
> [28] The statements are not rebutted by Mr. Sandeson. Indeed, the Applicant chose to file nothing (this option was afforded to him) in reply to the Crown's submissions. In argument Ms. Craig answered the Court's queries by stating that this was an "off the cuff remark". She questioned whether the words were ever spoken and said there was no context to the remarks. Applicant's counsel emphasized that her client has no history of violence during his time in jail. She noted he has upgraded his studies (he has achieved further credits to earn an MBA) over the past nearly five and a half years while incarcerated.
>
> [29] While it is correct that Mr. Sandeson has had no history of violence in jail, I am not prepared to disregard his recent comments made while being interviewed by a jail official. This is particularly so when I consider the circumstances of the alleged homicide and Mr. Sandeson's demonstrated past behaviour (as outlined above by the Crown in their brief). This was addressed by Sgt. Sayer during his direct evidence when he spoke of Mr. Sandeson's texts to a friend. As such, it cannot be said that his words were "a heat of the moment" direct exchange with his (then) girlfriend. Rather, his texts to another woman made it clear that he wanted to kill his girlfriend. Mr. Sandeson provided graphic and disturbing detail. Sgt. Sayer said that Mr. Sandeson's texts revealed that he wanted to dissolve Ms. Gashus' body parts in chemicals.

[9] The Applicant has now submitted evidence in an attempt to demonstrate a material change in circumstances *vis-à-vis* the Disobey Order. For example, in his affidavit at paras. 10 – 14 he deposes:

> 10. While in custody I have struggled with anxiety, depression and insomnia. I received medication to assist with these throughout but at times my medication was stopped or needed to be changed (see exhibit A).
>
> 11. On August 2, 2020, I left the day room. Staff ordered me to return, I did not do so because I was feeling anxious and wanted to be alone in segregation. Being around other inmates gave me anxiety. I expressed this and I was placed in the Health Care Unit (HCU) for the time being pending placement. As a result, in August 2020, I was referred to the healthcare unit "due to issues with sleep" (see exhibit B).
>
> 12. White in Health Care Unit, I had minimal exposure to other inmates, it is essentially isolation. This made me feel safer and eased my anxiety. On August

> 12, 2020 I asked to be kept in isolation on the Health Care Unit because I felt safer there (see exhibit C). I did not want to move because I had concerns for my safety.
>
> 13. On August 24, 2020, I was told I would be removed from the health care cells and had no choice but to move. I expressed that I did not want to move for the same reasons previously given however, I was ordered by the officer to move. I cited to the officer from the *Correctional Services Act* that they could hold me for my safety or the safety of others. I told them because they needed to validate their hold that they could go ahead and mark me as a danger to others. If I had them mark me as a risk to myself, I would have been put on suicide watch.
>
> 14. On September 12, 2020, I met with health care as I wanted to speak with someone before moving out of the CCU [sic, HCU] to the regular range (see exhibit D). I expressed that I felt safer in CCU [sic, HCU] and don't have to always be on guard to defend myself. I felt more anxiety when I was around other inmates because of fear for my safety. I was willing to try N4 since there were only 4 inmates on that range and I could stay in my cell if I felt unsafe.

[10] During his oral evidence Mr. Sandeson expanded on the situation in the lead up to the August 24, 2020 Disobey Order. He said that he did not feel safe in the general population. He testified that he had the *Correctional Services Act* "in my hand" and that the Captains were not allowing him to rely on the first two of four bases for remaining in isolation. Mr. Sandeson said that he was left with two options and then explained why he ruled out selecting the suicide option. He then stated that the Captains "made me" state that he was a risk to others. Mr. Sandeson added that he did not believe that the Disobey Order statement attributed to him was an accurate statement.

[11] On the basis of the above and the attached medical records (exhibits A, B, C and D), the Applicant says context is provided for the August, 2020 incident. At paras. 42 and 43 of his brief, the following is stated:

> The Applicant's affidavit and medical records from the jail in support of this application for release provides context to the August, 2020 incident. His medical records establish that the Applicant struggled with anxiety, depression and insomnia. The records reflect that he expressed anxiety towards being around other inmates, he had concerns for his safety. As a last resort, in an effort to remain isolated, he instructed the officer to validate his hold by being marked as a danger to others. The alternative would have been to be marked as a danger to himself, which would result in even more restrictive circumstances.
>
> This additional context reveals that the Applicant was not truly expressing any form of homicidal intent at the time, but rather was attempting what he believed would maintain his own safety by remaining isolated. This clarification allays concerns on the secondary grounds. Furthermore, a letter from North East Nova Scotia

> Correctional Facility confirms that the Applicant has been prosocial and incident free since his transfer to the facility.

[12] Mr. Sandeson provided the Court with the above referenced letter. In the October 4, 2021 correspondence from Leanna Nash, NNSCF Case Management Officer, she notes that, "[S]ince his transfer to NNSCF, February 26, 2021, he has been incident/level free and is respectful with staff and other inmates.".

[13] The Crown takes a two-fold response to this new evidence, as articulated in these paras. of their brief:

> The Applicant has failed to identify any legitimate or reasonable grounds explaining why this evidence was not tendered in the JIR hearing. The Crown submits that no legitimate or reasonable grounds exist. Prior to the January JIR hearing, the Applicant was given the opportunity to address or rebut these concerns. Ultimately, the Applicant "chose to file nothing." (para. 28 of Your Lordship's JIR decision, at Tab 1). In her submissions at the JIR, the Applicant questioned whether the Accused even made the remark and that it was going to be appealed (Tab 14B of the Applicant's Application Record at p. 39, lines 6-15). Moreover, the Applicant did not raise any concerns about the introduction of these statements nor the desire for additional time to reply to the statements. This purported explanation for the Accused's behaviour, his mental health issues, certainly existed at the time of the January JIR hearing. The Applicant was given ample opportunity to address it. They chose not to do so.
>
> The Crown acknowledges that the clarifications concerning the Offender Incident Report are relevant under s. 515(10) as it addresses the Accused's risk to the public's safety. Your Lordship found the comments to be "impulsive and dangerous" (para. 32 of JIR decision at Tab 1). They are no less concerning given the Accused's purported explanation for why he chose to threaten to kill other inmates. No matter the explanation for the outburst, the fact remains that the Accused's actions are demonstrative of manipulative and threatening behaviour. The Accused's justification for his behaviour increases the Crown's concern. This justification shows that the Accused does not understand the gravity of his action, does not take responsibility for his behaviour, and is unable to address conflict or negative stimuli appropriately.

[14] The Crown refers to the modified *Palmer* test as set out by Justice Wagner (as he then was) in *R. v. St.-Cloud* at para. 128:

> 128 In *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, this Court established the following criteria that must be met for evidence to be considered "new evidence" on appeal:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial ... .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> (Reproduced in *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 50.)

[15] Having regard to all of the circumstances, I am of the view that Mr. Sandeson's contextual affidavit and oral evidence could and should have been tendered at the last JIR hearing. This is particularly so, given that we were not dealing with bail at the very start of criminal proceedings. The record reflects that counsel for the accused received the Disobey Order two weeks before the hearing in January. Rather than leading any evidence to rebut this, the Defence chose to characterize the Crown's evidence in the manner that I outlined at para. 28 of my last decision.

[16] In any event, I do not find that the proffered evidence affects my views as set out in my previous decision. In this regard, exhibit C confirms that Mr. Sandeson was (again) prescribed Remeron to help with sleep about a week before the August 24, 2020 incident. While it is also documented that he was "…anxious about being in population. Advised to discuss that with the captain.", we know from the previous JIR how Mr. Sandeson handled the situation (para. 25 of my previous JIR decision). I find nothing in Mr. Sandeson's latest affidavit or oral evidence to mollify my earlier concerns. Indeed, based on all of the evidence I am drawn to the Crown's characterization of Mr. Sandeson's behavior as "manipulative and threatening". What is more, I regard the latest evidence as a poor attempt to justify Mr. Sandeson's documented impulsive and dangerous comments.

[17] At the end of the day, I have significant concerns that Mr. Sandeson could again exhibit such thoughts and absent a jail setting, act on them to the extreme detriment of those around him. In this regard, there has been no demonstrated material change in circumstances relevant to this case.

The Enhancement of the Release Plan With The Addition of a Home Monitoring System to the Proposed Place of Residence

[18] The Applicant submits that the revised plan of release "all but eliminates any chance that the Applicant could reoffend or interfere with the administration of justice". In this regard, it is submitted that he will be monitored by a surety and by Recovery Science at all times such that, "there will be no opportunity for him to reoffend, let alone a substantial likelihood".

[19] The Applicant says that the installation of a home monitoring system will allow for proposed sureties Adam Sandeson, Matthew Sandeson and David Sandeson to monitor his activities. All three of these proposed sureties reside at least an hour from the Sandeson family residence, as they did at the time of the JIR in January. In my previous JIR decision I expressed concern that the Accused's brothers lived a considerable distance from where the Accused would be residing. My concern remains as nothing has changed.

[20] From the Sandeson affidavit and *viva voce* evidence I understand that the enhanced security system was ordered online through Home Hardware. The system – cost unknown – features four cameras that are to be pointed at the four doors of the Sandeson home. Each of the proposed family member sureties will have an App on their phone, connected to the system. The Applicant has provided nothing further. No technical information or specifications have been given. The system is not up and running. It has yet to be tested.

[21] The cross-examinations demonstrated that the proposed sureties who testified are vague when it comes to operational details. When it comes to the home monitoring system, unlike the detailed written material and accompanying explanations provided by Recovery Science's Stephen Tan during the January JIR hearing, the lack of information proffered raises concerns with the Court. Indeed, I have significant concerns, including:

- lack of monitoring of the windows of the Sandeson residence;
- the absence of information concerning how (or even if) the system responds to a power outage;
- the absence of information concerning how (or even if) the system responds to an internet outage; and
- how far the coverage goes – for example, does the system reach the wood pile, barn and other parts of the Sandeson property where the Applicant is anticipated to go.

[22] In my view, the addition of the home monitoring system adds little and may actually detract from the previous release plan. Matthew and David Sandeson are both full time students and Adam is working full time. Their availability to monitor their brother by video is limited. The fact has not changed that they still reside an hour away from the Sandeson family residence and in my estimation, cannot be classified as jailers in the community. Furthermore, given his past behaviour and failure to advise at least his parents about William Sandeson's activities, I continue to have reliability concerns about Adam Sandeson as a proposed surety.

[23] Once again, given all of the circumstances, I find that the addition of the Sandeson brothers as proposed sureties actually weakens the release plan from the October, 2015 proposal which only had Michael and Katherine Sandeson as proposed sureties.

[24] As an addition to the home monitoring system, the Applicant also states that his father will retire if the Accused is to be released. This would allow "around the clock supervision" of the Accused. That was exactly the plan that was proposed at the last JIR. Ms. Sandeson testified that she was retired and would be home to supervise the Accused. During Michael Sandeson's testimony last time he stated that he worked part-time but that his hours were flexible. He testified that, if needed, he could bring the Accused to work with him. The defence plan for release at that time was constant 24 hour supervision of the Accused with electronic monitoring. That is being proposed once again in this Application for bail review. Considering all of the evidence I do not regard Michael Sandeson's pending retirement as a material change in circumstances. Moreover, I find that the overall release plan does not constitute a favourable material change in circumstances relevant to his case.

The Dismissal of the Crown's Leave to Appeal to the Supreme Court of Canada and the Trial Dates set for 2023

[25] On February 25, 2021, the Crown's leave to appeal to the Supreme Court of Canada was dismissed. Jury trial dates were scheduled shortly after and are set for January to March of 2023. Earlier dates were offered by the Court. The Crown was available for the earlier dates but they were turned down by defence counsel due to their lack of availability. In the January JIR decision, the Court addressed the delay noting at para. 55:

> [55] In coming to my decision I am mindful that Mr. Sandeson is entitled to the presumption of innocence. He does not have a criminal record. I am cognizant of the delay, particularly with the leave application before the Supreme Court of

> Canada. In all of the circumstances, it is nevertheless likely that Mr. Sandeson's trial (if it occurs) will take place in 2022 or 2023. I do not regard this delay, while unfortunate to all concerned, to be such that it outweighs the other factors which I have outlined herein.

Accordingly, I do not regard the now scheduled 2023 trial dates as constituting a material change in circumstances.

COVID-19

[26] The Applicant has deposed that, "[B]ecause of the Covid-19 pandemic I am also very worried about my health.". At para. 54 of his brief the following is stated:

> Another important consideration for the tertiary ground analysis is the Covid-19 crisis. Although Nova Scotia is doing relatively well at controlling the numbers province-wide, Covid-19 nonetheless puts the Applicant (and all inmates) at a greatly elevated risk while detained as compared to being released on a very strict bail plan. Even when correctional institutions take steps to reduce risk, it is not practicable for the Applicant to self-isolate and engage in appropriate preventative measures in custody. Recent outbreaks in both federal and provincial custodial institutions across the country prove the enormously elevated risk that inmates and staff alike are subject to. When an appropriate release plan is in place to mitigate the risk of reoffence, the Covid-19 crisis weighs heavily in favor of release in the tertiary ground analysis.

[27] During the last JIR hearing the Applicant also raised the pandemic as a factor of release in the tertiary ground analysis. I dismissed this noting that there was no evidence suggesting that the Applicant "is at a greatly elevated risk to contract COVID-19 while in a Nova Scotia correctional facility." (para. 39).

[28] A couple of months after my January 22, 2021 JIR decision, our Court of Appeal had cause to weigh in on the pandemic in the context of a sentencing appeal.

[29] In *R. v. Dawson; R. v. Ross*, 2021 NSCA 29, Justice Derrick noted as follows at paras. 102 – 105:

> [102] These observations acknowledge the ongoing impact of a readily transmissible and potentially deadly virus, an impact that is amplified where there is congregate living such as there is in penitentiaries and jails. I note the comments of Harris, J. in *R. v. Kandhai*, 2020 ONSC 1611:
>
> > [7] ...The entire country is being told to avoid congregations of people. A jail is exactly that, a state mandated congregation of people, excluded from the rest of the population by reason of their crimes or alleged crimes. The

> situation, which has led to drastic measures in society at large, is bound to increase day to day hardship in prison and the general risk to the welfare of prison inmates...

[103] The Office of the Correctional Investigator has made comparable statements in its Third COVID-19 Status Update of February 23, 2021:

> There can be little doubt that people inside prisons, like other congregate living settings, such as long-term care facilities, shelters or group residences, are significantly more vulnerable to transmission and spread of COVID-19. The difference is that prisons are enforced congregate settings where people are held in close proximity with one another...Prisoners do not necessarily have the ability or means to practice safe distancing, and maintaining hygiene and sanitation behind bars can be challenging at the best of times. The daily movement of staff from outside communities experiencing outbreaks creates potential vectors of disease transmission inside prisons. For elderly and medically compromised inmates, the risk of contracting COVID inside prison can be life-altering, or even deadly.(pp. 22-23)

[104] That said, I would join other Canadian appellate courts that have declined to reduce otherwise fit sentences due to the pandemic (see, for example: *R. v. Lariviere*, 2020 ONCA 324, at paras. 13-18; *R. v. D.B.*, 2020 ONCA 512; *R. v. Thompson*, 2020 ONCA 361; *R. v. Morgan*, 2020 ONCA 279, at paras. 8-12; *R. v. S.C.C.*, 2021 MBCA 1; *R. v. El-Kaaki*, 2020 BCCA 183).

[105] The pandemic has not eliminated carceral sentences. Sentencing during COVID must still respect sentencing imperatives. Thoughtful consideration of the impact of the pandemic on the principles of sentencing is found in *R. v. Hearns*, 2020 ONSC 2365, which includes the following statement:

> [23] ...I am not suggesting that the pandemic has generated a "get out of jail free" card. The consequences of a penalty -- be they direct or collateral -- cannot justify a sentence that is disproportionately lenient, or drastically outside the sentencing range. It cannot turn an inappropriate sentence into an appropriate one or justify dispositions that would place the public at risk...

[30] At para. 109 Justice Derrick concluded her COVID-19 comments with this observation:

> [109] The Status Update from the Office of the Correctional Investigator reports that all four of the Atlantic Region penitentiaries have remained COVID-free since the start of the pandemic. It is hoped that whatever measures are responsible for this will continue to keep the virus at bay while the vaccination roll-out extends into our communities and institutions.

[31] While made in the context of a sentencing appeal, I find our Court of Appeal's comments to be apposite here. There has been no evidence led to suggest that anything has changed at NNSCF, the Atlantic Region penitentiary housing Mr. Sandeson, whom I note to be vaccinated.

Conclusion

[32] Given all of the evidence and submissions, there are no material changes in circumstances that are either relevant or material to Mr. Sandeson's case. Accordingly, I dismiss the application and confirm that a *de novo* JIR hearing is not warranted.

Chipman, J.