*R v Sunrise*, 2018 NWTSC 41 S-1-CR-2017-000165

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

1. THE COURT: Barry Sunrise faces a charge
2. of sexual assault. This is for events alleged to
3. have happened on May 22nd, 2017. Mr. Sunrise was
4. arrested on May 23rd. He had a show cause
5. hearing before a justice of the peace on May 30th
6. and was ordered detained on the primary and
7. secondary ground. He has been in custody ever
8. since.
9. He had a preliminary hearing and was
10. committed to stand trial in November 2017. A
11. first pretrial conference was held on this matter
12. on January 16th, 2018. Counsel advised at that
13. time that the matter was not ready to be
14. scheduled for trial because results from DNA
15. testing were still pending. It was agreed that a
16. further pretrial conference would be held once
17. the results were known, and this second pretrial
18. conference took place on March 1st. At that
19. point, it was confirmed that the matter was ready
20. to be set for trial. Crown had sent its
21. availabilities for trial before that second
22. pretrial conference. Those availabilities were
23. received February 27th, and defence counsel sent
24. his availabilities the next day. The Crown did
25. have availabilities in September 2018, but
26. defence counsel was not available because another
27. matter of his was already scheduled to proceed
28. over the same time frame. The next dates when
29. both sides were available for trial were in
30. December. The jury trial was scheduled to
31. proceed and remains scheduled to proceed the week
32. of December 10th.
33. The issue of Mr. Sunrise's custodial status
34. came before this Court by operation of Section
35. 525 of the Criminal Code. The Crown continues to
36. oppose his release on the primary and secondary
37. grounds.
38. Mr. Sunrise bases his request for review on
39. two things: First, he argues that there have
40. been material changes in his circumstances in
41. three different ways. First, his trial date is
42. now known, which was obviously not the case at
43. the time of the show cause hearing. He points to
44. the time he will have spent in pretrial custody
45. by the time his trial proceeds, which, if
46. credited at the usual ratio of one and a half
47. days credited for each day of remand, would
48. entitle him to credit for just over 600 days if
49. he were to be convicted of this charge and face
50. sentencing.
51. So that is the first element that defence
52. relies on to say there is a change in
53. circumstances. The second is that the DNA
54. results are now known. The testing did not
55. produce any evidence that will assist the Crown
56. in this prosecution. As DNA testing was referred
57. to at the initial hearing and the Crown was
58. arguing that it would likely assist the Crown,
59. Mr. Sunrise says that the negative results that
60. have since been obtained constitute a change in
61. circumstances. The third change is that
62. Mr. Sunrise argues that the place where he
63. proposes to reside now is available in a more
64. long-term way than the proposed residence that
65. was referred to at the time of the original bail
66. hearing.
67. Mr. Sunrise also argues that the justice of
68. the peace may have erred in his treatment of his
69. criminal record. He argues that the justice of
70. the peace may have overemphasized the criminal
71. record and, in particular, the effect of some of
72. the relevant convictions.
73. The Crown's position is that there are not
74. really changes in circumstances here. The Crown
75. notes that the proposed place of residence is a
76. cabin at an unknown address on the Hay River
77. Reserve, that Mr. Sunrise would not be living
78. with the surety, and that it is far from clear
79. that the proposed surety would be in any position
80. to meaningfully supervise Mr. Sunrise if his
81. application is granted. The Crown concedes that
82. the prosecutor who appeared at the show cause
83. hearing, who was a different prosecutor, may have
84. overstated the significance of the fact that DNA
85. testing had been conducted in this case but notes
86. that the prospect of helpful DNA evidence was
87. raised in the context of the tertiary ground, and
88. that this was not the ground on which Mr. Sunrise
89. was detained.
90. I have reviewed the transcript and the
91. materials filed by Mr. Sunrise. First, I do not
92. think that the justice of the peace made any
93. errors that open this matter up for review.
94. It must be said at the outset that some of
95. the submissions that were made by the Crown
96. prosecutor at the initial bail hearing were
97. misguided. In effect, he argued before the
98. justice of the peace that the fact that a sexual
99. assault examination had taken place and DNA
100. testing would be done rendered the Crown's case
101. stronger than if no samples had been collected,
102. and no testing was possible. The flaw in that
103. submission is obvious. The mere fact that DNA
104. testing is done does not mean that the results
105. will help the Crown. Sometimes the results will
106. help the Crown; sometimes the results will assist
107. the defence; oftentimes, the results are neutral.
108. Crown counsel should always be careful not to
109. overstate the case or the strength of the
110. evidence, especially when making submissions in
111. justice of the peace court as justices of the
112. peace are laypeople.
113. In this particular case, however, defence
114. counsel at the show cause hearing very
115. effectively corrected the statements made by
116. Crown counsel and pointed out that the mere fact
117. that DNA testing would be done meant nothing as
118. far as the strength of the Crown's case. And on
119. my reading of the justice of the peace's
120. decision, although some portions of it were
121. inaudible and indiscernible and were not
122. transcribed, he did not appear to have accepted
123. the Crown's submissions on that point. He
124. appeared, to me, to have understood that the DNA
125. was, at that point, a neutral factor. So I do
126. not think that the record supports the idea that
127. the justice of the peace erred in this respect,
128. and, in addition, as noted by the Crown at this
129. hearing, the submissions made about the DNA were
130. made in the context of the tertiary ground. And
131. that is not the ground the accused was detained
132. on.
133. The second error that the defence alleges
134. was made by the justice of the peace has to do
135. with an overemphasis or misuse of the criminal
136. record. In speaking about this issue, the
137. justice of the peace said: (as read)
138. However, Mr. Sunrise, given your
139. criminal record and [there is an
140. indistinct portion here] given the
141. fact that [there is another
142. indistinct portion here] you have
143. been previously convicted of a
144. sexual assault, also you were
145. convicted with break and enter
146. with intent to commit sexual
147. assault, this is particularly
148. concerning to the Court, and
149. having this before the Court, it
150. gives the Court concern that
151. [there is another indistinct part]
152. if you [another indistinct part]
153. were convicted in the past of this
154. type of behaviour, then there is
155. concern that you might well,
156. again, commit this type of
157. behaviour. And, in fact, you are
158. here today accused of a sexual
159. assault.
160. Transcript of the bail hearing, page 22.
161. I can see why defence raises concerns about how
162. the justice of the peace worded his comments and
163. how he expressed his concerns about the criminal
164. record. But the comments were also tied in with
165. the alcohol abuse issue and the failure of the
166. proposed plan to address the alcohol issue which
167. seemed to be at the root of the accused's
168. problems with the law.
169. The secondary ground of detention is
170. concerned with public safety. The issue to be
171. decided is not guilt or innocence of the accused
172. on the offence charged. As always, with bail, it
173. requires a risk assessment. Past conduct is
174. relevant to that assessment. Public safety
175. concerns are enhanced when a person who faces a
176. charge for a crime of violence has a demonstrated
177. pattern of committing violent crimes, and this is
178. especially so when the record also demonstrates a
179. pattern of breaches of court orders because the
180. whole point of a release order is to craft
181. conditions that will address the public safety
182. concerns that exist. If the Court cannot have
183. confidence that its orders will be followed, then
184. that means that, realistically, the risk cannot
185. be managed. That is the context in which I
186. understand the comments of the justice of the
187. peace in this case, and I do not find that he
188. erred in his treatment and use of the criminal
189. record.
     1. The next question is whether there has been
     2. a material change in circumstances that opens the
     3. door to a review by this Court. The Crown takes
     4. issue with the suggestion that there has, in
     5. fact, been such a change. As I have already
     6. mentioned, the defence relies on three things.
     7. First, the timing of the trial is now known.
     8. Second, the cabin where the accused would live
     9. appears to be available to him indefinitely as
     10. opposed to the accommodations that were talked
     11. about at the initial bail hearing. And third,
     12. the outcome of the DNA testing.
     13. The trial date was not known at the time of
     14. the bail hearing, but that would almost
     15. inevitably always be the case. That cannot, in
     16. itself, constitute a change in circumstances in
     17. the context of bail reviews. On a review
     18. pursuant to Section 525 of the Code, one of the
     19. considerations is whether there has been
     20. inordinate delay in getting the matter to trial.
     21. Here, by the time this trial proceeds, if the
     22. accused remains detained, there will have been a
     23. period of remand time that is lengthy, and I can
     24. understand that from the perspective of the
     25. accused, this is of concern. At the same time,
     26. the time between the charge and the proposed
     27. trial date is not out of line with what can be
190. expected for a person to have a jury trial.
191. Trial dates are set based on the availability of
192. witnesses, counsel, and of the Court. It goes
193. without saying that there are modes of trial that
194. allow quicker trial dates than a jury trial
195. election. People have the right to choose to be
196. tried by a jury, but one of the consequences of
197. that choice is that there may be a longer delay
198. before trial. That is just the reality, in
199. general, in most places, I expect, but certainly
200. it is in this jurisdiction.
201. This Court is a circuit court. It sits in
202. various communities on criminal and sometimes
203. family matters. It is a generalist court that
204. has four resident judges tasked with hearing all
205. the cases that come before the Supreme Court in
206. this jurisdiction.
207. I actually expect that the time within which
208. people have a jury trial in this jurisdiction is
209. faster than in many other places. In this case,
210. the trial will be held within a year and four
211. months of the alleged events. As I said, I am
212. sure that it does seem like a very long time for
213. the person who is awaiting trial on remand and
214. probably also for witnesses, but it is far from
215. unreasonable, and, on its own, it is not the type
216. of delay that could justify release in the
217. framework of Section 525 of the Code.
218. Submissions were made about the remand time
219. and the credit it would correspond to in the
220. event of conviction. Again, I understand the
221. argument, but this is not a situation where even
222. enhanced credit is beyond the range of sentence
223. that could be expected to be imposed if the
224. accused is convicted after trial, considering the
225. nature of the allegations and the extensive
226. criminal record which includes two directly
227. related convictions.
228. The results of the DNA testing were not
229. known at the time of the initial bail hearing.
230. Now they are known, and they are not helpful to
231. the Crown. But those results, as well as the
232. comments made by defence counsel at the hearing,
233. about the fact that all the witnesses to be
234. called at this trial were consuming alcohol at
235. the time of the events, all of that goes to the
236. strength of the Crown's case, which is a more
237. directly relevant and compelling factor under the
238. tertiary ground. The strength of the Crown's
239. case is not completely irrelevant to the
240. secondary ground, but in this case, it was not
241. the primary consideration of the justice of the
242. peace in addressing public safety concerns.
243. As for the release plan, there is no
     1. question it is different, and perhaps that
     2. constitutes a change in circumstances, but I am
     3. not convinced that it is a change of
     4. circumstances that actually assists the accused.
     5. It does seem that the cabin where it is proposed
     6. he would stay is available to him indefinitely;
     7. whereas, the proposed surety at the bail hearing,
     8. the original bail hearing, candidly acknowledged
     9. that many people lived in this house and that he
     10. could make a bedroom available to the accused
     11. "for a period of time". That left some questions
     12. at the time as to how long that room would be
     13. available to the accused. However, this was not
     14. something that appears to have influenced the
     15. justice of the peace's decision at the original
     16. bail hearing.
     17. There is not a lot of evidence before me
     18. about the person who is being proposed as a
     19. surety now. He has signed an acknowledgement of
     20. surety form confirming that he understands what
     21. the obligations of the surety are, but there is
     22. no affidavit from him. There are very few
     23. details about the cabin where the accused would
     24. stay. All that is said is that it is halfway
     25. between the river and the house where the surety
     26. resides.
     27. I find that in some respects, this plan is
         1. weaker than the one proposed initially as far as
         2. the level of supervision that the surety could be
         3. expected to provide. The accused would live in
         4. the cabin, not with the surety. The plan
         5. contemplates, therefore, less immediate
         6. supervision than the plan that was presented at
         7. the initial hearing, and the absence of details
         8. about the exact location of the cabin, its
         9. distance from the house where the surety lives,
         10. makes assessing whether there could be meaningful
         11. supervision even more difficult.
         12. I already mentioned aspects of the accused's
         13. criminal record. It is a very extensive record.
         14. He has been convicted numerous times for failing
         15. to appear in court. He has been convicted for
         16. escaping lawful custody, and he has numerous
         17. other convictions for failing to comply with
         18. court orders. He also has related convictions:
         19. one for sexual assault and one for break and
         20. enter and commit sexual assault. Although the
         21. justice of the peace referred to it as a break
         22. and enter with intent, the record has it as a
         23. break and enter and commit sexual assault, and
         24. that is relevant to the secondary ground.
         25. Courts always have to be cautious not to
         26. allow such a criminal record to overtake the
         27. entire analysis, but at the same time, a criminal
244. record like this one cannot be overlooked either.
245. It raises significant concerns under the primary
246. and secondary grounds.
247. In my view, the plan being proposed now is
248. not as strong in terms of supervision as the one
249. that failed to persuade the justice of the peace
250. at the original bail hearing. It does not
251. alleviate the primary and secondary ground
252. concerns, nor do the changes in circumstances
253. that the defence relies on.
254. For those reasons, the application for
255. release is dismissed, and detention will
256. continue.

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15 PROCEEDINGS ADJOURNED

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1 CERTIFICATE OF TRANSCRIPT:

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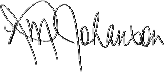
1. I, Roxanne M. Johanson, certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Calgary, Province of
7. Alberta, this 3rd day of August 2018.

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

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