IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

BARRY SUNRISE

Transcript of the Reasons for Decision delivered by The Honourable Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 12th day of July, 2018.

APPEARANCES:

Mr. A. Godfrey	Counsel for the Crown
Mr. P. Harte	Counsel for the Accused

(Charge under s. 271 of the Criminal Code)

This decision is subject to a publication ban until the trial into this matter has ended pursuant to s. 525(8)and 517 of the Criminal Code

THE COURT: Barry Sunrise faces a charge of sexual assault. This is for events alleged to have happened on May 22nd, 2017. Mr. Sunrise was arrested on May 23rd. He had a show cause hearing before a justice of the peace on May 30th and was ordered detained on the primary and secondary ground. He has been in custody ever since.

He had a preliminary hearing and was committed to stand trial in November 2017. A first pretrial conference was held on this matter on January 16th, 2018. Counsel advised at that time that the matter was not ready to be scheduled for trial because results from DNA testing were still pending. It was agreed that a further pretrial conference would be held once the results were known, and this second pretrial conference took place on March 1st. At that point, it was confirmed that the matter was ready to be set for trial. Crown had sent its availabilities for trial before that second pretrial conference. Those availabilities were received February 27th, and defence counsel sent his availabilities the next day. The Crown did have availabilities in September 2018, but defence counsel was not available because another matter of his was already scheduled to proceed

over the same time frame. The next dates when both sides were available for trial were in December. The jury trial was scheduled to proceed and remains scheduled to proceed the week of December 10th.

The issue of Mr. Sunrise's custodial status came before this Court by operation of Section 525 of the Criminal Code. The Crown continues to oppose his release on the primary and secondary grounds.

Mr. Sunrise bases his request for review on two things: First, he argues that there have been material changes in his circumstances in three different ways. First, his trial date is now known, which was obviously not the case at the time of the show cause hearing. He points to the time he will have spent in pretrial custody by the time his trial proceeds, which, if credited at the usual ratio of one and a half days credited for each day of remand, would entitle him to credit for just over 600 days if he were to be convicted of this charge and face sentencing.

So that is the first element that defence relies on to say there is a change in circumstances. The second is that the DNA results are now known. The testing did not

produce any evidence that will assist the Crown in this prosecution. As DNA testing was referred to at the initial hearing and the Crown was arguing that it would likely assist the Crown, Mr. Sunrise says that the negative results that have since been obtained constitute a change in circumstances. The third change is that Mr. Sunrise argues that the place where he proposes to reside now is available in a more long-term way than the proposed residence that was referred to at the time of the original bail hearing.

Mr. Sunrise also argues that the justice of the peace may have erred in his treatment of his criminal record. He argues that the justice of the peace may have overemphasized the criminal record and, in particular, the effect of some of the relevant convictions.

The Crown's position is that there are not really changes in circumstances here. The Crown notes that the proposed place of residence is a cabin at an unknown address on the Hay River Reserve, that Mr. Sunrise would not be living with the surety, and that it is far from clear that the proposed surety would be in any position to meaningfully supervise Mr. Sunrise if his application is granted. The Crown concedes that

the prosecutor who appeared at the show cause hearing, who was a different prosecutor, may have overstated the significance of the fact that DNA testing had been conducted in this case but notes that the prospect of helpful DNA evidence was raised in the context of the tertiary ground, and that this was not the ground on which Mr. Sunrise was detained.

I have reviewed the transcript and the materials filed by Mr. Sunrise. First, I do not think that the justice of the peace made any errors that open this matter up for review.

It must be said at the outset that some of the submissions that were made by the Crown prosecutor at the initial bail hearing were misguided. In effect, he argued before the justice of the peace that the fact that a sexual assault examination had taken place and DNA testing would be done rendered the Crown's case stronger than if no samples had been collected, and no testing was possible. The flaw in that submission is obvious. The mere fact that DNA testing is done does not mean that the results will help the Crown. Sometimes the results will help the Crown; sometimes the results will assist the defence; oftentimes, the results are neutral. Crown counsel should always be careful not to

overstate the case or the strength of the evidence, especially when making submissions in justice of the peace court as justices of the peace are laypeople.

In this particular case, however, defence counsel at the show cause hearing very effectively corrected the statements made by Crown counsel and pointed out that the mere fact that DNA testing would be done meant nothing as far as the strength of the Crown's case. And on my reading of the justice of the peace's decision, although some portions of it were inaudible and indiscernible and were not transcribed, he did not appear to have accepted the Crown's submissions on that point. He appeared, to me, to have understood that the DNA was, at that point, a neutral factor. So I do not think that the record supports the idea that the justice of the peace erred in this respect, and, in addition, as noted by the Crown at this hearing, the submissions made about the DNA were made in the context of the tertiary ground. And that is not the ground the accused was detained on.

The second error that the defence alleges was made by the justice of the peace has to do with an overemphasis or misuse of the criminal

record. In speaking about this issue, the justice of the peace said: (as read)

> However, Mr. Sunrise, given your criminal record and [there is an indistinct portion here] given the fact that [there is another indistinct portion here] you have been previously convicted of a sexual assault, also you were convicted with break and enter with intent to commit sexual assault, this is particularly concerning to the Court, and having this before the Court, it gives the Court concern that [there is another indistinct part] if you [another indistinct part] were convicted in the past of this type of behaviour, then there is concern that you might well, again, commit this type of behaviour. And, in fact, you are here today accused of a sexual assault.

Transcript of the bail hearing, page 22.

I can see why defence raises concerns about how the justice of the peace worded his comments and

how he expressed his concerns about the criminal record. But the comments were also tied in with the alcohol abuse issue and the failure of the proposed plan to address the alcohol issue which seemed to be at the root of the accused's problems with the law.

The secondary ground of detention is concerned with public safety. The issue to be decided is not guilt or innocence of the accused on the offence charged. As always, with bail, it requires a risk assessment. Past conduct is relevant to that assessment. Public safety concerns are enhanced when a person who faces a charge for a crime of violence has a demonstrated pattern of committing violent crimes, and this is especially so when the record also demonstrates a pattern of breaches of court orders because the whole point of a release order is to craft conditions that will address the public safety concerns that exist. If the Court cannot have confidence that its orders will be followed, then that means that, realistically, the risk cannot be managed. That is the context in which I understand the comments of the justice of the peace in this case, and I do not find that he erred in his treatment and use of the criminal record.

The next question is whether there has been a material change in circumstances that opens the door to a review by this Court. The Crown takes issue with the suggestion that there has, in fact, been such a change. As I have already mentioned, the defence relies on three things. First, the timing of the trial is now known. Second, the cabin where the accused would live appears to be available to him indefinitely as opposed to the accommodations that were talked about at the initial bail hearing. And third, the outcome of the DNA testing.

The trial date was not known at the time of the bail hearing, but that would almost inevitably always be the case. That cannot, in itself, constitute a change in circumstances in the context of bail reviews. On a review pursuant to Section 525 of the Code, one of the considerations is whether there has been inordinate delay in getting the matter to trial. Here, by the time this trial proceeds, if the accused remains detained, there will have been a period of remand time that is lengthy, and I can understand that from the perspective of the accused, this is of concern. At the same time, the time between the charge and the proposed trial date is not out of line with what can be

expected for a person to have a jury trial. Trial dates are set based on the availability of witnesses, counsel, and of the Court. It goes without saying that there are modes of trial that allow quicker trial dates than a jury trial election. People have the right to choose to be tried by a jury, but one of the consequences of that choice is that there may be a longer delay before trial. That is just the reality, in general, in most places, I expect, but certainly it is in this jurisdiction.

This Court is a circuit court. It sits in various communities on criminal and sometimes family matters. It is a generalist court that has four resident judges tasked with hearing all the cases that come before the Supreme Court in this jurisdiction.

I actually expect that the time within which people have a jury trial in this jurisdiction is faster than in many other places. In this case, the trial will be held within a year and four months of the alleged events. As I said, I am sure that it does seem like a very long time for the person who is awaiting trial on remand and probably also for witnesses, but it is far from unreasonable, and, on its own, it is not the type of delay that could justify release in the

framework of Section 525 of the Code.

Submissions were made about the remand time and the credit it would correspond to in the event of conviction. Again, I understand the argument, but this is not a situation where even enhanced credit is beyond the range of sentence that could be expected to be imposed if the accused is convicted after trial, considering the nature of the allegations and the extensive criminal record which includes two directly related convictions.

The results of the DNA testing were not known at the time of the initial bail hearing. Now they are known, and they are not helpful to the Crown. But those results, as well as the comments made by defence counsel at the hearing, about the fact that all the witnesses to be called at this trial were consuming alcohol at the time of the events, all of that goes to the strength of the Crown's case, which is a more directly relevant and compelling factor under the tertiary ground. The strength of the Crown's case is not completely irrelevant to the secondary ground, but in this case, it was not the primary consideration of the justice of the peace in addressing public safety concerns.

As for the release plan, there is no

question it is different, and perhaps that constitutes a change in circumstances, but I am not convinced that it is a change of circumstances that actually assists the accused. It does seem that the cabin where it is proposed he would stay is available to him indefinitely; whereas, the proposed surety at the bail hearing, the original bail hearing, candidly acknowledged that many people lived in this house and that he could make a bedroom available to the accused "for a period of time". That left some questions at the time as to how long that room would be available to the accused. However, this was not something that appears to have influenced the justice of the peace's decision at the original bail hearing.

There is not a lot of evidence before me about the person who is being proposed as a surety now. He has signed an acknowledgement of surety form confirming that he understands what the obligations of the surety are, but there is no affidavit from him. There are very few details about the cabin where the accused would stay. All that is said is that it is halfway between the river and the house where the surety resides.

I find that in some respects, this plan is

weaker than the one proposed initially as far as the level of supervision that the surety could be expected to provide. The accused would live in the cabin, not with the surety. The plan contemplates, therefore, less immediate supervision than the plan that was presented at the initial hearing, and the absence of details about the exact location of the cabin, its distance from the house where the surety lives, makes assessing whether there could be meaningful supervision even more difficult.

I already mentioned aspects of the accused's criminal record. It is a very extensive record. He has been convicted numerous times for failing to appear in court. He has been convicted for escaping lawful custody, and he has numerous other convictions for failing to comply with court orders. He also has related convictions: one for sexual assault and one for break and enter and commit sexual assault. Although the justice of the peace referred to it as a break and enter with intent, the record has it as a break and enter and commit sexual assault, and that is relevant to the secondary ground.

Courts always have to be cautious not to allow such a criminal record to overtake the entire analysis, but at the same time, a criminal

record like this one cannot be overlooked either. It raises significant concerns under the primary and secondary grounds.

In my view, the plan being proposed now is not as strong in terms of supervision as the one that failed to persuade the justice of the peace at the original bail hearing. It does not alleviate the primary and secondary ground concerns, nor do the changes in circumstances that the defence relies on.

For those reasons, the application for release is dismissed, and detention will continue.

PROCEEDINGS ADJOURNED

CERTIFICATE OF TRANSCRIPT:

I, Roxanne M. Johanson, 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 Calgary, Province of Alberta, this 3rd day of August 2018.

Roxanne M. Johanson, CSR(A)
Official Court Reporter