IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

AUGUST DARREN POITRAS

Transcript of a Ruling on a Bail Review delivered by The Honourable Justice J.Z. Vertes, in Yellowknife, in the Northwest Territories, on the 10th day of April, A.D. 2003.

APPEARANCES:

Mr. N. Sinclair: Counsel for the Crown

Mr. B. Enge: Counsel for the Defence

Charges under ss. 267(a) C.C. x 2, 264.1(1) C.C.

THE COURT: Mr. Poitras is facing trial on three charges: two charges of assault with a weapon and one charge of uttering a threat. All charges allegedly arose on February 8th, 2003. His trial was originally set to take place in March. At that time some Crown witnesses did not appear, and the trial was adjourned, peremptory on the Crown, to be heard by the Territorial Court on May 5th.

In a hearing before the Justice of the Peace in Hay River on February 14th, Mr. Poitras was remanded in custody and, by my review of the transcript, it is evident that the Justice of the Peace was satisfied that there was cause to detain Mr. Poitras in custody, both on the primary ground and on the secondary ground.

The one curious point about the previous hearing is that it also appears that the Justice of the Peace contemplated that the question of bail would be spoken to when the accused made his first appearance in Territorial Court on February 17th. I say that because, in the transcript, the Justice of the Peace says: "I'm going to remand you in custody to the February 17th court date for first appearance. At that time you could argue, if you wish, before the Territorial Court whether you should be released." As far as I am aware, nothing was done with respect to the question of bail in the Territorial Court, and of

course the Territorial Court judge has no jurisdiction to conduct a bail review.

In a circumstance such as this, I think one should exercise some caution because on one reading of what was done on February 14th, it may seem that the detention order was meant to last only until February 17th, and then it is almost as if there was going to be a new bail hearing, or at least the Justice of the Peace contemplated a new bail hearing at that time to be held by the Territorial Court judge and at a time when the accused would have the benefit of legal counsel. Be that as it may, the accused has been detained in custody and he filed an application for a review in this court, and this court is now required to conduct that review.

One of the questions that seems to arise frequently on these types of applications is: What is the nature of the review? I just want to make it clear what in my opinion is the nature of this type of a review.

This is not an original thought to me. It is the opinion expressed by some commentators and other judges, although not universally shared I may say. It is best expressed by Mr. Justice Salhany in his textbook on Canadian Criminal Procedure, and I paraphrase from the 6th edition. He writes that the proper approach is that the review procedure

contemplated in ss. 520 and 521 of the *Criminal Code* is really a hybrid one in the nature of a fresh hearing as well as a review of the record before the justice. Since there is an obligation on the applicant (whether it is the prosecutor or the accused) to "show cause", the reviewing judge must give due consideration to the decision of the justice and not substitute his or her discretion for that of the justice unless it appears that the justice has exceeded his or her jurisdiction, made an error in law or erred in his or her appreciation of the facts or the proper inferences to draw from the proven facts. However, because the reviewing judge is entitled to hear "such additional evidence or exhibits as may be tendered" by the accused or the prosecutor, the decision of the justice should be examined in the light of any new evidence, and therefore in this sense it is a hearing *de novo*.

That view was expressed judicially by Justice Salhany in a case called *McCue and the Queen*, a 1998 decision of the Ontario Court at 130 C.C.C. (3d) 90. It is similar to an opinion I expressed in *Caza* at 1999 N.W.T.J. 73. But, as I say, it is not one universally held. There are cases that suggest that it should be strictly an appeal; there are cases that adopt a more *de novo* approach. I think the only safe thing to say is that the state of the law across

Canada is chaotic on this question.

Generally speaking, I prefer the views of Justice Salhany as expressed in his textbook. I think that is the correct approach. If I may be so bold to say, I think that is the general approach adopted by the judges of this court and has been for many years.

So what that means is that a reviewing judge should not interfere with a justice's order unless there is some reversible error or some relevant new evidence or other compelling change in circumstances which would make the justice's decision no longer valid. If no such error can be found and no new information exists, the reviewing judge should not vacate the order made by the justice, even though the reviewing judge may disagree with the original justice's determination as to whether to grant bail or not to grant bail. Here I find no error in principle made by the Justice of the Peace. I find no record of any misapprehension of fact by the Justice of the Peace in Hay River who considered this question first, and in my view there is no cause to interfere on that basis.

The application to set aside the detention order seems to be based primarily on two points: the first one being the fact that Mr. Poitras's parents have come forward to provide assurances that they can supervise him if he is released, that they would

control his movements, and that there should be no concern about his not appearing for trial. The other point is that, the Crown's witnesses having failed to appear the first time, it is highly unlikely that they will appear the next time, and even if they do, all that may likely happen is that they will recant their evidence because there is hearsay evidence to the fact that these complainants do not wish to press ahead with these charges.

With respect, I think that confuses the point of a bail hearing. That argument may be quite cogent, if true and if grounded on evidence. That argument may be quite cogent to counter some argument that the Crown may wish to base on the tertiary ground as to the strength of the Crown's case for example, but it really does not go to either the primary or secondary ground.

As counsel are well aware, the *Criminal Code* sets out three specific criteria, and only three criteria, to justify an accused person's detention in custody prior to trial. There is the primary ground as to a concern about the accused not appearing for trial; there is the secondary ground which deals with a concern for public safety and protection and a fear of the accused committing further offences; and there is the tertiary ground which relates to the public's perception and confidence in the administration of

justice.

It is under that tertiary ground that the relative strength of the Crown's case is an important factor. And it would be under that ground, it seems to me, where an argument that the complainants, the alleged victims, want to recant or have expressed wishes that they do not wish to proceed with the charge may come into play. But I also express this word of caution. Under our system, it is not up to the victims or the alleged victims to determine whether a charge will proceed or not. So even a reluctant witness may testify, and even a reluctant witness may testify truthfully. Just because a witness is reluctant does not help much in determining whether the Crown will make out its case or not.

Is there any new information or new evidence here that would suggest that a different order is justified in this case? In my view there is not.

I recognize that the Crown is placing its argument justifying detention on both the primary and secondary grounds. I must say that if it was simply the primary ground, I may not be inclined to give much weight to Crown's submissions. I recognize nevertheless that the accused was convicted five times of failing to appear in court, the most recent of which was in 2001. I also recognize that he has been twice convicted of escaping lawful custody. But in

terms of the primary ground, I think there probably could be sufficient restrictions placed on the accused and, with his parents coming forward as sureties, to assure his appearance in court.

In my view, I think clearly there are grounds under the secondary ground justifying the accused's continued detention. He has been convicted of 38 offences since 1985. He has been sentenced to dispositions of fines, probation, incarceration, including periods in the penitentiary. He has committed crimes of violence. He has committed crimes of breaching court orders. In my opinion, there is ample evidence justifying detention under the secondary ground.

I note as well that the trial is merely four weeks away, and certainly under any evaluation it cannot be said that there has been undue delay which should impact significantly on the question of continued detention.

For those reasons, the application is dismissed. The accused will be detained in custody pending his trial.

MR. SINCLAIR: Has Your Honour considered your willingness to impose an order under section 515(12) preventing communication between the accused and any witness or complainant in this matter?

THE COURT: I don't see a foundation for

that, other than your submissions and suspicion.

MR. SINCLAIR: There was the concerns expressed by the complainants themselves during -- which was part of the allegations, and the fact that the complainant or, pardon me, that the accused acknowledged contacting at least one of the witnesses and the fact that these witnesses have failed to appear.

THE COURT: Well, he's in custody. I'm not quite sure how he's going to contact them unless they tell him where they are. Again, this goes back to a point I touched on earlier. The more critical any information is in terms of the closer it is to the issue that determines whether any disposition or order should be made, the more important it is to have it in the form of evidence. If you had an affidavit from one of these complainants saying "I was threatened" or "Somebody did talk to me", "I am fearful", I may be more inclined to do so. Here, I'm not inclined to do so, not under these circumstances.

MR. SINCLAIR: Thank you, sir.

THE COURT: Mr. Enge.

MR. ENGE: I would concur with your comments, Your Honour.

THE COURT: All right. Thank you, gentlemen. Close court.

Certified to be a true and accurate transcript, pursuant to Rule 723 and 724 of the Supreme Court Rules of Court

A Wright

Annette Wright, RPR, CSR(A)

Court Reporter