R. v. Chocolate 2015 NWTSC 28.cor1

Date corrigendum filed: 2015 06 24
Date: 2015 06 23
Docket: S 1 CR 2015 000037

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

MIKEY CHOCOLATE

Publication Ban: There is a ban on the publication, broadcast or transmission of the evidence taken, the information given or the representations made and the reasons for decision until such time as the trial has concluded, pursuant to **s. 517** of the *Criminal Code*, RSC 1985, Chap C-46

Publication Ban: There is a ban on the publication , broadcast or transmission of any information that could identify the complainant, pursuant to **s. 486.4** of the *Criminal Code*, RSC 1985, Chap C-46

Corrected judgment: A corrigendum was issued on June 24, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

Ruling on Application for judicial interim release.
Heard at Yellowknife, NT, on June 4, 2015
Reasons filed: June 23, 2015

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K. SHANER

Counsel for the Crown: Marc Lecorre, Public Prosecution Service of Canada
Counsel for the Accused: Michael Martin, Legal Aid Commission of the NWT

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[1] On June 4, 2015 Mikey Chocolate was granted judicial interim release, with written reasons to be provided.

BACKGROUND

[2] Mikey Chocolate is charged with sexual assault. The events forming the basis of the charge arose in November of 2014 while he was a serving prisoner at the North Slave Correctional Centre. He has elected trial by judge and jury. A preliminary inquiry has been held. A trial date has not been set.

[3] Mr. Chocolate's prison term ended June 3, 2015 and he sought judicial interim release, more commonly referred to as "bail", pending his trial. He made the application in Chambers on June 1, 2015. He did not bring the application earlier because he was serving a sentence until June 3, 2015.

[4] The Crown opposed release.

THE LEGAL FRAMEWORK

[5] This being the initial application for release, the Crown bore the onus of showing cause that Mr. Chocolate should be detained: *Criminal Code*, s. 515(1).

[6] The right of an accused to be granted reasonable bail in the absence of just cause for detention is guaranteed by s. 11(e) of the *Charter of Rights and Freedoms.* Detention may be justified only on one or more of what are commonly referred to as the primary, secondary and tertiary grounds set out in ss. 515(10) (a), (b) and (c), respectively:

> 515. (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (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
>
> (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.

[7] Crown counsel argued detention was justified on the secondary and tertiary grounds (ss. 515(10)(b) and (c)). With respect to the secondary ground, this position is based on Mr. Chocolate's criminal record and his inability to comply with release conditions in the past, which gives rise to a concern that Mr. Chocolate will commit further offences if he is released. With respect to the tertiary ground, the Crown argues the overall circumstances of the case are such that detention is necessary to maintain public confidence in the justice system.

THE ALLEGATIONS

[8] Crown counsel provided a summary of the allegations which are, at this point, unproven.

[9] The complainant and Mr. Chocolate were both serving prisoners at North Slave Correctional Centre in November of 2014. The complainant and another individual went to Mr. Chocolate's cell to view some of the latter's artwork. The other individual left and so the complainant was alone with Mr. Chocolate. He claims Mr. Chocolate then pulled him into the cell and forced him to have anal sex. The assault lasted approximately fifteen minutes. There were no witnesses, other than the complainant. There is no DNA evidence. The complainant said he was afraid to call for help.

MR. CHOCOLATE'S BACKGROUND

[10] Evidence about Mr. Chocolate's background came from an affidavit he swore in support of his application for bail, as well as his testimony and that of his father, Raymond Mantla.

[11] Mr. Chocolate is an Aboriginal man from Bechokǫ̀, a Tłı̨chǫ community located just outside of Yellowknife, in the Northwest Territories. He is 21 years old. He attended high school until the end of tenth grade.

[12] Mr. Chocolate has an extensive and largely uninterrupted criminal record, starting with convictions in the Youth Court system. His record includes some ten

convictions for failing to comply with court orders between 2009 and 2013 as well as offences for a number of other crimes, many of which are serious.

[13] The first conviction, for assault, dates back to 2009, when Mr. Chocolate would have been 15 or 16. He was sentenced to a year of probation. Four months after that conviction, he was convicted of mischief and failure to comply with a disposition, for which he was sentenced to fifty hours of community service work. A month later, he was again convicted of mischief, as well as one count of failure to comply with a disposition and one count of failure to comply with a recognizance. He received a sentence of 6 months of probation on each of these charges, imposed on September 17, 2009.

[14] Just months later, in February of 2010, Mr. Chocolate was convicted of being disguised with intent to commit an indictable offence, sexual assault, assault causing bodily harm, resisting arrest and failure to comply with a disposition.

[15] Mr. Chocolate's first convictions as an adult were sustained in August of 2012. He would have been just shy of his nineteenth birthday. He was convicted of assault with a weapon and drug possession. He was also convicted at that time of failing to comply with an undertaking and failing to comply with a recognizance.

[16] The following year Mr. Chocolate was convicted of assault, assault causing bodily harm and three counts of failing to comply with an undertaking.

[17] Mr. Chocolate acknowledges alcohol abuse has been a significant influence in his criminal behaviour. During his most recent period of incarceration he attended Alcoholics Anonymous, some individual counselling and he took programming on reintegration. He testified he does not currently drink alcohol, although this is not surprising, given that the use of alcohol and other intoxicants is prohibited in prison. One of the terms of the release plan he proposed was that he abstain from all intoxicating substances.

[18] Mr. Chocolate has some work experience, although it is very limited, no doubt because of the amount of time he has spent incarcerated. In 2010 he worked for approximately one month stocking shelves and assembling bikes at a store. He also worked briefly as a hose man on a water truck in 2011.

[19] Information about the home in which Mr. Chocolate was raised and the level of parental guidance and supervision he received, as well as what his home life is anticipated to be like in the immediate future, came primarily from his father's testimony. It is outlined later in these reasons.

THE PROPOSED RELEASE PLAN

[20] Mr. Chocolate's proposed release plan called for him to live with his parents in their home in Bechokǫ̀. His sister, who is a minor, lives there as well. Mr. Chocolate's mother, Margaret Wanazah, and his father agreed to act as sureties and they would make a $500.00 cash deposit. The home is free of alcohol and other intoxicating substances.

[21] As part of his release plan, Mr. Chocolate proposed a number of conditions, in addition to the mandatory ones. These include maintaining employment, abiding by a curfew, abstaining from intoxicating substances and reporting regularly to the RCMP.

[22] In the immediate future, Mr. Chocolate anticipates fulfilling the condition that he works by helping his father harvest mushrooms this summer near Fort Providence. This would, of course, be temporary, lasting only through the mushroom harvesting season.

[23] During his testimony, Mr. Mantla indicated that once the mushroom harvesting season has ended, he anticipates he will provide Mr. Chocolate with employment in the winter months building ice roads. Mr. Chocolate indicated this was a strong possibility as well. The plan is not definite, but Mr. Mantla has done this in the past and he plans to purchase equipment to it again.

[24] In his affidavit Mr. Chocolate proposed he attend Chief Jimmy Bruno school in Bechokǫ̀ following the mushroom harvesting season, to work on completing high school. No further details were provided about this.

THE PROPOSED SURETIES

[25] Both of Mr. Chocolate's parents have signed acknowledgements confirming they understand the duties of a surety. These were filed during the hearing.

[26] Mr. Mantla testified at the hearing. Ms. Wanazah did not.

[27] During his testimony, Mr. Mantla told the Court his own father attended residential school. Mr. Mantla also went to residential school, attending Grollier Hall in Inuvik. He did not say he was abused while there, but the experience was a very negative one. He was the only student from the Tłı̨chǫ region there at the

time. In addition to being away from his family, he testified he was bullied and teased as a result of being "different" and from another part of the Northwest Territories.

[28] Mr. Mantla acknowledged he was not "there" for Mr. Chocolate when he was growing up. Mr. Mantla has had his own struggles with alcohol and he has had significant contact with the criminal justice system. He has a criminal record on which are recorded some twenty-five convictions, including four convictions for failing to comply with conditions. He conceded these were all related to conditions requiring abstention from drug and alcohol use.

[29] Mr. Mantla has been sober for nearly two years now and he attends counselling as well as Alcoholics Anonymous meetings. He was emphatic in stating there is no alcohol or drug use in his family's home. He feels he is now in a position to be there to teach his son and to provide guidance to him. He is prepared to supervise Mr. Chocolate and he understands that if Mr. Chocolate does not comply with release conditions, he will have to report his son to the police.

[30] As noted, Mr. Mantla will provide employment to his son by having the latter harvest mushrooms. Mr. Chocolate will be supervised personally by Mr. Mantla while they do this. It is possible Mr. Mantla will build ice roads in the winter and, if so, he is prepared to provide employment to Mr. Chocolate in this endeavor as well. Even if he is unable to provide this employment, however, Mr. Mantla will be able to supervise Mr. Chocolate in the home.

[31] Although Ms. Wanazah did not testify, Mr. Chocolate provided information about her in his affidavit. She currently works providing home care to individuals in Bechokǫ̀ and she has worked on an "on-call" basis for the local ambulance service.

[32] Under cross-examination by the Crown, Mr. Chocolate confirmed that his mother acted as a surety for him on one occasion in 2009 when he failed to comply with conditions. There was no information about how the breach came to the attention of authorities and specifically, whether it was Ms. Wanazah who reported the breach as part of her responsibilities as a surety, or someone else.

ISSUES

[33] The main issues are straightforward, namely, whether detention is justified on either the secondary or tertiary grounds. This requires an examination of whether release conditions can be imposed to address the Crown's concerns with respect to both grounds.

[34] A further issue, which counsel were asked to, and did, address, is the applicability of *Gladue* factors to decisions on judicial interim release. I will address this issue first.

ANALYSIS

Applicability of Gladue Factors to Decisions on Judicial Interim Release

[35] What is meant by "*Gladue* factors" is now well-known; however, it is worthwhile setting them out here for the sake of context. Briefly stated, *Gladue* factors are "The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts . . ." *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC) at para 66.

[36] The Supreme Court of Canada described them in more detail as follows:

> [67] The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."
>
> *R v Gladue*

[37] The consideration and application of *Gladue* factors figures most prominently in sentencing: s. 718.2(e) of the *Criminal Code* imposes a statutory

requirement on judges to take these factors into account in imposing sentence on Aboriginal offenders. There are, however, a number of cases from courts throughout Canada in which *Gladue* factors have been applied in decisions on bail. These include *R v Robinson,* 2009 ONCA 205; *R v Oakes,* 2015 ABCA 178; *R v Silversmith,* 2008 CanLii 60168 (OSCJ); and *R v Magill,* 2013 YKTC 8.

[38] In *Robinson,* the Ontario Court of Appeal stated unequivocally its view that *Gladue* factors are valid and important considerations in bail applications:

> [13] It is common ground that principles enunciated in the decision of the Supreme Court of Canada in *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19 have application to the question of bail. However, the application judge cannot apply such principles in a vacuum. Application of the *Gladue* principles would involve consideration of the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts. The exercise would involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular Aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release.

[39] In *R v Magill,* 2013 YKTC 8, Ruddy, C.J. provided a thoughtful and thorough analysis of the rationale for considering socio-economic factors such as employment status, education level and family circumstances, in decisions on pre-trial detention involving Aboriginal accuseds. She noted (at para 24) that while *R v Gladue* and *R v Ipeelee,* [2012] 1 SCR 433, 2012 SCC 13 were written in the context of sentencing, the principles set out in each of those decisions provide guidance to judges in other types of decisions, including bail. She went to state:

> [26] These socioeconomic factors play an equally, if not more important, role at the bail stage of a criminal charge. An accused with a poor employment record, substance abuse issues and an unstable family and community support network is more likely to be detained, even though these are the very results that flow from the Canadian history of colonialism, dislocation and residential schools. A judge has the obligation to evaluate the application of bail criteria to ensure that the result does not serve to perpetuate systemic racial discrimination.

[40] The Crown argues that in the context of bail, *Gladue* factors are relevant only to the tertiary ground. This is because a judge or justice hearing a bail application is required by s. 515(10)(c)(iv) of the *Criminal Code* take into account sentencing implications, that is, whether an accused is potentially facing a lengthy prison term, in determining if pre-trial detention is justified. The Crown argues that sentencing considerations do not come into play in assessing the primary and

secondary grounds and accordingly, the potential sentence plays no role. Thus, the Crown says *Gladue* factors have no application in considering of whether detention is required to ensure an accused attends at trial or to protect the public.

[41] In support of this position, the Crown relies on *R v Anderson,* [2014] 2 SCR 167; 2014 SCC 41, and *R v Chambers,* 2014 YKCA 13. The Crown argues the effect of *Anderson* and *Chambers* is to restrict the application of *Gladue* factors to sentencing and any case law on the application of *Gladue* factors decided before them, including *Robinson* and *Magill,* has no precedential value.

[42] With respect, I disagree with the Crown's position about the effect of these cases. Neither *Anderson,* nor *Chambers* dealt with the question of whether *Gladue* factors are appropriate and/or necessary considerations for judges or justices in bail hearings.

[43] The *Anderson* case was about prosecutorial discretion. It involved an Aboriginal offender who was convicted of impaired driving, which attracts a mandatory minimum sentence for subsequent convictions, provided the Crown gives notice of intention to seek greater punishment to the accused.

[44] Two issues were raised. The first was whether s. 7 of the *Charter* required the *prosecutor* to consider an accused's Aboriginal status when making decisions which would ultimately limit the sentencing options available to a judge. The second issue was whether the decision to seek a greater punishment was a matter of prosecutorial discretion and if so, upon what standard it could be reviewed.

[45] Moldaver, J., rejected the argument that prosecutors have a constitutional duty to consider *Gladue* factors in deciding how to proceed against an Aboriginal accused and he confirmed the statutory duty of judges to consider *Gladue* factors in sentencing, which arises under s. 718.2(e) of the *Criminal Code* (at paras 18-28). The issue of whether *Gladue* factors should be applied by a judge or justice in bail hearings was not before him, however, and certainly, he did not purport to overrule, among others, the Courts of Appeal of Alberta and Ontario on this issue.

[46] *R v Chambers* was decided in the context of determining how much credit an Aboriginal offender should receive for pre-sentence custody under s. 719(3.1) of the *Criminal Code*. A key issue for the Yukon Court of Appeal was whether the sentencing judge erred in concluding she was required *constitutionally* (pursuant to

ss. 7 and 15 of the *Charter*) to apply *Gladue* factors in every step of the sentencing process.

[47] On this issue, Bauman, C.J.A., determined the sentencing judge erred because she elevated the statutory direction in s. 718.2(e) to consider *Gladue* factors in sentencing Aboriginal offenders "to the level of a stand-alone and pervasive *Charter* right or direction" (at para 72).

[48] I do not interpret *R v Chambers* as standing for the proposition that the socio-economic factors identified in *Gladue* are not appropriate consideration in bail applications. That question was not before the Yukon Court of Appeal. Accordingly, like *Anderson*, the *Chambers* case does not have the sweeping implications the Crown suggests it does.

[49] In my view, honouring the constitutional right to reasonable bail requires consideration of the socio-economic factors present in the life of *any* accused, regardless of whether they are Aboriginal. For many Aboriginal people who come before the courts, however, the factors identified in *Gladue* will form a large part of their overall socio-economic context. It would be unreasonable and unfair to conclude detention is justified based solely on an accused's criminal record and/or the circumstances of the alleged offence without considering the role *Gladue* factors may have played in leading to that person committing criminal acts in the past, being charged again and, consequently, seeking bail. There simply must be more than a superficial review of an accused's past criminal conduct and/or the circumstances leading to the current charge.

[50] An examination of the intergenerational impact of the residential school system, cultural isolation, substance abuse, family dysfunction, poverty, inadequate housing, low education levels and un- or underemployment on an Aboriginal offender may inform questions about *why* an accused has an extensive criminal record and, if applicable, *why* that person has demonstrated an inability to comply with pre-trial release conditions in the past. They will also inform the decision about whether, given the accused's circumstances, there are release conditions which can be imposed so that future compliance is realistic and concerns about securing attendance at trial, public safety and overall public confidence in the justice system are meaningfully addressed.

[51] In summary, the socio-economic factors identified in *Gladue* are necessary and relevant considerations in determining whether detention is justified on any of the three grounds in s. 515(10) of the *Criminal Code.*

Is Mr. Chocolate's Detention Justified on the Secondary Ground?

[52] In arguing detention is justified on the secondary ground, Crown counsel pointed to the significant number of convictions on Mr. Chocolate's record, including those sustained as a result of breaching court ordered conditions. The Crown argued his record is evidence of a substantial likelihood Mr. Chocolate would commit more crimes if released. The Crown also suggested it is unlikely either of the two sureties could keep Mr. Chocolate from engaging in criminal activity or breaching the terms of his release any more effectively than they were able to in the past. Finally, the Crown argued the release plan proposed is insufficient.

[53] The Crown's concern about a substantial likelihood that Mr. Chocolate will commit further crimes if released is not without foundation. On its face, Mr. Chocolate's record is dismal. He has sustained numerous convictions in a short period of time, with little interruption. There are a number of convictions for violent offences on Mr. Chocolate's record, including a prior conviction for sexual assault. The offence with which he is currently charged is a serious one. The Crown also draws attention to the numerous convictions resulting from non-compliance with court orders and directions.

[54] In my view, the Crown's concerns can be addressed through a combination of appropriate supervision, which has not been available for Mr. Chocolate in the past, and strict, but realistic, conditions.

[55] A look at Mr. Chocolate's personal circumstances provides some explanation as to why he appears to have had such difficulty in complying with court ordered conditions in the past. Most of Mr. Chocolate's past encounters with the justice system occurred while he *should* have been under parental supervision, but at a time when it was not available to him because of what was going on in his family. From the evidence it appears he was often left to his own devices, with no guidance or supervision, and he got into trouble.

[56] I inferred from Mr. Mantla's testimony that his own problems with alcohol contributed in a significant way to a dysfunctional family and home environment

in which Mr. Chocolate spent his childhood. It does not take a great leap in logic to conclude that a person with an alcohol dependency, who has frequent contact with the justice system, may not make being a responsible parent a priority. Indeed, Mr. Mantla admitted that in the past, he failed to keep his son from breaking the law. He stated he "did not really talk to Mikey back then" and that he was not "there" for his son when he was getting into trouble.

[57] Mr. Mantla's personal circumstances, which, no doubt, had a negative effect upon not only Mr. Chocolate, but the entire family, have changed substantially. As noted, Mr. Mantla has been sober for nearly two years. He attends counselling and Alcoholics Anonymous. He has a schedule which allows him to supervise closely Mr. Chocolate's activities and compliance. He is prepared to provide summer work to Mr. Chocolate through his mushroom harvesting activities, which will take place on the land. In the winter, there is a possibility he will be able to keep Mr. Chocolate employed building ice roads. Should that plan not come to fruition, he is nevertheless prepared to supervise Mr. Mantla closely.

[58] With respect to the sureties, I am satisfied Mr. Mantla is able to provide effective supervision. Having Ms. Wanazah there to supervise as well will contribute to successful supervision.

[59] Turning to the Crown's concerns about the sufficiency of the release plan, I agree there are aspects of the proposed release plan which are problematic. Despite the strength of the sureties, what Mr. Chocolate proposed as conditions would not provide for an adequate supervision of, and control over, Mr. Chocolate's activities and movement in the community. Tight control is necessary, given his record and anything short of very strict conditions would simply set up Mr. Chocolate for failure.

[60] The proposed condition requiring Mr. Chocolate to attend high school in Bechokǫ̀ this coming fall is unrealistic. No evidence was presented about what the school is capable of offering for programming and support for a student in Mr. Chocolate's circumstances. Moreover, there was no evidence provided at the hearing about any efforts Mr. Chocolate himself has made to register for and attend school. Finally, it is abundantly clear Mr. Chocolate would require close supervision upon release, both to protect the public and to promote compliance. I am not convinced a school environment would allow for, or could realistically provide, the degree of supervision he requires.

[61] Imposing a curfew is also insufficient. Having Mr. Chocolate abide by a curfew, but otherwise be free to move about in the community for potentially long periods of time, does not permit adequate supervision. Requiring Mr. Chocolate to remain at his residence at all times, with certain reasonable exceptions, would, however, minimize opportunities to breach his conditions or commit other offences. Reasonable exceptions are things like working, going to the RCMP detachment to comply with reporting requirements or attending a medical appointment.

[62] Mr. Chocolate acknowledged many of his encounters with the justice system found their roots in alcohol abuse. He proposes that he abstain from alcohol and drugs while on bail. It is prudent to impose this condition and, given Mr. Chocolate's participation in Alcoholics Anonymous while he was serving his last term of incarceration, as well as the fact he will be living in a home free of intoxicants, it is realistic to expect he will have the ability to comply.

[63] In summary, there is a reasonable basis for the Crown's concern that Mr. Chocolate would re-offend if released. These can, however, be addressed by the combination of reliable sureties who are prepared to supervise him and the imposition of strict conditions which limit substantially movement in the community and the opportunity to engage in criminal behaviour. A full list of the conditions is set out at the end of these reasons.

Justification of Detention on the Tertiary Ground: Public Confidence

[64] During argument both counsel referred to *R v St. Cloud*, 2015 SCC 27, a recent decision respecting the interpretation and application of the tertiary ground. Wagner, J., distilled the principles to be applied in determining whether detention is justified on the tertiary ground. It is useful to set them out here:

> [87] I would summarize the essential principles that must guide justices in applying s. 515(10)(*c*) *Criminal Code* as follows:
>
> - Section 515(10)(*c*) *Criminal Code.* does not create a residual ground for detention that applies only where the first two grounds for detention ((*a*) and (*b*)) are not satisfied. It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.

- Section 515(10)(c) *Criminal Code* must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare cases or exceptional circumstances or only to certain types of crimes.

- The four circumstances listed in s. 515(10)(c) *Criminal Code* are not exhaustive.

- A court must not order detention automatically even where the four listed circumstances support such a result.

- The court must instead consider all the circumstances of each case, paying particular attention to the four listed circumstances.

- The question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide the analysis.

- No single circumstance is determinative. The justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified.

- This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. This is the test to be met under s. 515(10)(c).

- To answer this question, the court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.

- This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.

[65] Crown counsel made submissions with respect to each of the four circumstances in s. 515(10)(c), namely: the apparent strength of the Crown's case, the gravity of the offence, the alleged circumstances surrounding the commission of the offence and the possibility of a lengthy prison term if those allegations are proved.

[66] With respect to the apparent strength of the case, Crown counsel acknowledged there is not an overwhelming amount of evidence against Mr. Chocolate. There are no eye-witnesses and there is no physical evidence,

including DNA evidence. The event was not recorded in any way, as it was in *St. Cloud.* The case will come down to a matter of credibility between the complainant and Mr. Chocolate. Crown counsel characterized the case against Mr. Chocolate as "fair". Based on what was before me, this is a reasonable characterization.

[67] Turning to the gravity of the offence, sexual assault carries with it a maximum penalty of ten years imprisonment when prosecuted by indictment. Compared to the maximum sentences for other offences, it is not among the most grave, but rather, falls close to the midpoint of the continuum. This is not, of course, to say sexual assault is not a very serious offence with wide-ranging consequences for victims. Indeed, there is no shortage of case law in this jurisdiction to confirm this. The impact on victims can be, and often is, significant and long-lasting. For the purposes of bail, however, its "gravity" or seriousness must be determined based on the maximum sentence (and the minimum sentence, if there is one) for the offence, compared to other *Criminal Code* offences: *R v St. Cloud*, at para 60.

[68] By any standard, the circumstances under which this particular sexual assault is alleged to have taken place are very serious. They represent a significant violation of the complainant's sexual integrity. The complainant was pulled into a prison cell by Mr. Chocolate and forced to have anal sex. The sexual assault lasted for fifteen minutes, a relatively long period of time. It was opportunistic, tremendously invasive and it involved a degree of violence.

[69] If Mr. Chocolate is convicted, he is, potentially, facing incarceration in a penitentiary. That means he would serve his sentence in southern Canada, removed even further from his family and home. The invasive and violent nature of this particular sexual assault would place it into the category of "major" sexual assault and engage the three year starting point for sentence: *R v AJPJ*, 2011 NWTCA 02. The circumstances outlined above would be aggravating factors which, combined with Mr. Chocolate's criminal record, would serve to support the imposition of a period of incarceration potentially longer than three years.

[70] The sentencing judge would be required by s. 718.2(e) of the *Criminal Code* to take *Gladue* factors into account in determining an appropriate sentence and that could, of course, affect the length of incarceration. In some cases, *Gladue* factors will be shown to diminish the responsibility of the offender, such that a lesser period of incarceration is deemed appropriate. Nevertheless, there is a strong

likelihood Mr. Chocolate will be incarcerated for some period of time if convicted, which is a serious consequence.

[71] In *St. Cloud*, Wagner, J., confirmed the four factors enumerated in s. 515(10)(c) are not exhaustive and thus it is open to me to take other considerations into account. One such consideration is the length of time Mr. Chocolate will have to wait to get to trial.

[72] Mr. Chocolate's charges are relatively recent. Things have been moving forward - the preliminary inquiry was held on March 26, 2015 – but the trial has not yet been scheduled. It is a reality that the Court's schedule is heavy and jury trials must be scheduled quite far in advance. Although there is nothing to suggest there has been or will be any undue delay, it would be unrealistic to expect Mr. Chocolate's matter will be heard within the year. The result is that he would stand to be detained without trial for a significant period of time.

[73] While the alleged circumstances of the offence are very serious and Mr. Chocolate, if convicted, may be liable to incarceration in a penitentiary, the gravity of the offence, the relative weakness of the Crown's case and the fact that the trial has not yet been set combine to militate against detention. As noted above, sexual assault is an offence with serious implications for victims, but it is not, based on its maximum sentence, among the most grave in the *Criminal Code.* Further, there is no physical evidence, nor independent witness to the alleged events. The evidence about the allegations will come solely through the oral testimony of the complainant and the case will be decided almost entirely on the complainant's credibility.

[74] It is trite that pre-trial detention is the exception, and not the rule. In the present circumstances, depriving Mr. Chocolate of his freedom while he awaits a trial which has not been set down would likely cause a reasonable person, properly informed about the legislative provisions, the values captured in the *Charter* and the actual circumstances of the case, to *lose* confidence in the justice system and its commitment to honouring the presumption of innocence and the right to reasonable bail, among others.

[75] Accordingly, I am not satisfied detention is justified on the tertiary ground.

CONCLUSION

[76] For the foregoing reasons, Mr. Chocolate's application of judicial interim release was granted and he was ordered released on a Recognizance with the following conditions, in addition to the statutory conditions imposed by the *Criminal Code:*

a. Raymond Mantla and Margaret Wanazah shall act as sureties;
b. There must be a cash deposit of $500.00
c. Mr. Chocolate shall have no contact, direct or indirect, with the complainant;
d. Mr. Chocolate shall reside at his parents' home, House 342 Bechokǫ̀ unless he obtains the Court's permission to change his residence;
e. Mr. Chocolate must remain at that residence at all times except:
    - to attend court as required;
    - to attend medical or dental appointments, including those that may be in Yellowknife;
    - by reasons of a medical emergency;
    - to meet with his lawyer or a court worker;
    - to work, including working with his father, Raymond Mantla; or
    - to comply with reporting requirements;

f. Mr. Chocolate must present himself at the door of the residence, or answer the telephone (as the case may be) in person, to allow the authorities to monitor his compliance with these conditions;
g. Mr. Chocolate must abstain from alcohol and drugs, other than those prescribed to him by a licensed medical practitioner;
h. Mr. Chocolate must report to the RCMP in Bechokǫ̀ on Mondays between the hours of 9:00 am and 5:00 pm by telephone or in person;
i. That if it is necessary for him to leave Bechokǫ̀ for medical and dental appointments or treatment, for work or to meet with his lawyer, or for court, Mr. Chocolate must advise the RCMP in Bechokǫ̀ at least 24 hours in advance, except in the case of a medical emergency;

j. Mr. Chocolate must remain in the Northwest Territories at all times; and
k. Mr. Chocolate must carry a copy of his recognizance with him at all times when he is away from his residence.

"K. Shaner"

K.Shaner
J.S.C.

Dated at Yellowknife, NT, this
23rd day of June 2015

Counsel for the Crown: Marc Lecorre
Public Prosecution Service of Canada

Counsel for the Accused: Michael Martin
Legal Aid Commission of the NWT

Corrigendum of the Reasons for Judgment

of

The Honourable Justice K. Shaner

1. Errors occurred in Paragraphs 56 and 23. Paragraphs 56 and 23 read:

[56] I inferred from Mr. Mantla's testimony that own his problems with alcohol (…)

[23] During his testimony, Mr. Mantla indicated that once the mushroom harvesting seasons (…).

2. Paragraphs 56 and 23 have been corrected to read:

[56] I inferred from M. Mantla's testimony that <u>his own problems</u> with alcohol (…)

[23] During his testimony, Mr. Mantla indicated that once the mushroom harvesting <u>season</u> (…)

3. The citation has been amended to read:

Citation: *R. v. Chocolate 2015 NWTSC 28.cor1*

(Changed text to document has been underlined.)

S-1-CR 2015-000037

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

- and –

MIKEY CHOCOLATE

Corrected judgment: A corrigendum was issued on June 24, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE K. SHANER