IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

CLIFFORD ALOOKEE

Transcript of Decision on Bail Estreatment Hearing delivered by the Honourable Justice L.A. Charbonneau, sitting at Yellowknife, in the Northwest Territories, on March 2nd, A.D. 2011.

APPEARANCES:

Mr. M. St-Germain: Counsel for the Crown

Mr. J. Bran: Counsel for the Accused

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THE COURT: This is an application for forfeiture of bail monies that were deposited with the Court following an order made by a Justice of the Peace. In that order, the Justice of the Peace had ordered that Clifford Alookee be released on a recognizance with a number of conditions, including one that he deposit $2,500 in cash deposit before he could be released.

There are many unique features to this case. It makes the decision to be made on this hearing a difficult one. To put this hearing and my decision in context, I will refer to some extent to the history of these proceedings.

First, the history of the prosecution that this recognizance was associated with. Mr. Alookee was charged in March of 2009 with a sexual assault that allegedly had occurred in Yellowknife. He was arrested and he was ordered released on the recognizance that I have already referred to. That order was made in March, 2009, and the cash deposit was made in May. So that was when Mr. Alookee was actually released.

There were no sureties on the recognizance. It simply required that monies be deposited. There is a receipt on the court file that shows that those monies were sent to the Court by Anaoyok Alookee, who is Mr. Alookee's mother.

Mr. Alookee's Preliminary Hearing took place on August 7th in Yellowknife, and he was present as required. He was committed to stand trial and his jury trial was scheduled to commence on May 31st, 2010. On that date, Mr. Alookee did not appear. His counsel advised that Mr. Alookee was still in Taloyoak and that he did not have the financial means to come to Yellowknife for his trial. At that point a warrant was issued for Mr. Alookee's arrest and the many people who were in the courtroom in response to jury summonses were excused.

It is not disputed that after Mr. Alookee was advised that a warrant had been issued for his arrest he went to the RCMP Detachment in Taloyoak to turn himself in. He was asked to come back two days later, and I gather this was because that was when the next flight out of the community was scheduled for. Mr. Alookee did return to the RCMP as directed. He was taken into custody and brought to Yellowknife. He was brought before the Court on June 3rd, and the matter was adjourned to June 4th to give counsel time to decide how to proceed next.

At that point there were two hearings that potentially needed to be scheduled; a hearing under section 598 of the Criminal Code to

determine whether Mr. Alookee had lost his right to be tried by a jury, and also a bail hearing to determine whether he would remain in custody or be released again pending the scheduling of his trial, because, obviously, the trial was not going to proceed that week.

On June 4th the bail hearing proceeded. There was no viva voce evidence called at that time, but Mr. Alookee's counsel made submissions about some financial strains that had hit the Alookee family and some of their circumstances, all this leading to his failing to attend court.

At the conclusion of that hearing, Mr. Alookee was ordered detained on the primary ground. The section 598 hearing was adjourned to August 20th, and it was understood that the issue of bail could be revisited at that time. Counsel advised that he would likely call viva voce evidence at the section 598 hearing, and it was expected this might be relevant to bail.

So on August 20th the 598 hearing was held. Mrs. Alookee was called as a witness, and at the conclusion of her testimony the Crown conceded that Mr. Alookee had met his onus and had showed cause why he should retain his right to have a jury trial. The bail hearing then proceeded. The evidence that had already been called was

applied to it, and Mr. Alookee testified. At the conclusion of that bail hearing he was ordered detained, but on the secondary ground.

His jury trial was eventually rescheduled and it started on January 24th, concluding on January 26th when the jury returned a verdict of not guilty. That is the procedural history of the prosecution.

Turning to the history of the forfeiture proceedings: Essentially, pursuant to section 770 of the Criminal Code, if a person does not comply with a condition of a recognizance, a Court, having knowledge of the default, is to endorse the recognizance with a certificate in Form 33. The section sets out certain requirements as to what has to appear on the certificate. The certificate was issued on June 4th at the conclusion of the bail hearing.

Section 771 of the Criminal Code provides that once a certificate has been filed, a hearing date must be set on request of either the Clerk of the Court or the Attorney General. No request was made by either the Clerk or the Attorney General for a hearing date, but, rather, after the criminal proceedings were completed in January, 2011, Mr. Alookee's counsel wrote to the Registry requesting the return of the bail

monies. The Registry contacted the Crown, who advised they did wish to have the monies forfeited, and that is how the matter got set for a hearing.

That hearing started earlier this week. Mr. Alookee's counsel raised preliminary objections to the hearing taking place, arguing that the Court did not have jurisdiction to hold it. Some issues were raised with respect to notice, as well as alleged deficiencies in the certificate itself.

After hearing submissions from both counsel on these issues, I concluded that the Court did have jurisdiction to hold the hearing, and I set the continuation of the hearing to today's date. I did so because I was of the view that counsel and the Court should have an opportunity to review the evidence that was adduced on August 20th, since that evidence related to the circumstances that led to the default that triggered the forfeiture hearing.

The Crown on this hearing had initially indicated that it was seeking full forfeiture of the bail monies, but, after having reviewed the transcript of the August 20th proceedings, Crown counsel has conceded that full forfeiture may not be appropriate. He maintains that some

forfeiture should be ordered in order to uphold the integrity of the bail principles.

Counsel points out that Mrs. Alookee was not a surety in this matter, so whatever diligence she displayed and whatever efforts she made are not what the Court should focus on at this hearing. He says that the Court should focus, rather, on Mr. Alookee's own actions and efforts to comply with a recognizance.

The Crown has referred me today to the case of R. v. Howell reported at [2008] N.J. No. 259, where one of the considerations in deciding on the amount of forfeiture was that the person in that case had been prosecuted and sentenced for the breach. The Court found that that mitigated the need to forfeit the full amount. In that case, because there has not been a prosecution for failure to appear, the Crown says, using the flip side of the same reasoning, that militates in favour of forfeiture.

For his part, Mr. Alookee's counsel says that no money should be forfeited in this case. He has made arguments that justice was not delayed in this case, because the Court never lost control over Mr. Alookee. He argues that it is irrelevant if it was Mrs. Alookee making the efforts to get her son to court or Mr. Alookee

himself; the point is that efforts were made.

He also argues that the position taken by the Crown today is inconsistent with the position that was taken at the 598 hearing when the concession was made that Mr. Alookee should not lose his right to a jury trial and, in the process of doing so, acknowledged that efforts had been made and stated that there was no fault on Mr. Alookee's part or on his mother's part.

I want to deal with that argument now, because I think it is important to draw certain distinctions. I do think that the position that the Crown took at the section 598 hearing is relevant in the sense that it shows that the Crown accepted aspects of the evidence that was presented about the circumstances of the default, but that position has to be put in context of the nature of the hearing that was being held at that time. Section 598 of the Code deals with what happens when a person fails to appear or remain at his or her jury trial. This section places an onus on that person to show that they had a legitimate excuse for not attending. Otherwise, they lose their right to a jury trial.

That section has been challenged and its constitutionality has been upheld, but it has been interpreted to mean that nothing less than

deliberate avoidance or a mistake about the trial date that results from wilful blindness should deprive a person of their right to a jury trial. So it is a fairly high threshold.

The position that the Crown took in the context of the section 598 hearing must be understood bearing in mind the legal test that was applicable in that hearing. In light of the evidence that was heard, it was my opinion at the time - and it remains my opinion - that that was a sound, reasonable position for the Crown to take. The circumstances that led the Crown to take that position and the evidence that led the Crown to take that position in the context of the section 598 hearing have relevance to this hearing, but I do not think that having made that concession at that time should necessarily be seen as creating an insurmountable obstacle for the Crown at the forfeiture hearing, because the legal test and principles that apply at a forfeiture hearing are very different than the ones that apply at a section 598 hearing. The evidence about the circumstances of the failure to appear is relevant to both, but, as I say, the tests to be applied are very different.

Turning now to the principles that I must apply in a hearing like this one, there are,

first of all, general principles. A forfeiture hearing is an opportunity for the person who was bound by the recognizance or the sureties, if there are any sureties, to be relieved from forfeiture. The onus is on those persons to show that they should be relieved from forfeiture.

That is what is stated in Trotter's text, The Law of Bail in Canada, 2nd Edition. That is at page 473. It is also what the case of Canada v. Horvath says. That is a case I referred to early on in these proceedings. It is reported at [2009] 0.J. No. 4308 at paragraph 27. It is a Court of Appeal of Ontario decision, a five-judge panel, and I have found it very helpful and quite persuasive as far as setting out what kinds of considerations apply at a hearing like this one.

In his text, Trotter also notes that paragraph 2 of section 771 does not provide much guidance as to how these hearings are to be conducted and what criteria should be applied in deciding whether to forfeit some, none or all of the bail amounts. All the provision says is that the Judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture that he considers

proper. One does not get much broader than that as far as a provision that gives a power to a court. So it is clear from that particular provision that the power is a discretionary one.

That is why I found the Horvath case useful, because it contains an overview of the various considerations that ought to come into play when making a decision like the one I have to make today. That case dealt with situations that involved sureties, but I find that many of the principles that are set out in that case can also apply to situations such as this one where there was no surety, especially in this case, I think, because although Mrs. Alookee was not a surety, she was the one who sent the monies to be deposited.

The evidence adduced on August 20th, which was not challenged in any real way by the Crown, was that this money is her money. The evidence also showed that she acted very much as a de facto surety in the circumstances of this case, taking steps to try to get Mr. Alookee to court; she was very aware of his reporting conditions.

Although I agree with the Crown that she does not have any standing on this hearing, I still am of the view that in exercising my discretion I should not disregard her involvement

completely, nor the fact that ultimately the money that stands to be forfeited is hers.

In Horvath the Court recognized the importance of approaching these hearings with the objective of ensuring the effectiveness of the bail system, which is obviously an important consideration. But the Court also said at paragraph 44 that it did not accept that the only way to ensure the effectiveness of the system was to adopt a rigid rule of total forfeiture, absent exceptional circumstances. Rather, the Court favoured a more flexible approach as being more consistent with the broad discretion that is implied by the language of section 771(2), and I agree entirely with that.

At paragraph 51 of the decision the Court outlined a number of factors that can be considered in deciding how to exercise the discretion. All these factors, of course, are worded in terms of the surety, but, as I have said, many are relevant and, in my opinion, can be applied by analogy to cases where there are no sureties. These factors include, for instance, the amount of the recognizance, the question of diligence, whether it is diligence of the surety or diligence of the person bound by the recognizance, the question of means of the people

involved, the question of the conduct that takes place after the breach.

To the extent that the evidence called on August 20th related to the reasons why Mr. Alookee was not in court on May 31st, his actions and that of his mother, both before and after that date, as well as the financial situation that the family faced, that evidence goes to some of these factors I have just identified and is relevant to the question that must now be decided. That is why I felt it was important to have transcripts of that evidence so that what was said at that time be clear.

Counsel acknowledged earlier this week that there would be very little point in having these people testify again about these matters for the purposes of the forfeiture hearing, and, once again, that is a reasonable approach. The transcripts show that their evidence on August 20th, that being the evidence of Mrs. Alookee and the evidence of Mr. Alookee, was not really challenged by the Crown. The cross-examination was geared as eliciting further details and clarifications, but, really, there was no issue taken with what the witnesses were saying about what transpired.

Mrs. Alookee said that Mr. Alookee came to

live with her after he was charged with matters involving his common-law spouse in Repulse Bay and he was required to live outside of that community. She testified that she paid for him to come to Taloyoak to live with her, and she explained that as the trial date approached in April or May she tried to contact Defence counsel to explain their money issues, but that counsel was on holidays. She testified that she had also spoken to counsel sometime before this in February, she thought, and that she had been told that there might be some assistance available for her. When she was not able to get a hold of counsel, she tried to get a points ticket for Mr. Alookee, but, because they were at the last minute, that did not work either.

She explained that the financial problems the family faced around that time stemmed in part from the fact that her husband got diagnosed with cancer in September, 2009 and that she and her husband had to spend extended periods of time in Edmonton while he was being treated. There were expenses associated with all of this and that strained the family's finances.

Mr. Alookee, for his part, testified that he had looked for work while he was on release in Repulse Bay and also after he moved to Taloyoak,

but he did not have any success. He also talked about how he turned himself in to police custody on the very day the warrant was issued and, again, two days later when he was directed to do so.

The exercise of a discretionary power requires the balancing of a lot of factors, and there are quite a few that come out of the evidence and the circumstances of this case; some that militate in favour of forfeiture and others that militate against it.

As far as things that would tend to militate in favour of a forfeiture order, I think the first is the need for the courts to uphold and enforce the bail system and not undermine it. The real effective force of bail and of cash deposits and sureties is that it provides a powerful incentive for a person to attend their trial and comply with conditions, because, if they do not, monetary consequences will follow for themselves, for their loved one who posted their bail or for their sureties, if they have any.

As the Court of Appeal of Ontario put it in Horvath at paragraph 41, our system depends on accused persons attending court, and if accused came to believe that they can fail to attend

court and there would be no consequences as far as bail monies or sureties, the surety system and bail system would be ineffective. That is a consideration that militates in favour of there being a meaningful monetary consequence for the default in this case.

Another consideration is the nature of the default. By this I mean this was a failure to appear at a date set for a jury trial. Prospective jurors were inconvenienced by having to attend court in response to their summonses. There had been subpoenas issued for the May 31st date, and the court file shows that two were issued to residents of Gjoa Haven, and, of course, there was the expense associated with arresting and transporting Mr. Alookee under escort to Yellowknife for his trial.

Another consideration is the effect of the default, which in this case was to delay the trial for some six months. Defence counsel has argued, based on R. v. Wan, [2010] B.C.J. No. 766, that a delay of the trial in this context implies a loss of control by the Court over the movements of the accused for a period of time; in other words, a period of limbo where the system loses track of someone.

The case that Defence case referred to does

make reference to this notion of losing control over the accused, but, again, these comments must be read in the context of the case. In Wan the accused was out on bail, breached his conditions, was arrested and then was taken before the court and his matters were dealt with. There is no indication whatsoever that proceedings were delayed in any way as a result of the default. Whereas in this case, because the default was a failure to appear and it occurred on a trial date, there was a delay in the proceedings, and that is a factor.

The next consideration having to do with the circumstances leading to the breach, and I will get back to this in a moment, but some aspects of that also militate in favour of forfeiture to this extent: The trial had been set a long time ahead of time. Most of the efforts seem to have been made by Mrs. Alookee. Some steps that might have been taken were not taken, such as speaking to the police or Crown or the court to flag these problems that were being encountered.

As for this question that the Crown has asked me to take into account, that being the fact that Mr. Alookee was not prosecuted or sentenced for the breach, I will say this: The Crown argues this militates in favour of

forfeiture. But, with respect, I cannot agree with that. I do not think that the argument used in the Howell case can be used a contrario, because the fact that a person is not charged does not necessarily mean that they got a break. It can simply mean that the authorities recognized that they would not have had a reasonable prospect of conviction on a breach charge. So I really do not see how that argument works. It is the flip side of the consideration given by the Court in Howell to not over-punish someone, but, with respect, I do not think it works in the other direction.

So I have talked about things that would militate in favour of forfeiture. Now I will turn to things that militate against it. Some of these factors go back to the same general categories, but just other angles, other sides of the same coin, if I can put it that way.

The consequences of the default: I have talked about this already as far as the delay of the trial and the inconvenience to prospective jurors and the costs. One very significant consequence of this default is that Mr. Alookee ended up being detained following his failure to attend and he was detained for a number of months. That is not an insignificant

consequence, and, in my view, in the circumstances of this case, it is especially not an insignificant consequence because of the situation that was going on with his family, his father's serious illness and deteriorating health.

I was told today that at the time of the trial Mr. Alookee had not passed away, but the fact is, at the time of the August 20th bail hearing the evidence from Mrs. Alookee was that the prognosis was very poor, which means that while Mr. Alookee was sitting on remand, he was sitting with the knowledge that essentially his father was dying. So I do not think that that is a consequence that can be ignored in terms of the overall picture.

The other aspect is to do with the circumstances of the default itself. I think I should take into account that there were financial pressures on the family due to the father's illness that were beyond the control of Mr. Alookee and of everybody else. So that is one factor. Also, although perhaps more could have been done, some steps were taken on his behalf to try to address this, including contacting counsel, trying to find alternative means of getting a ticket and those other things

that she testified about.

The third factor - and it is one of the ones identified in Horvath - is the behaviour after the default. In this case, I think to be fair, Mr. Alookee could not have been more cooperative with the authorities in turning himself in. It is very clear he was not trying to evade the authorities. On the contrary, according to his mother's testimony, he really wanted to get this matter dealt with.

Another factor that is identified in the case law is the amount of money. In Horvath, the court said at paragraph 46 that in most cases involving relatively small amounts, total forfeiture may be required to adequately enforce what is called the "pull of bail". By that, the Court means the effectiveness of the bail system and the incentive it gives to an accused to comply with conditions. But, of course, what is a relatively small amount? That in itself is a very relative thing.

Based on the evidence about this family's situation, I have no doubt that $2,500 is not a small amount of money. As I have already noted, I do not think that I can ignore the evidence that this is Mrs. Alookee's money, even though, as far as the recognizance that was issued, she

was not named as a surety.

So I have tried to outline the various considerations that I see having relevance here. Part of the reason I have gone on at some length here was that I do find this is one of those cases where there really are factors pointing in all directions. I have considered all these factors, and, I must say, ordinarily in a situation that involves a failure to appear for a jury trial in particular, I would be very much inclined to order full forfeiture or at least partial forfeiture, primarily to promote and uphold the effectiveness of bail principles. I think that in most cases that would be an appropriate way to deal with the matter if I take into consideration the applicable principles and the persuasive guidelines set out in the case that I have referred to several times already. But when a Court exercises broad discretionary powers, it has to be sensitive to the unique circumstances of each individual case.

After having considered all the competing factors carefully, I conclude that given the circumstances that brought about the default, including the financial and personal turmoils that the family was going through at the time, as well as the very direct personal consequences

that Mr. Alookee faced himself as a result of his failure to attend court on May 31st, it is not in this case necessary to forfeit these bail monies to uphold the principles that underlie the bail system.

It has been suggested that I could order the forfeiture of a small amount to symbolically uphold the bail principles, but I have decided against that. I think the forfeiture of a small amount of money, even if it was $200 or $300, might do more harm than good as far as upholding the bail system. It might actually trivialize matters more than anything else. The fact is that but for the very exceptional circumstances in this case, most of all of these monies would have been ordered forfeited. So since I have concluded that in the circumstances that would not be appropriate, I really do not see the point in making what would essentially be a token order.

Unlike the analogy that was made with the situation of a sentencing where a Judge gives one day in jail to an offender, I think in that context there is a point. The Judge sends a message to the offender and leaves a very clear clue for the next Judge, should the person be before the Court again. But in the context of

forfeiture, I do not think that the kind of signal that this would give is the same or can serve the same purpose, and I do not see it as a desirable approach. For these reasons, I decline to order forfeiture of these monies.

Now, the question is what order I should make. Mr. Bran, I can't remember what you requested in your letter, but would it be appropriate for me to direct that the monies be returned to you in trust for Mr. Alookee? I am sure the Registry won't want to mail $2,500 to Taloyoak. So what do you suggest?

MR. BRAN: Your Honour, I don't have a trust account, and I don't believe I am in a position to legally take any money in trust. What I would suggest is issuing a -- and I am not even sure how bail money is normally returned, if it's returned in cash or if it's returned in a cheque.

THE COURT: Okay. Well, I think what I am going to do is I am simply going to make the order that the money -- and I have to order it returned to Mr. Alookee, I think, because Mrs. Alookee, although there is a receipt in her name, the money was ordered deposited for him. She is not a surety. I cannot direct that the money be returned to her. So I will order that it be

returned to Mr. Alookee, and I will speak to the Registry staff to make sure that that is done in a way that is consistent with how they normally proceed so that I do not create problems, and perhaps we can figure out those details later. But do you know, Mr. Alookee still lives with his mother, does he?

MR. BRAN: Your Honour, I am not sure, given the fact that there was an issue with Nunavut matters before the Nunavut Court of Justice. What I could do is I can undertake to contact Mr. Alookee and get a current mailing address and I can provide that to the Court Registry --

THE COURT: Okay.

MR. BRAN: -- probably by the end of tomorrow for mailing purposes.

THE COURT: All right. Well, my order will be that the monies be returned to Mr. Alookee and that counsel provide the Registry with the necessary information to allow that to happen. That should leave it general enough.

I want to thank you, counsel, for your submissions on this. They were very helpful.

I just wanted to add, more as a postscript than anything else, that there is a mechanism in the Criminal Code in the warrant provisions that

provides for an application to be made for the issuance of an arrest warrant when a person has breached or is about to breach a recognizance.

I am not directing it as a criticism at all. I am just raising it as an option that may, in certain circumstances, be open if counsel become aware very shortly before the start of a trial that the accused person will not be in court. That is a mechanism that I think is sometimes used. Of course, it requires communicating with the Crown, because it would be the Crown that would be applying for the warrant, not Defence, but it is a means of getting something in place that can allow a trial to proceed.

It was not the case in this case, but it is a means to, for example, avoid having a court party get on a plane on a Monday morning to a destination when it is known that there will not be a point to that if the person, say, is stuck on the wrong side of Great Bear Lake at breakup time or -- you smile, Mr. Bran, but that has happened.

So I just wanted to mention that, just in case a situation arises in the future where that option could be considered, possibly.

So if there is nothing further from either of you, we will close court.

MR. ST-GERMAIN: Thank you, Your Honour.

MR. BRAN: Thank you, Your Honour.

THE COURT: Thank you, counsel.

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Jill MacDonald, RMR
Court Reporter