

R v Kuptana, 2019 NWTSC 4

AMENDED ORIGINAL

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

MATTHEW JAMES KUPTANA

Original amended as of October 25, 2018 to:

Cover page: Appearances: **Mr. E. McIntyre** Counsel for the
Accused

Transcript of the Decision held before The
Honourable Justice A.M. Mahar, sitting in Inuvik, in the
Northwest Territories, on the 25th day of May, 2018.

APPEARANCES:

Mr. J. Potter:	Counsel for the Crown
Mr. E. McIntyre:	Counsel for the Accused

(Charges under s. 271 of the *Criminal Code*)

A.C.E. Reporting Services Inc.

1 THE COURT: Good morning everybody. I
2 have come to a decision. I will reserve the
3 option of substantially editing my reasons
4 because I haven't written them out. I simply
5 wanted to get this done in the most efficient way
6 possible. I may not substantially edit it, it
7 depends how it comes out, what the issues are.

8 First, looking at the procedural history in
9 this matter: It is a bit complicated because Mr.
10 Kuptana was facing two charges, not one.

11 Back in April of 2015, he was charged with
12 one sexual assault and was released. He was then
13 charged in September of that year with this
14 offense, and he was taken into custody.

15 In October of 2015, then represented by
16 Michael Martin, he waived his preliminary
17 inquiries and he elected to be tried by judge
18 alone in the Supreme Court on both charges.

19 On December the 14th, 2015, he entered
20 guilty pleas to both charges. On April 13th,
21 2016, Mr. Martin made an application to be
22 removed from the record, and I am assuming that
23 at that point in time it became clear that
24 Mr. Kuptana was considering changing his plea.

25 Mr. Bran took over the file, and on May the
26 2nd, he indicated that Mr. Kuptana wanted to
27 change his plea. I am not exactly sure why an

1 application was not brought at that point in time
2 with respect to both matters. It seems fairly
3 clear that Mr. Kuptana's intention was to
4 withdraw his plea with respect to both of the
5 charges.

6 A decision was made by Justice Smallwood in
7 August of 2016 rejecting the application to
8 strike the plea because Mr. Kuptana was properly
9 advised at the time of his guilty pleas,
10 understood what he was pleading guilty to and
11 entered the plea fully aware of what the
12 consequences might be and fully aware of his
13 rights.

14 Mr. McIntyre today does not ask the Court to
15 revisit that issue. I spoke earlier this week
16 about the fact that it would seem redundant to
17 have brought a separate application to strike the
18 plea in this case because those issues were fully
19 canvassed by Justice Smallwood. As Mr. McIntyre
20 quite candidly agreed, those aspects of the case
21 were made out and it would be improper to strike
22 the plea under those circumstances.

23 So here we are in what is essentially a
24 Gardiner Hearing on the issue of facts required
25 to prove the necessary elements of the offence,
26 which is an unusual circumstance. There is a
27 paucity of case law to assist me.

1 We are all agreed that the Crown must prove
2 the issue beyond a reasonable doubt.

3 As Justice Charbonneau said in an earlier
4 decision, it would be difficult to imagine that
5 the Crown would face a lesser burden with respect
6 to a fact on an essential element of the offence
7 as opposed to a fact in aggravation, and the case
8 law is quite clear that facts in aggravation have
9 to be proven beyond a reasonable doubt.

10 Mr. Potter is in an unfortunate situation
11 this week because a case that would otherwise
12 perhaps have been quite a strong case was
13 hamstrung by his inability to get the witness
14 here for this hearing, and he has had to rely on
15 an unsworn statement that was simply audiotaped
16 on the morning of the events in question.

17 The statement was taken at 8:30 in the
18 morning by a Constable Sharpe. The alleged event
19 occurred between five and seven in the morning
20 and the complainant admitted in her statement
21 that she had consumed approximately 12 drinks on
22 the night in question.

23 I do not have any external information about
24 the statement. It was not videotaped and not
25 sworn, but that is not particularly surprising in
26 the context of a witness who is being interviewed
27 at the health centre shortly after an incident

1 when she has been consuming alcohol.

2 I do not know why a further statement was
3 not taken. I do not want to speculate beyond
4 simply suggesting a possibility: The officer may
5 not have wanted to take the full statement until
6 he was satisfied that the complainant was sober.
7 One of the things that troubled me about the
8 statement was the complainant's reference to
9 Mr. Kuptana as her uncle and herself as
10 Mr. Kuptana's daughter's cousin, and yet she does
11 not know his last name, and she does not know
12 where he is from. I do not take that as an
13 indication of untruthfulness, but it does connect
14 with the defence suggestion that I should not be
15 totally convinced of the sobriety of the witness
16 at the time that she gave the statement. The
17 statement is not just a key piece of evidence.
18 It is the only piece of evidence that I have on
19 which to base a conviction.

20 I am again thankful to counsel for
21 suggesting a limited scope in terms of what the
22 remedies are in this case, and I do not believe
23 there is any value in me deciding what remedies
24 could be available in a different sort of case.
25 Hopefully we do not find ourselves in this
26 situation very often. What could and should
27 happen in the event that the Crown is able to

1 mount a full case in a hearing like this I will
2 leave for another judge at another time to
3 decide.

4 In this case, both counsel and I agree that
5 an appropriate remedy, if I find that the Crown
6 has not proven the case beyond a reasonable doubt
7 or proven this fact, would be to strike the plea
8 and order the matter set for trial.

9 Mr. Kuptana chose to testify on his own
10 behalf. This is a sentencing hearing, it is not
11 a trial. The usual procedural safeguards with
12 respect to a trial are not entirely in place.

13 I have allowed the Crown to rely on hearsay
14 evidence in the form of a statement, and I have
15 accepted that it has threshold reliability for
16 the purpose of this hearing. In that sense it is
17 very fortunate for Mr. Kuptana that he did decide
18 to testify because that threshold reliability is
19 difficult to argue against in the absence of any
20 evidence to the contrary.

21 I will look first at Mr. Kuptana's
22 testimony. Mr. Kuptana says that on the night in
23 question around 6 o'clock, 6:30 in the evening he
24 went out to get some alcohol from the liquor
25 store. He bumped into the complainant who he was
26 not expecting to see, but she was also picked up
27 by the same cab at the North Mart. They went to

1 the liquor store. She ended up going wherever
2 she went, and he picked up a flat of 15 beers and
3 went home with it.

4 He went home to watch bingo with his family.
5 His common-law spouse was there, his daughter,
6 his daughter's friend Salome, and at some point
7 the complainant showed up, also to watch bingo.
8 Mr. Kuptana was not entirely clear about what
9 transpired during that evening. This is not
10 surprising given the passage of time and how
11 unremarkable the events would have been; watching
12 bingo with his family and his family's friends.

13 He knew the complainant as the friend of his
14 daughter. They were clearly fairly close
15 friends. The complainant came back at some point
16 during the night. He remembers hearing the bell
17 because everybody else had basically gone to bed,
18 and he heard the bell because the bell is very
19 close to where he was sitting with headphones on
20 listening to YouTube videos of music. He let the
21 complainant in and he did recall that earlier in
22 the evening when they were out in the car, the
23 complainant had talked about being upset with her
24 common-law spouse because he had cheated on her.

25 He believes that the complainant came to his
26 house between 1 and 2 o'clock in the morning.
27 She immediately went up to bed in his daughter's

1 room and presumably fell asleep or passed out.

2 Mr. Kuptana says that he continued watching
3 videos, and sometime between five and seven in
4 the morning, he stopped watching videos and went
5 upstairs and decided to see if the complainant
6 would like to have sex with him. He went into
7 the room, shook her awake, and asked her if she
8 wanted to have sex. She said yes. They
9 proceeded to have sex. His common-law spouse
10 came into the room, started yelling, and that is
11 when the complainant woke up.

12 The complainant provided a statement, as I
13 have indicated. It was a short statement, ten
14 minutes long or so. She basically agreed with
15 what the accused said about most of the night in
16 question. It was a bit unclear about how exactly
17 she ended up over at Mr. Kuptana's house again.
18 She said she had locked herself out of her place,
19 could not find her keys, went back to his place
20 and went in. She said the first thing that she
21 became aware of was Mr. Kuptana on top of her
22 having sex with her when she was woken up by
23 yelling from Mr. Kuptana's common-law spouse.

24 She said that she fell asleep in the same
25 bed as the accused's daughter Sandy and that when
26 she woke up, she was on the other bed with her
27 pants removed with Mr. Kuptana having sex with

1 her.

2 With respect to Mr. Kuptana's evidence, it
3 is significantly impacted by the guilty plea.
4 The guilty plea in itself is not evidence and its
5 impact is somewhat limited by the fact that he
6 did not admit the facts at that point in time.
7 However, it is a clear indication that he
8 intended to admit the necessary facts to ground
9 the offence and to that extent casts a pall on
10 his evidence. It is definitely something that
11 the Court should and does take into account when
12 assessing his credibility.

13 The story that he tells is not particularly
14 believable. His testimony was, while not great,
15 not terrible.

16 The main issue that I had with it is the
17 idea that some three or four hours would go by
18 between the time that the quite intoxicated
19 complainant went upstairs to go to bed and the
20 time that Mr. Kuptana would decide to go upstairs
21 and see if she wanted to have sex.

22 It does not strike me as hard to believe in
23 terms of his intentions, but it does strike me as
24 hard to believe in terms of the common sense
25 understanding of what would be likely to occur
26 with somebody who has been heavily drinking,
27 passes out, falls asleep and is woken up a few

1 hours later, presumably out of a dead sleep, and
2 asked to have sex. I do not find the narrative
3 otherwise incredible. I do not find it
4 particularly believable, but I do not find it
5 incredible. I find that particular aspect of it
6 causes me some significant concern.

7 Meshing that with the fact of the earlier
8 guilty plea, I can clearly say that I do not
9 believe Mr. Kuptana, and I do not accept most of
10 his evidence.

11 The next part of the analysis is does his
12 evidence raise a reasonable doubt in the context
13 of the evidence as a whole. I have to look at the
14 rest of the case before I completely reject
15 Mr. Kuptana's testimony.

16 The fact that Mr. Kuptana decided to testify
17 is important in so far as it at least establishes
18 that he denies these events in terms of the lack
19 of consent, and that denial is an important
20 consideration when I look at the strength of the
21 Crown's case, which is based entirely on a very
22 limited statement.

23 There are a number of aspects of that
24 limited statement that would have benefitted from
25 viva voce testimony and the ability of the
26 defence to cross-examine the witness.

27 We touched on some of these yesterday during

1 submissions and comments on submissions. One of
2 these aspects is the way in which this incident
3 was discovered. I found it somewhat concerning
4 that the complainant would be able to stay
5 unconscious when she was presumably moved from
6 one bed to another, would be able to stay
7 unconscious while her clothes were being removed,
8 able to stay unconscious while sex was initiated
9 but somehow is woken up by simply somebody
10 yelling. I am open to believing that, but in the
11 absence of the evidence being tested under
12 cross-examination and in the absence of an
13 ability to see the witness testify and to see how
14 she testified about it, I find those issues
15 somewhat troubling. I am not suggesting that it
16 indicates a lack of truthfulness, it is just an
17 issue that I would like to have heard more fully
18 fleshed out.

19 Another aspect that I would have wanted more
20 evidence about was her level of sobriety at the
21 time when she gave the statement. I am being
22 asked to rely on this statement to ground a
23 conviction for a very serious offence. Although
24 it does cover all of the necessary elements of
25 the offence, I do not have any evidence from the
26 police officer who took it to indicate the
27 complainant's level of sobriety.

1 I agree with the Crown's comments that she
2 sounded sober, at least from what I could tell
3 from the audio statement. She did sound sober,
4 but that is of limited value. She was also very
5 quiet. She was responding slowly to the
6 questions. She clearly was not highly
7 intoxicated at that point in time, but as I
8 indicated earlier, I was troubled by her
9 reference to Mr. Kuptana as her uncle because it
10 is an unnecessary mistake, and it does not appear
11 to be borne out from either Mr. Kuptana's
12 evidence nor in her later assertion that she does
13 not know what his last name is or where he is
14 from. That does not lead me to believe that she
15 is intentionally misleading the Court or anything
16 like that, but it does cause me to question her
17 level of certainty.

18 One of the more critical aspects that I
19 would have wanted to hear evidence about was one
20 that Mr. McIntyre raised, which is the
21 possibility that events can happen when someone
22 has no memory that are not necessarily occurring
23 when somebody is either unconscious or asleep.
24 I'm not suggesting that there is anything in the
25 complainant's statement that would indicate that,
26 but in an event like this where somebody is
27 coming to consciousness and where there are

1 questions about how other events took place
2 without waking her up, it is at least a line of
3 questioning the Court would have wanted to hear
4 before coming to a firm conclusion about the
5 reliability of that aspect of the complainant's
6 testimony.

7 With all of that said, I do have a
8 reasonable doubt with respect to the issue of
9 consent on the basis of the evidence before me.
10 That is not to indicate that there is anything
11 about the statement that in and of itself would
12 cause me to reject the evidence of the
13 complainant, but I simply would have needed to
14 hear more in order to be satisfied beyond a
15 reasonable doubt.

16 So on that basis, the application to strike
17 the plea is granted, and the matter is set over
18 for trial.

19 MR. MCINTYRE: Thank you, Sir.

20 THE COURT: And, gentlemen, what I would
21 suggest is that you -- well, obviously you're
22 going to talk about what needs to happen at this
23 point in time, but if you are anticipating
24 another trial taking place, you can provide your
25 dates to Court Services, and I'm sure Justice
26 Charbonneau will take it from there in terms of
27 setting the dates.

1 MR. MCINTYRE: Certainly. One issue my
2 friend and I discussed leading up to this
3 possibility was Justice Smallwood obviously made
4 the decision on the plea and has already, I
5 think, considered herself disqualified.
6 Justice Charbonneau, of course, heard the other
7 matter in its entirety, thus she would be
8 disqualified. Having heard what you've heard on
9 this hearing, I mean it is up to Your Honour, of
10 course, but my friend and I thought that it might
11 be best if you were disqualified as well. That
12 leaves us with exactly one quarter of the Supreme
13 Court bench.

14 Now Justice Shaner took the original plea
15 but no evidence was heard, and it was a long time
16 ago. Now it would, of course, be up to her
17 whether she felt she was conflicted or not, but
18 that should be an issue that should be flagged
19 when scheduling this thing, either a Deputy has
20 to come up or it should be Justice Shaner.

21 THE COURT: Well, you have a number of
22 deputies, and you are right, I suppose it
23 shouldn't be me. I would probably be prepared to
24 do it given that I made limited findings with
25 respect to the evidence that is in front of me,
26 but there's probably no need to push that
27 envelope if I do not have to. So I will let -- I

1 will write an e-mail suggesting that we take some
2 steps to find a different judge to do it.

3 MR. POTTER: Thank you.

4 THE COURT: Is there anything else?

5 MR. MCINTYRE: Well, .yes. So there is the
6 issue of bail. Now I have never checked the
7 file. Mr. Kuptana's testimony is that he was
8 denied bail, but as you've set out, there's a
9 long procedural history. In any event, whatever
10 his bail status is right now I understand that my
11 friend is in a position to consent to reopen
12 bail, and we've negotiated some terms here.

13 THE COURT: All right. So this is on
14 consent?

15 MR. POTTER: That is right, Your Honour.

16 THE COURT: What do you suggest, Mr.
17 Potter?

18 MR. POTTER: Actually, I'll let my friend
19 put to you the conditions because he's prepared
20 them so...

21 MR. MCINTYRE: Yes. I prepared some
22 conditions, and I meant to print them off for
23 Madam Clerk here to assist her but I will show
24 I couldn't get the printer to work in the
25 business centre here, so the bail we're proposing
26 is a \$500 no cash surety. That surety is a woman
27 named Justine Okheena O-K-H-E-E-N-A. She is the

1 common-law spouse of Mr. Kuptana's brother Joseph
2 Kuptana. They live in Ulukhaktok. That is where
3 he will be residing once he can get the funds
4 together to get from Inuvik to Ulukhaktok. They
5 have to raise money for a ticket.

6 I have also secured an interim residence
7 here in Inuvik, while I understand it costs about
8 \$700 to get that ticket, and the family is
9 working on that, and that is actually with Ms.
10 Barb Malogana (phonetic). I have talked to her.
11 She is willing to let Mr. Kuptana stay with her
12 on a temporary basis until that ticket is
13 purchased. So the first condition would be
14 reside at Unit Number 6, 170 McKenzie Road in
15 Inuvik.

16 THE COURT: Do you have -- you have all of
17 this written out?

18 MR. MCINTYRE: I do. I'm not sure, some
19 judges like me to read it in.

20 THE COURT: I am going to ask you to read
21 it in, but in terms of how we are going to go
22 about preparing the order -- I will let you read
23 it all in. You can assume if the Crown is
24 agreeable to this I am assuming -- you can assume
25 that I will be as well. So read it in for the
26 record.

27 MR. MCINTYRE: Yes, we'll have to figure that

1 out in terms of getting the order together. The
2 other concern is if the surety does not call in
3 today, he may be transported back to Yellowknife
4 and then back to Inuvik where he will be released
5 because Court Services will release him from his
6 point of arrest is my understanding here so...

7 THE COURT: Perhaps I can help with some
8 direction on that.

9 MR. MCINTYRE: Hopefully we can figure that
10 out.

11 THE COURT: So carry on with the terms of
12 the order.

13 MR. MCINTYRE: So I left off upon release
14 reside at Unit Number 6, 170 McKenzie Road Inuvik
15 until such time as you have made arrangements to
16 travel to Ulukhaktok, Northwest Territories.
17 While you are in Inuvik, report to the RCMP
18 detachment in person within 27 hours of release
19 between 9 a.m. and 4 p.m. and thereafter as
20 directed by the RCMP here. Once you have moved
21 to Ulukhaktok, you will reside at Unit 58 PO Box
22 114 Ulukhaktok. I understand there's no street
23 names there. Report in person to the Ulukhaktok
24 RCMP detachment within 72 hours of your arrival
25 between 9 a.m. and 4:30 p.m., thereafter as
26 directed by the RCMP. No contact or
27 communication, direct or indirect, with Chantel

1 Kodlak aka Chantel Ninjlak (phonetic). Do not
2 use, possess or consume alcohol or other
3 intoxicating substances and provide a copy of a
4 confirmed itinerary returning to Inuvik within
5 three weeks of the trial date to the Ulukhaktok
6 RCMP. That last condition because of the
7 financial concerns with getting here. We don't
8 want another trial date to be set and have him
9 to have difficulties, so that would at least
10 provide the Crown with some assurance that this
11 ticket will be provided and we'll know that he'll
12 be able to attend for that trial when it happens.

13 THE COURT: What is his release status on
14 the other matter?

15 MR. MCINTYRE: My understanding is he was
16 sentenced this is coming from him, I haven't
17 checked with sentence administration North
18 Slave -- is that he has served that sentence
19 finished serving it approximately two months ago
20 was my understanding was his release date here.
21 March is what he is saying is when he finished
22 his warrant on that.

23 THE COURT: All right.

24 MR. MCINTYRE: So my understanding is this is
25 the only thing holding him in custody right now.

26 THE COURT: Well, I'm sure the RCMP and
27 Corrections will look into that and we'll all be

1 satisfied. What do you suggest we do in terms of
2 the order.

3 MR. MCINTYRE: So we don't have the means
4 to --

5 THE COURT CLERK: I can go to the courthouse and
6 type it and up and fax it to Ulukhaktok and then
7 I guess it would be up to the RCMP once it is
8 signed. Usually it is once we have the signed
9 copy, then he's released, but I'm getting on a
10 plane.

11 THE COURT: Yeah. Why don't we do this,
12 why don't we break court and then we can have a
13 candid conversation about how we are going to
14 make this happen. I do not think there is any
15 reason for us to do it on the record.

16 MR. POTTER: I'll just say before we rise
17 that the Crown consents to this release as
18 discussed by my friend assuming, of course, the
19 warrant has completed on his sentence that he's
20 served. Obviously this will be subject to that
21 warrant in any event.

22 MR. MCINTYRE: I would hope they wouldn't
23 release him if there's still a warrant of
24 committal.

25 THE COURT: Okay. Thank you, gentlemen,
26 we'll break court.

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CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 6th day of June, 2018.

Certified Pursuant to Rule 723
of the Rules of Court



Colleen Rea
Court Reporter