SC CR 98 044

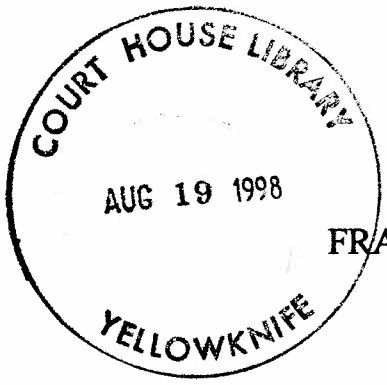
Date: 1998 07 10
Docket: CR 03620

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent



- and -

FRANÇOIS GOUPIL

Applicant

NOTE: Section 517 of the Criminal Code prohibits publication of this ruling

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Ruling on bail review application under s. 520 of the Criminal Code.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V. A. SCHULER

Heard at Yellowknife on July 2, 1998

Reasons filed: July 10, 1998

Counsel for the Applicant: Louis Belleau

Counsel for the Respondent: Brad Allison, Diane Sylvain

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REASONS FOR JUDGMENT

[1] This is an application pursuant to section 520 of the Criminal Code for review of an order made by a Justice of the Peace detaining François Goupil in custody pending his trial.

[2] The accused is charged, along with five others (the charge against one of the co-accused named in the information having been withdrawn), with one count of conspiracy to traffic in hashish over a six year period at Iqaluit and elsewhere in the Northwest Territories, contrary to s. 465(1)(c) of the Criminal Code. It is alleged that the accused is a member of the Hell's Angels motorcycle club who supplied hashish from Quebec to his co-accused Claude Caza in Iqaluit for distribution in the eastern Arctic. It is further alleged that approximately eight kilograms of hashish were shipped to Mr. Caza every month, whose profit was in the area of $20,000.00 per shipment.

[3] Section 515(6)(d) of the Criminal Code places the onus on the accused to show cause why his detention is not justified in this situation. The grounds for detention are as 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, 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

(c) on any other just cause being shown and without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Notwithstanding the above, the accused is, of course, entitled to the presumption of innocence.

[4] The accused is 28 years old and lives with his common law wife and their young child in St-Elie d'Orford in the province of Quebec. He was unemployed at the time of his arrest and no employment history has been indicated save for a three week period in 1997.

[5] He has a criminal record consisting of two convictions for possession of narcotics, for which he received fines of $150.00 and $50.00 in June of 1994 and a conviction for possession of a firearm knowing the serial number was altered for which he received a fine of $290.00 in December, 1994. The latter offence was dealt with in Quebec, but arose in Iqaluit. Other than the conspiracy charge, he has no charges pending.

[6] The evidence against the accused consists mainly of intercepted communications. In particular, certain conversations between the accused and Claude Caza were recorded at Mr. Caza's chalet in Quebec.

[7] I think it is fair to say that the conversations in question are not completely clear and there are many gaps in the transcripts provided. The Crown argues that conversations between the accused and Mr. Caza on August 31, 1997 include reference to a single digit number code that the two men were working out as they spoke. That is an interpretation that can be put on the words said. I agree with the observation of the Justice of the Peace that it is not the type of conversation one would expect to hear from people who appear to be watching a child at play.

[8] Crown counsel indicated further that police surveillance indicates that Mr. Goupil acted in a surreptitious manner when visting Mr. Caza, driving by the place

once or twice before stopping and parking in such a way that his licence plate was not visible.

[9] The Crown relied as well on this application on other intercepted communications, to which the accused was not a party. Words spoken by co-conspirators would be admissible against Mr. Goupil only if they were said in furtherance of the alleged conspiracy: *R. v. Carter* (1982), 67 C.C.C. (2d) 568 (S.C.C.). Crown counsel indicated that it will be argued at trial that the words or declarations of the co-conspirators were said in furtherance of the conspiracy. It is not my function on this application to rule on the admissibility of evidence. I will say only that it does not appear to me to be certain that the Crown will succeed in this argument.

[10] A further conversation between one of the co-accused and a police officer was relied upon in which the co-accused identifies Mr. Goupil as the supplier for the Caza trafficking activity. That conversation does not appear to be admissible against the accused since it is simply a description to the police officer of what has transpired and what is going on. The co-accused is not compellable as a witness. Whether he does in fact testify against the accused will depend on a number of factors, for example, the charge against him being withdrawn or severed. Counsel for the accused argued that the credibility of the co-accused will be suspect if he does testify. That is not, however, a determination for me to make on this application

[11] Other evidence against the accused on which the Crown relies is that five pagers were seized from the accused's residence from which it was ascertained that two had numbers recorded in their memory which did not correspond with telephone numbers and are thought to be codes. There are references by the co-accused referred to above in his conversation with the police officer to the use by Mr. Caza and Mr. Goupil of pagers and numbers used as codes for drug transactions.

[12] The Crown relies to a great extent in opposing Mr. Goupil's release on his affiliation with the Hell's Angels. A vest bearing Hell's Angels insignia was seized from Mr. Goupil's residence as were a videotape and photograph of him wearing Hell's Angels regalia. The addresses and telephone numbers of known members of the Hell's Angels and their clubhouses were found; some of the addresses were for members in South Africa.

[13] Crown counsel submitted that Mr. Goupil has been a member of the Sherbrooke chapter of the Hell's Angels since June of 1996 and that he is well known to law enforcement officials in Quebec. Submissions were made about criminal activity of members of the Sherbrooke chapter and ongoing police investigations into murder and

violence. Nothing, however, was presented which tied Mr. Goupil to any of the investigations, nor was any detail provided as to why he is well known to law enforcement officials. No evidence was called on these points and there was no admission by the defence that Mr. Goupil is a member of the Hell's Angels.

[14] The admission of evidence on bail hearings or bail reviews is subject to less stringent rules than at trial (for example, s. 518(1)(e) of the Criminal Code, which permits a justice to receive and base his decision on evidence he considers credible and trustworthy) and it is not unusual for counsel to agree on undisputed facts as to what was found at the scene of a crime or by an investigation or what witnesses have told the police. In this case, however, I heard statements about the Hell's Angels and Mr. Goupil without any evidence being called to substantiate them and without much detail to connect Mr. Goupil with what was put forward. The case was also presented in this fashion before the Justice of the Peace.

[15] There is a risk of error when counsel proceeds in this fashion. In this case, Crown counsel initially submitted that 50 pagers were located by the police at Mr. Goupil's residence. When this was challenged by defence counsel and after reviewing the documentation, the number was substantially reduced such that the Crown indicated only 5 were found (I note that 50 was also the number presented to the Justice of the Peace at the original release hearing).

[16] In referring to one of the intercepted conversations wherein reference was made to Mr. Goupil being at the "Valleyfield Regattas", Crown counsel submitted that the Valleyfield Regattas is a reference to an annual function of the Sherbrooke chapter of the Hell's Angels. This was challenged by counsel for the defence, who advised that it is a boat race organized by the city of Valleyfield.

[17] I point out these instances because in my view caution must be used in assessing submissions in which facts are presented which have not been agreed to by counsel and which are not the subject of viva voce or affidavit evidence. This contrasts with, for example, the way that police witnesses familiar with the Hell's Angels organization testified about the activities of the Hell's Angels and the involvement of the accused in the case of *R. v. Pelletier and Poirier*, August 28, 1997, (Que. S.C.), submitted by Crown counsel.

[18] On a related point, although Mr. Goupil was accompanied at the review hearing by an unusually large (for this jurisdiction) number of police officers, some of whom were visibly heavily armed, no explanation was provided by counsel for why this was felt to be necessary. Accordingly, and without in any way criticizing the decision by

the police to arrange security in this fashion, I feel it would be inappropriate for me to draw from it any inference against the accused.

[19] Having said all of this, nevertheless there is some evidence to connect Mr. Goupil with the Hell's Angels, specifically the material found at his residence to which I have already referred. The information provided to police by the co-accused earlier referred to also identified Mr. Goupil as a member of the Hell's Angels.

[20] The Crown placed reliance on s. 2 of the Criminal Code, which since May 2, 1997 defines "criminal organization" as:

> ... any group, association or other body, consisting of five or more persons, whether formally or informally organized,
>
> (a) having as one of its primary activities the commission of an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, and
>
> (b) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences;

[21] The Crown alleges that both the Caza organization and the Hell's Angels fall within the definition of "criminal organization" and that is a circumstance relevant to the issue of Mr. Goupil's release. Mr. Goupil is not charged with participation in a criminal organization under s. 467.1 of the Criminal Code. However, section 515(6)(a)(ii) puts the onus on the accused for release where he is charged with an offence alleged to have been committed for the benefit of, at the direction of or in association with a criminal organization for which the maximum punishment is five years or more. In this case, as I have indicated, the accused already has the onus because of the offence which is charged.

[22] Apart from the reverse onus, the effect of s. 2 must be, in my view, as stated by Beaulieu, J. in *R. v. Pelletier and Poirier, supra.* Beaulieu J. held that the new provisions mean that the judge hearing a release application should consider the accused's role, responsibility and authority in a criminal organization. Based on the evidence in that case about the role of the accused in the Hell's Angels and the nature of the Hell's Angels as a highly organized and criminal association, Beaulieu J. concluded that if the accused were not detained, there was a substantial likelihood that they would commit other offences or undermine the administration of justice and also

that release of the accused would contribute substantially to undermining confidence in the administration of the judicial system.

[23] In this case, the evidence I have referred to links Mr. Goupil to the Hell's Angels. I think that for purposes of this application I can take into account that the Hell's Angels have a public profile as a world-wide organization involved in drug trafficking and violence and that concerns have been voiced by public officials about their activities in the province of Quebec and elsewhere in Canada; they are not an obscure motorcycle club.

[24] Counsel for Mr. Goupil argued that his client does not have to prove that he is not a member of the Hell's Angels. However, the onus is on the accused on this application and the caselaw suggests that the accused is in fact in the best position to demonstrate that he is "small fry" and therefore not the type of individual at whom the reverse onus provision is directed. In *R. v. Pearson* (1992), 17 C.R. (4th) 1 (S.C.C.), Lamer C.J.C., in ruling that the reverse onus provisions do not contravene the *Charter of Rights and Freedoms*, stated the following:

> Moreover, the onus which it imposes is reasonable in the sense that it requires the accused to provide information which he or she is most capable of providing. If a person accused of trafficking or importing is "small fry" or a "generous smoker", then the accused is in the best position to demonstrate at a bail hearing that he or she is not part of a criminal organization engaged in distributing narcotics.

[25] Bearing in mind that Lamer C.J.C. was speaking of the justification for the reverse onus provisions, and not saying that all persons who do not show that they are small fry will be detained, still, the onus is on the accused. In this case, Mr. Goupil did not testify and his affidavit makes no reference to the Hell's Angels. There is no basis upon which I can conclude that he is small fry and the evidence from the intercepted communications as a whole indicates that the role played by Mr. Goupil in the Caza organization was not a minor one.

[26] The Justice of the Peace who heard Mr. Goupil's application for release found that detention was not justified on the primary ground because he was satisfied that there was a sufficient possibility that the accused would be found not guilty and so would attend for trial. In other words, he felt that the Crown's case was not so strong that the accused would be inclined to flee.

[27] On the secondary ground, however, the Justice of the Peace found that the case was sufficiently strong that, coupled with the fact that Mr. Goupil had been arrested in

Iqaluit in 1994 for possession of a firearm with an altered serial number and all the other information presented, it was probable that he would use threats of violence to intimidate witnesses. Accordingly he detained the accused on this ground.

[28] Counsel for the accused argued before me that the findings of the Justice of the Peace are inconsistent and that there was no evidence upon which he could conclude that the accused was likely to intimidate witnesses.

[29] I am not convinced that there is a real inconsistency. I read the comments of the Justice of the Peace as saying that in his view the Crown's case was not so strong as to cause the accused to flee because conviction is inevitable, but that the case itself and all the other circumstances put before the Justice of the Peace were sufficient to establish a likelihood that the accused would intimidate witnesses.

[30] With regard to the latter, the Justice of the Peace specifically referred to the 1994 firearm conviction. Neither the Crown nor the defence provided any information to me about the facts upon which that conviction was entered. The onus, as I have said, is on the accused. So I am left, as was the Justice of the Peace, with the fact that the accused was at some time before December of 1994 and in all likelihood within the time frame of the charge against him, in Iqaluit in possession of a firearm on which the serial number had been altered. In my view, this is a matter of significant concern.

[31] Although the evidence at present consists almost solely of intercepted communications and police testimony, I take into account that there are civilians who may be witnesses. There is the co-accused referred to earlier who gave information to the police. Crown counsel referred to others, not co-accused, but charged in the same police investigation, who have agreed to co-operate with the police. I do not agree with defence counsel's submission that the only witnesses against the accused are those who cannot be intimidated.

[32] I also take into consideration Mr. Goupil's connection with the Hell's Angels, although the evidence of his role in it does not approach the strength of the evidence in *R. v. Pelletier and Poirier*.

[33] In *R. v. Pearson*, another factor considered by Lamer C.J.C. as justification for the reverse onus provisions was that trafficking in narcotics occurs:

> ... systematically, usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail.

[34] I have noted earlier that the accused in this case has not put before the court any history of employment except for the three weeks in 1997 when he was employed by his proposed surety, Mr. Brassard, who is also prepared to employ him now. There is no indication as to how he supports his family. Nothing has been presented which would indicate that the accused, as suggested by the evidence available to the Crown, is not engaged in the drug trade.

[35] The lack of employment, combined with the Hell's Angels connection, the gravity of the offence, the evidence, and the firearm incident all provide a basis, in my view, to conclude that there is a substantial likelihood that, if released, the accused will commit a criminal offence or interfere with the administration of justice. Put as it was in *R. v. McAuley*, [1993] O.J. No. 3101 (Ont. Gen. Div.), there is a "real chance" that the accused will do these things and the accused has not satisfied the onus of showing that this is not the case.

[36] In coming to this conclusion, I have considered whether the sureties offered and conditions suggested by defence counsel would meet the concerns but in all the circumstances I am not satisfied that they can.

[37] Therefore, all considered, I am not satisfied that the Justice of the Peace erred in detaining the accused on the secondary ground and the order for detention will remain in effect.

[38] I thank counsel for their submissions.

V. A. Schuler
J. S. C.

Dated at Yellowknife, Northwest Territories
this 10th day of July, 1998

Counsel for the Applicant: Louis Belleau

Counsel for the Respondent: Brad Allison, Diane Sylvain

CR 03

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