R. v. Kuptana, 2017 NWTSC 4 S-1-CR-2015-000118

 S-1-CR-2015-000119

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

 IN THE MATTER OF:

 HER MAJESTY THE QUEEN

 - V -

 MATTHEW JAMES KUPTANA

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 Transcript of the Decision by The Honourable Justice

 S. H. Smallwood on the application to change plea,

 sitting in Yellowknife, in the Northwest Territories,

 on the 23rd day of August, 2016.

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 APPEARANCES:

 Ms. W. Miller: Counsel for the Crown

 Mr. J. Bran: Counsel for the Defence

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 Charges under s. 271 x 2 Criminal Code of Canada

 No information shall be published in any document or

 broadcast or transmitted in any way which could identify

 the victim or a witness in these proceedings pursuant to

 s. 486.4 of the Criminal Code of Canada

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 1 MS. MILLER: Good afternoon, Your Honour.

 2 THE COURT: Good afternoon.

 3 MR. BRAN: Good afternoon. If there

 4 are no concerns or objections I'd ask that

 5 Mr. Kuptana be able to sit with me at counsel

 6 table.

 7 THE COURT: Any concerns?

 8 POLICE OFFICER: No concerns, Your Honour.

 9 THE COURT: Thank you. You can sit

 10 beside your lawyer.

 11 Matthew James Kuptana is applying to

 12 change his guilty plea to sexual assault,

 13 which is alleged to have been committed against

 14 M. K. on April 26th, 2015. Mr. Kuptana asserts

 15 that as a result of the death of a relative that

 16 he was not thinking clearly and he was confused

 17 when he entered his guilty plea in this court.

 18 Defence counsel has also referred to that

 19 there was no confirmation of the guilty plea

 20 in the transcript of events, which was prepared,

 21 apparently questioning whether the guilty plea

 22 was validly recorded.

 23 Mr. Kuptana was charged on April 27th,

 24 2015, with committing a sexual assault allegedly

 25 on M. K. the day before. He was released on

 26 a promise to appear, which was confirmed by

 27 a justice on April 27th, 2015. On July 28th,

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 1 2015, he appeared in court with counsel. At

 2 that time reading of the charge was waived

 3 and the Crown elected to proceed by indictment,

 4 and the accused elected trial by judge and

 5 jury, requesting a preliminary inquiry. The

 6 matter was adjourned to September 1st, 2015,

 7 to confirm the preliminary inquiry date, and

 8 also to September 22nd, 2015, for the preliminary

 9 inquiry. On September 1st, 2015, Mr. Kuptana

 10 appeared again with different counsel. At that

 11 time the matter was adjourned to September 15th,

 12 2015, to confirm the date, and the preliminary

 13 inquiry date of September 22nd, 2015, was also

 14 maintained.

 15 Mr. Kuptana was arrested and charged with

 16 committing another sexual assault, this time

 17 allegedly on C. K., on September 19th, 2015.

 18 Both matters were brought before a Justice

 19 of the Peace on September 19th, 2015, and

 20 the accused was remanded in custody over to

 21 September 22nd, 2015. On that date Mr. Kuptana

 22 appeared in Territorial Court on both sexual

 23 assault charges. A lawyer, Michael Martin,

 24 appeared with him, and the matters were

 25 adjourned to September 29th, 2015. The

 26 preliminary inquiry did not proceed on

 27 that date.

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 1 On September 29th, 2015, Mr. Martin

 2 appeared for Mr. Kuptana. At that time the

 3 Crown proceeded by indictment on the September

 4 19th, 2015 sexual assault charge, and both

 5 sexual assault matters were adjourned to

 6 October 6th, 2015. On October 6th, 2015,

 7 Mr. Kuptana appeared again with Mr. Martin.

 8 He elected trial by judge alone on the September

 9 19th, 2015 sexual assault charge, and re-elected

 10 to trial by judge alone on the April 26th, 2015

 11 sexual assault charge. The preliminary inquiry

 12 was waived and Mr. Kuptana was ordered to stand

 13 trial on both charges.

 14 The Crown subsequently filed indictments

 15 on both sexual assault charges. On December

 16 14th, 2015, Mr. Kuptana appeared in this court

 17 with Mr. Martin as his counsel. He was arraigned

 18 on both sexual assault charges and guilty pleas

 19 were recorded on both counts. The matter was

 20 adjourned to January 4th, 2016, so that counsel

 21 could submit their availability for a sentencing

 22 date to be held in Inuvik. On January 4th,

 23 2016, Mr. Martin appeared for the accused and

 24 the matter was scheduled for April 18th, 2016,

 25 in Inuvik for sentencing.

 26 On April 13th, 2016, Mr. Martin applied

 27 and was granted permission to be removed from

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 1 the record. Mr. Kuptana was present in court

 2 and the matter was adjourned to May 2nd, 2016,

 3 for new counsel, Mr. Bran, to review the file

 4 and to meet with Mr. Kuptana. On May 2nd,

 5 2016, Mr. Bran appeared for Mr. Kuptana and

 6 advised that Mr. Kuptana wished to change one

 7 of his pleas from guilty to not guilty. The

 8 application to change Mr. Kuptana's plea of

 9 guilty to the sexual assault alleged to have

 10 been committed on M. K. on April 26th, 2015,

 11 was subsequently heard before me on August

 12 8th, 2016.

 13 No affidavits were filed on the application.

 14 Mr. Kuptana testified regarding the circumstances

 15 surrounding the entry of his guilty pleas. The

 16 transcript of proceedings from December 14th,

 17 2015, has been filed, as well as the criminal

 18 record of the accused. While it is somewhat

 19 lengthy I am going to re-produce what was said

 20 before Justice Shaner in entering the pleas as

 21 it is relevant to the application:

 22

 23 COURT CLERK: Matthew James Kuptana,

 24 on or about the -- you stand charged

 25 that on or about the 19th day of

 26 September, 2015, at or near the

 27 Town of Inuvik, in the Northwest

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 1 Territories, did commit a sexual

 2 assault on C. K., contrary to

 3 Section 271 of the Criminal Code.

 4 Do you understand the charge as

 5 it is read to you?

 6 ACCUSED: Yes.

 7 COURT CLERK: How do you plead to

 8 this charge, guilty or not guilty?

 9 MR. MARTIN: The plea is guilty.

 10 Correct, Mr. Kuptana?

 11 ACCUSED: Yes.

 12 COURT CLERK: The accused pleads

 13 guilty, Your Honour.

 14 THE COURT: Thank you. Mr. Martin,

 15 have you discussed the provisions

 16 of Section 606 of the Criminal Code?

 17 MR. MARTIN: Yes, I have reviewed

 18 Section 606(1.1) of the Code with

 19 him, Your Honour. I am satisfied

 20 that it is fully informed and

 21 voluntary, complying with that

 22 section. He understands he's

 23 giving up his right to a trial,

 24 that there will be an entry

 25 on the criminal record. He's

 26 admitting the essential elements

 27 of the offence, and he understands

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 1 the Court is not bound by any

 2 submissions made between the

 3 parties.

 4 THE COURT: Thank you. I will

 5 ask the clerk to then arraign

 6 Mr. Kuptana and take his plea

 7 on the other matter, which is

 8 S-1-CR-2015-118.

 9 COURT CLERK: Matthew James Kuptana,

 10 you stand charged that on or about

 11 the 26th day of April, 2015, at

 12 or near the Town of Inuvik, in the

 13 Northwest Territories, did commit

 14 a sexual assault on M. K., contrary

 15 to Section 271 of the Criminal Code.

 16 Do you understand this charge as it

 17 is read to you?

 18 ACCUSED: Yes.

 19 COURT CLERK: How do you plead to

 20 this charge, guilty or not guilty?

 21 MR. MARTIN: The plea to that

 22 is guilty as well. Correct,

 23 Mr. Kuptana?

 24 ACCUSED: (No verbal response).

 25 COURT CLERK: Thank you.

 26 MR. MARTIN: And again, I'm

 27 satisfied it complies with

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 1 Section 606(1.1).

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 3 Following this counsel and the Court

 4 discussed scheduling of the sentencing

 5 before adjourning the matter to January

 6 4th, 2016. It is the second charge that

 7 Mr. Kuptana now wishes to change his plea

 8 to not guilty.

 9 On the application Mr. Kuptana testified

 10 that he is 46 years old. He grew up in

 11 Ulukhaktok and speaks English and Inuvialuktun,

 12 although he prefers to speak Inuvialuktun.

 13 He attended school up to grade 5 but did

 14 not complete that grade. At the time of

 15 his arrest he was living with his common-law

 16 partner in Inuvik and he was working full-time

 17 as a security guard at the hospital.

 18 Mr. Kuptana testified that his nephew,

 19 Alex Akhiatak, was living in Ulukhaktok. He

 20 had contacted Mr. Kuptana on Facebook, asking

 21 if he could stay with him for a few weeks.

 22 Mr. Kuptana said no because he did not have

 23 enough room at his house, and that about four

 24 days later, on July 1st, 2015, Mr. Akhiatak

 25 committed suicide. Mr. Kuptana testified that

 26 afterwards he felt bad and blamed himself and

 27 he began drinking a lot.

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 1 Following his arrest on September 19th,

 2 2015, Mr. Kuptana was remanded into custody.

 3 In his testimony Mr. Kuptana agreed that

 4 he had reviewed the charges with a lawyer,

 5 he had discussed entering the pleas with

 6 a lawyer, he had reviewed the offer from

 7 the Crown with a lawyer, and that he gave

 8 instructions to his lawyer to take the deal,

 9 that he came to court and entered guilty pleas

 10 to both counts of sexual assault, and that when

 11 he entered his guilty pleas he knew what was

 12 going to happen afterwards.

 13 When asked to explain what he was thinking

 14 when he pled guilty Mr. Kuptana testified that

 15 he was not really thinking and was grieving.

 16 He described other relatives who passed away

 17 while he was in custody and he had been grieving

 18 for several months. Mr. Kuptana was asked

 19 whether his feelings caused confusion in court,

 20 to which he responded "yeah." When he was asked

 21 about what he was confused about he said that

 22 he was grieving his nephew and blamed himself.

 23 He said that he was confused in court because

 24 he was grieving the loss of his family and

 25 was stressed out because of the loss of family

 26 members.

 27 Mr. Kuptana was asked about whether he

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 1 told anyone, including his lawyer, that he

 2 was confused, and he responded no, that he

 3 kept it to himself. In cross-examination,

 4 Mr. Kuptana acknowledged that he had a

 5 criminal record, which was entered as an

 6 exhibit. Mr. Kuptana has 13 entries on his

 7 criminal record, starting in 1992 and continuing

 8 to 2014. He has been convicted for six offences

 9 against the administration of justice, four

 10 offences of violence, two drug offences and

 11 a property offence.

 12 Mr. Kuptana agreed that he had been in

 13 court before, he had entered guilty pleas before,

 14 and he knew that a guilty plea meant that there

 15 would not be a trial. He agreed that he had

 16 spoken to a lawyer about the charges, knew that

 17 there was an offer from the Crown that dealt with

 18 both charges, and knew that the date in court in

 19 December was to enter his pleas to the charges.

 20 Mr. Kuptana agreed that he understood that

 21 he was going to enter guilty pleas to both sexual

 22 assault charges, and he agreed that he understood

 23 what was going on in court and that he did

 24 enter guilty pleas to both counts. Mr. Kuptana

 25 referred in cross-examination to being confused,

 26 but was not able to articulate clearly what part

 27 of the process in court that he was confused

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 1 about. His responses to the questions about

 2 his confusion frequently referred to the fact

 3 that he was grieving at the time.

 4 A guilty plea entered in open court by

 5 an accused who is represented by counsel is

 6 presumed to be a valid plea. Where the accused

 7 seeks to set aside the plea he bears the onus

 8 of demonstrating that the plea is not valid,

 9 R. v. Eastmond, 2001 CanLII 7498, paragraph 6.

 10 The Supreme Court of Canada in Edgey

 11 [1975] 2 S.C.R. 426 held that an accused

 12 may change his plea if there are valid

 13 grounds for doing so. The Supreme Court

 14 did not specifically determine what constituted

 15 valid grounds, but gave non-exhaustive examples,

 16 such as the accused never intended to admit

 17 a fact which is an essential element of the

 18 offence, or the accused may have misapprehended

 19 the nature and/or effect of the guilty plea,

 20 or never intended to plead guilty at all.

 21 Where a valid ground has been established

 22 the presiding judge then has the discretion

 23 to strike the plea of guilty.

 24 Dealing first with the issue of whether

 25 the accused entered a plea of guilt. While

 26 the transcript does not record a verbal response

 27 when the accused was asked by his counsel whether

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 1 he agreed that he was pleading guilty, it is

 2 apparent that it was the accused's intention

 3 to plead guilty, and that is what transpired

 4 in the courtroom. The plea of guilty was

 5 stated by Mr. Martin, counsel for Mr. Kuptana,

 6 and counsel are permitted to state the plea

 7 on behalf of the accused when the accused is

 8 present.

 9 There is no indication on the transcript

 10 that the accused did not agree to the plea of

 11 guilty, and everyone, the judge, crown counsel,

 12 defence counsel, the court clerk and the accused,

 13 proceeded on the basis that the accused had pled

 14 guilty. In addition, the accused testified on

 15 the application that he intended to plead guilty

 16 and that it was his recollection that he had pled

 17 guilty. In the circumstances I conclude that the

 18 accused did plead guilty on December 14th, 2015,

 19 to the sexual assault on M. K.

 20 With respect to the plea, the accused

 21 testified that he had reviewed the charges

 22 with a lawyer, he had discussed entering the

 23 pleas with a lawyer, he had reviewed the offer

 24 from the Crown with a lawyer, he gave his lawyer

 25 instructions to take the deal that had been

 26 offered, he came to court with the intention

 27 of entering guilty pleas to both counts of

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 1 sexual assault, and did enter guilty pleas

 2 to both counts of sexual assault.

 3 Mr. Kuptana also testified that when

 4 he entered his guilty pleas he knew what

 5 was going to happen after. The accused,

 6 while not highly educated, was familiar with

 7 the court process, having been convicted for

 8 other offences as recently as 2014, and having

 9 agreed that he had pled guilty to other offences

 10 before. It cannot be said that the accused

 11 misapprehended the nature and/or effect of the

 12 guilty plea or never intended to plead guilty

 13 at all.

 14 The argument of the accused centers

 15 around his confusion at the time and his

 16 ongoing grieving process as a result of the

 17 death of his nephew and another relative prior

 18 to entering his plea. It is not surprising

 19 that the events that Mr. Kuptana described

 20 caused him grief, caused him to blame himself

 21 for his nephew's death, and that the grieving

 22 process would be one that would be ongoing for

 23 months, if not longer. The death of a relative

 24 is difficult, and when you are in custody it can

 25 be difficult to deal with without the support

 26 of loved ones or family. However, there is no

 27 suggestion that as a result of this Mr. Kuptana

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 1 did not understand or know what he was doing when

 2 he entered his guilty plea. Indeed, his evidence

 3 was that he did know what he was doing.

 4 In the end, I am not certain what Mr.

 5 Kuptana was confused about, but his confusion

 6 does not appear to relate to anything regarding

 7 the court process itself or what transpired in

 8 the courtroom on December 14th, 2015. There

 9 has been no evidence presented that suggests

 10 that the accused does not intend or never

 11 intended to admit a fact which is an essential

 12 ingredient of the offence. That issue has not

 13 been explored. It has not been argued that the

 14 accused was under a misapprehension regarding the

 15 facts which constitute an essential ingredient of

 16 the offence.

 17 In the circumstances I am not satisfied

 18 that Mr. Kuptana has demonstrated valid grounds

 19 for being permitted to change his plea, and

 20 I decline to exercise my discretion to permit

 21 him to change his plea from guilty to the

 22 charge of having sexually assaulted M. K.

 23 Counsel, in terms of providing availability,

 24 I take it, Mr. Bran, that Mr. Kuptana still

 25 wishes to have the sentencing occur in Inuvik.

 26 Was that the plan?

 27 MR. BRAN: Mr. Kuptana is advising me

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 1 that he does wish to continue with the process

 2 taking place in Inuvik, and he wishes to have

 3 a translator for his next appearance so that

 4 he can have that hearing in his own language.

 5 THE COURT: In terms of counsel providing

 6 availability, how long will you need? I am

 7 assuming a day in Inuvik or do you think it

 8 will be longer?

 9 MS. MILLER: Well, Your Honour, I did

 10 have a conversation with Mr. Bran prior to

 11 the decision about perhaps we may need a

 12 pre-sentencing conference to determine length.

 13 Depending on what may or may not be admitted

 14 as far as the facts go there could be an issue

 15 there. So perhaps if we could send in dates

 16 and actually have a pre-sentencing conference.

 17 It does sound a bit odd, but I think that that's

 18 the best way to move forward without wasting any

 19 time as far as getting up there and something

 20 happening in Inuvik. It's the Crown's view that

 21 we should probably try to sort things out before

 22 we set a date and go up there, and the Crown can

 23 send in availability for a short conference with

 24 a judge, and I will speak to Mr. Bran further as

 25 well as to anticipating possible issues before

 26 we go up there.

 27 THE COURT: Mr. Bran?

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 1 MR. BRAN: I do agree that perhaps a

 2 few steps should be taken or can be taken prior

 3 to making all of the arrangements for a date

 4 in Inuvik. What I'm thinking might be helpful

 5 as well is possibly having an Agreed Statement

 6 of Facts drafted, provided to me by the Crown.

 7 Perhaps then, once that has been done perhaps

 8 we can attempt to have that filed in court with

 9 Mr. Kuptana being here in person. If that's

 10 something that's agreeable to my friend and

 11 the Court perhaps his matters can be adjourned

 12 to a docket day here in Yellowknife, perhaps

 13 September the 12th, and if an Agreed Statement

 14 of Facts can then be drafted, reviewed in court

 15 with the accused present, if that process can

 16 take place on say the 12th, if everything goes

 17 smoothly with that process then perhaps the

 18 next step could be to actually set a sentencing

 19 date, knowing that we have an Agreed Statement

 20 of Facts, we know that it's accepted by the

 21 accused, who will confirm that in court in

 22 person. I think that might be a prudent

 23 step if everybody's in agreement with that.

 24 THE COURT: Okay.

 25 MS. MILLER: That's fine, Your Honour.

 26 I actually was going to send something to

 27 Mr. Bran for review. Whether or not it

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 1 happens in court or with him reviewing it

 2 with Mr. Kuptana it's agreeable to the Crown.

 3 THE COURT: We will then adjourn it

 4 to September 12th, to be spoken to on the

 5 chambers list at 10 a.m., and counsel can

 6 hopefully exchange an Agreed Statement of

 7 Facts by then and discuss the scheduling of

 8 the sentencing to be held in Inuvik. So there

 9 will be a form 19 to that date. Is there

 10 anything else that is needed in this matter?

 11 MS. MILLER: Not from the Crown, Your

 12 Honour, thank you. That's my only matter.

 13 THE COURT: Thank you.

 14 MR. BRAN: And again, was that 10 a.m.

 15 on the 12th?

 16 THE COURT: Yes.

 17 MR. BRAN: Thank you.

 18 THE CLERK: Excuse me, Your Honour.

 19 That's for both matters, correct?

 20 THE COURT: Yes, for both matters.

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 23 Certified to be a true and

 accurate transcript, pursuant

 24 to Rules 723 and 724 of the

 Supreme Court Rules.

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 27 Joel Bowker

 Court Reporter

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