**S-1-CR-2015-000119**

***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: Mr. E. McIntyre:

Counsel for the Crown Counsel for the Accused

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

* + 1. *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

1. strike the plea because Mr. Kuptana was properly
2. advised at the time of his guilty pleas,
3. understood what he was pleading guilty to and
4. entered the plea fully aware of what the
5. consequences might be and fully aware of his
6. rights.
7. Mr. McIntyre today does not ask the Court to
8. revisit that issue. I spoke earlier this week
9. about the fact that it would seem redundant to
10. have brought a separate application to strike the
11. plea in this case because those issues were fully
12. canvassed by Justice Smallwood. As Mr. McIntyre
13. quite candidly agreed, those aspects of the case
14. were made out and it would be improper to strike
15. the plea under those circumstances.
16. So here we are in what is essentially a
17. Gardiner Hearing on the issue of facts required
18. to prove the necessary elements of the offence,
19. which is an unusual circumstance.
20. paucity of case law to assist me.

There is a

* 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
28. mount a full case in a hearing like this I will
29. leave for another judge at another time to
30. decide.
31. In this case, both counsel and I agree that
32. an appropriate remedy, if I find that the Crown
33. has not proven the case beyond a reasonable doubt
34. or proven this fact, would be to strike the plea
35. and order the matter set for trial.
36. Mr. Kuptana chose to testify on his own
37. behalf. This is a sentencing hearing, it is not
38. a trial. The usual procedural safeguards with
39. respect to a trial are not entirely in place.
40. I have allowed the Crown to rely on hearsay
41. evidence in the form of a statement, and I have
42. accepted that it has threshold reliability for
43. the purpose of this hearing. In that sense it is
44. very fortunate for Mr. Kuptana that he did decide
45. to testify because that threshold reliability is
46. difficult to argue against in the absence of any
47. evidence to the contrary.
48. I will look first at Mr. Kuptana's
49. testimony. Mr. Kuptana says that on the night in
50. question around 6 o'clock, 6:30 in the evening he
51. went out to get some alcohol from the liquor
52. store. He bumped into the complainant who he was
53. not expecting to see, but she was also picked up
54. by the same cab at the North Mart. They went to
55. the liquor store. She ended up going wherever
56. she went, and he picked up a flat of 15 beers and
57. went home with it.
58. He went home to watch bingo with his family.
59. His common-law spouse was there, his daughter,
60. his daughter's friend Salome, and at some point
61. the complainant showed up, also to watch bingo.
62. Mr. Kuptana was not entirely clear about what
63. transpired during that evening. This is not
64. surprising given the passage of time and how
65. unremarkable the events would have been; watching
66. bingo with his family and his family's friends.
67. He knew the complainant as the friend of his
68. daughter. They were clearly fairly close
69. friends. The complainant came back at some point
70. during the night. He remembers hearing the bell
71. because everybody else had basically gone to bed,
72. and he heard the bell because the bell is very
73. close to where he was sitting with headphones on
74. listening to YouTube videos of music. He let the
75. complainant in and he did recall that earlier in
76. the evening when they were out in the car, the
77. complainant had talked about being upset with her
78. common-law spouse because he had cheated on her.
79. He believes that the complainant came to his
80. house between 1 and 2 o'clock in the morning.
81. She immediately went up to bed in his daughter's
82. room and presumably fell asleep or passed out.
83. Mr. Kuptana says that he continued watching
84. videos, and sometime between five and seven in
85. the morning, he stopped watching videos and went
86. upstairs and decided to see if the complainant
87. would like to have sex with him. He went into
88. the room, shook her awake, and asked her if she
89. wanted to have sex. She said yes. They
90. proceeded to have sex. His common-law spouse
91. came into the room, started yelling, and that is
92. when the complainant woke up.
93. The complainant provided a statement, as I
94. have indicated. It was a short statement, ten
95. minutes long or so. She basically agreed with
96. what the accused said about most of the night in
97. question. It was a bit unclear about how exactly
98. she ended up over at Mr. Kuptana's house again.
99. She said she had locked herself out of her place,
100. could not find her keys, went back to his place
101. and went in. She said the first thing that she
102. became aware of was Mr. Kuptana on top of her
103. having sex with her when she was woken up by
104. yelling from Mr. Kuptana's common-law spouse.
105. She said that she fell asleep in the same
106. bed as the accused's daughter Sandy and that when
107. she woke up, she was on the other bed with her
108. pants removed with Mr. Kuptana having sex with

1 her.

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With respect to Mr. Kuptana's evidence, it

1. is significantly impacted by the guilty plea.
2. The guilty plea in itself is not evidence and its
3. impact is somewhat limited by the fact that he
4. did not admit the facts at that point in time.
5. However, it is a clear indication that he
6. intended to admit the necessary facts to ground
7. the offence and to that extent casts a pall on
8. his evidence. It is definitely something that
9. the Court should and does take into account when
10. assessing his credibility.
11. The story that he tells is not particularly
12. believable. His testimony was, while not great,
13. not terrible.
14. The main issue that I had with it is the
15. idea that some three or four hours would go by
16. between the time that the quite intoxicated
17. complainant went upstairs to go to bed and the
18. time that Mr. Kuptana would decide to go upstairs
19. and see if she wanted to have sex.
20. It does not strike me as hard to believe in
21. terms of his intentions, but it does strike me as
22. hard to believe in terms of the common sense
23. understanding of what would be likely to occur
24. with somebody who has been heavily drinking,
25. passes out, falls asleep and is woken up a few
26. hours later, presumably out of a dead sleep, and
27. asked to have sex. I do not find the narrative
28. otherwise incredible. I do not find it
29. particularly believable, but I do not find it
30. incredible. I find that particular aspect of it
31. causes me some significant concern.
32. Meshing that with the fact of the earlier
33. guilty plea, I can clearly say that I do not
34. believe Mr. Kuptana, and I do not accept most of
35. his evidence.
36. The next part of the analysis is does his
37. evidence raise a reasonable doubt in the context
38. of the evidence as a whole. I have to look at the
39. rest of the case before I completely reject
40. Mr. Kuptana's testimony.
41. The fact that Mr. Kuptana decided to testify
42. is important in so far as it at least establishes
43. that he denies these events in terms of the lack
44. of consent, and that denial is an important
45. consideration when I look at the strength of the
46. Crown's case, which is based entirely on a very
47. limited statement.
48. There are a number of aspects of that
49. limited statement that would have benefitted from
50. viva voce testimony and the ability of the
51. defence to cross-examine the witness.
52. 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
53. questions about how other events took place
54. without waking her up, it is at least a line of
55. questioning the Court would have wanted to hear
56. before coming to a firm conclusion about the
57. reliability of that aspect of the complainant's
58. testimony.
59. With all of that said, I do have a
60. reasonable doubt with respect to the issue of
61. consent on the basis of the evidence before me.
62. That is not to indicate that there is anything
63. about the statement that in and of itself would
64. cause me to reject the evidence of the
65. complainant, but I simply would have needed to
66. hear more in order to be satisfied beyond a
67. reasonable doubt.
68. So on that basis, the application to strike
69. the plea is granted, and the matter is set over
70. for trial.
71. MR. MCINTYRE:
72. THE COURT:

Thank you, Sir.

And, gentlemen, what I would

1. suggest is that you -- well, obviously you're
2. going to talk about what needs to happen at this
3. point in time, but if you are anticipating
4. another trial taking place, you can provide your
5. dates to Court Services, and I'm sure Justice
6. Charbonneau will take it from there in terms of
7. setting the dates.
	* 1. *Reporting Services Inc.* 13
			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
8. will write an e-mail suggesting that we take some
9. steps to find a different judge to do it.
10. MR. POTTER:
11. THE COURT:

Thank you.

Is there anything else?

1. MR. MCINTYRE:

Well, . yes.

So there is the

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

All right.

So this is on

1. MR. POTTER:
2. THE COURT:
3. Potter?
4. MR. POTTER:

That is right, Your Honour. What do you suggest, Mr.

Actually, I'll let my friend

1. put to you the conditions because he's prepared
2. them so...
3. MR. MCINTYRE:

Yes.

I prepared some

1. conditions, and I meant to print them off for
2. Madam Clerk here to assist her but I will show
3. I couldn't get the printer to work in the
4. business centre here, so the bail we're proposing
5. is a $500 no cash surety. That surety is a woman
6. named Justine Okheena O-K-H-E-E-N-A. She is the
7. common-law spouse of Mr. Kuptana's brother Joseph
8. Kuptana. They live in Ulukhaktok. That is where
9. he will be residing once he can get the funds
10. together to get from Inuvik to Ulukhaktok. They
11. have to raise money for a ticket.
12. I have also secured an interim residence
13. here in Inuvik, while I understand it costs about
14. $700 to get that ticket, and the family is
15. working on that, and that is actually with Ms.
16. Barb Malogana (phonetic). I have talked to her.
17. She is willing to let Mr. Kuptana stay with her
18. on a temporary basis until that ticket is
19. purchased. So the first condition would be
20. reside at Unit Number 6, 170 McKenzie Road in
21. Inuvik.
22. THE COURT:
23. this written out?

Do you have -- you have all of

1. MR. MCINTYRE: I do. I'm not sure, some
2. judges like me to read it in.
3. THE COURT: I am going to ask you to read
4. it in, but in terms of how we are going to go
5. about preparing the order -- I will let you read
6. it all in. You can assume if the Crown is
7. agreeable to this I am assuming -- you can assume
8. that I will be as well. So read it in for the
9. record.
10. 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
11. Kodlak aka Chantel Ninjlak (phonetic). Do not
12. use, possess or consume alcohol or other
13. intoxicating substances and provide a copy of a
14. confirmed itinerary returning to Inuvik within
15. three weeks of the trial date to the Ulukhaktok
16. RCMP. That last condition because of the
17. financial concerns with getting here. We don't
18. want another trial date to be set and have him
19. to have difficulties, so that would at least
20. provide the Crown with some assurance that this
21. ticket will be provided and we'll know that he'll
22. be able to attend for that trial when it happens.
23. THE COURT: What is his release status on
24. the other matter?
25. MR. MCINTYRE: My understanding is he was
26. sentenced this is coming from him, I haven't
27. checked with sentence administration North
28. Slave -- is that he has served that sentence
29. finished serving it approximately two months ago
30. was my understanding was his release date here.

21 March is what he is saying is when he finished

1. his warrant on that.
2. THE COURT: All right.
3. MR. MCINTYRE: So my understanding is this is
4. the only thing holding him in custody right now.
5. THE COURT: Well, I'm sure the RCMP and
6. Corrections will look into that and we'll all be

# satisfied. What do you suggest we do in terms of

1. the order.
2. MR. MCINTYRE: So we don't have the means
3. to --
4. THE COURT CLERK: I can go to the courthouse and
5. type it and up and fax it to Ulukhaktok and then
6. I guess it would be up to the RCMP once it is
7. signed. Usually it is once we have the signed
8. copy, then he's released, but I'm getting on a
9. plane.
10. THE COURT: Yeah. Why don't we do this,
11. why don't we break court and then we can have a
12. candid conversation about how we are going to
13. make this happen. I do not think there is any
14. reason for us to do it on the record.
15. MR. POTTER: I'll just say before we rise
16. that the Crown consents to this release as
17. discussed by my friend assuming, of course, the
18. warrant has completed on his sentence that he's
19. served. Obviously this will be subject to that
20. warrant in any event.
21. MR. MCINTYRE: I would hope they wouldn't
22. release him if there's still a warrant of
23. committal.
24. THE COURT:
25. we'll break court.

Okay. Thank you, gentlemen,

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2 **CERTIFICATE OF TRANSCRIPT**

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1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 6th day of June, 2018.
8. Certified Pursuant to Rule 723
9. of the Rules of Court 13

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1. Colleen Rea
2. Court Reporter

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