

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

DARREN KOE

Transcript of the Bail Review held before the Honourable Chief Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 1st day of September, 2020.

APPEARANCES:

B. Wun: Counsel for the Crown
P. Falvo: Counsel for the Defence

Charge under s. 267 (b) of the *Criminal Code*

There is a ban on the publication, broadcast or transmission of the evidence taken, the information given or the representations made and the reasons for decision until such time as the trial has concluded pursuant to s. 517 of the *Criminal Code*.

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1 **(VIDEOCONFERENCE COMMENCES)**

2 **THE CLERK:** All rise. These sittings of the Supreme
3 Court of the Northwest Territories are now in session.
4 The Honourable Justice Charbonneau presiding.
5 Please be seated.

6 **THE COURT:** Good afternoon, counsel. Good
7 afternoon, Mr. Koe. Mr. Falvo, I see that two transcripts
8 have now been filed, One of what looks like it was an
9 interim appearance on the 27th of April, 2020, before
10 Justice of the Peace Guigon and then the transcript of
11 the substantive show cause hearing that took place
12 before Justice of the Peace Wharton.

13 So I have reviewed those two transcripts.
14 I have also reviewed Mr. Koe's affidavit. So just before
15 we start, I thought I would ask just a few questions, a
16 few housekeeping questions.

17 First of all, is the Crown essentially
18 relying on the same allegations as the ones that were
19 put before Justice of the Peace Wharton? Because if
20 that is the case, they are on the record and I do not
21 really see a need for them to be stated again unless
22 you want to.

23 **B. WUN:** It's the same allegations.

24 **THE COURT:** All right. And I will make sure that I have
25 everything right in terms of the pending charges
26 because on this Supreme Court file the only Information
27 I have is the -- the only charge that is before me is the

1 Territorial Court file 2019-1261. So that is the one that
2 is the assault causing bodily harm charge?

3 B. WUN: Yes.

4 THE COURT: So the other Informations, Territorial
5 Court Informations, are not on the Supreme Court file,
6 but the various breaches and other incidents are
7 referred to in the show cause hearing transcript. So I
8 think I have the complete picture, but I just wanted you
9 to be aware that that is the only file that is before me
10 today.

11 B. WUN: Yes, Your Honour. And my friend filed the --
12 Mr. Koe's affidavit. In that affidavit Exhibit A is the
13 criminal record.

14 THE COURT: Yes.

15 B. WUN: That criminal record is slightly outdated. It
16 doesn't include the breaches that are referred to in the
17 transcript and in his affidavit. So I do have the updated
18 criminal record. I would like to file that now.

19 THE COURT: You agree that that is a full record,
20 Mr. Falvo?

21 P. FALVO: Yes. Mr. Wun pointed out the error in the
22 affidavit because it was the record that had been
23 disclosed, but it wasn't updated to subsequent events.

24 THE COURT: Yes.

25 P. FALVO: So he has shown me the document that
26 he's about to tender, and it's agreed that there was a
27 sentencing on June 10 before Chief Judge Gorin.

1 There were 75 days of sentence at that time; as well an
2 outstanding conditional sentence was deemed to be
3 served and was disposed of on that date.

4 THE COURT: So June 10th, you say 75 days custody
5 and then the conditional sentence which had previously
6 been suspended was deemed served?

7 B. WUN: Yes.

8 THE COURT: So that is no longer pending?

9 P. FALVO: Yes.

10 THE COURT: Okay. So let's mark that, then, as
11 Exhibit A on the bail review, which will be the complete
12 criminal record.

13 **EXHIBIT A: UPDATED CRIMINAL RECORD OF D. KOE**

14 THE COURT: Thank you for clarifying that. The second
15 or third question I wanted to ask is whether the Crown -
16 - just for the record, the Crown is still opposing release?

17 B. WUN: Yes.

18 THE COURT: And is the Crown still opposing release
19 only on the secondary ground?

20 B. WUN: On the secondary ground.

21 THE COURT: All right. My last question for you,
22 Mr. Wun, is was it your intention today to seek to cross-
23 examine Mr. Koe on his affidavit, or are you content to
24 just rely on submissions?

25 B. WUN: I'm content to simply rely on submissions,
26 Your Honour.

27 THE COURT: All right. Is there any other evidence you

1 wish to adduce on the bail hearing?

2 B. WUN: No.

3 THE COURT: Mr. Falvo, aside from your client's
4 affidavit and now this updated criminal record, is there
5 any other evidence that you want to bring forward at the
6 bail review?

7 P. FALVO: Evidence, no, Your Honour.

8 THE COURT: All right. So this is a reverse onus, as I
9 understand. It was a reverse onus initially. We are on
10 a 525 review. I am not sure the onus matters that
11 much, in any event, and I say that because even on a
12 reverse onus I do find that ultimately the issue is
13 whether detention is necessary, and it might affect who
14 speaks first.

15 I do not have a particular -- I do not think
16 much rides on that, but had you discussed who would
17 go first on the submissions? I am willing to go either
18 way. I would turn to you, Mr. Falvo, unless you have
19 agreed otherwise, but ...

20 P. FALVO: I mean -- that's fine --

21 THE COURT: You get the right of reply if you go first,
22 so I suppose that ...

23 P. FALVO: Thank you.

24 **SUBMISSIONS BY. P. FALVO:**

25 The Court has the recording of the bail
26 hearing as well as the affidavit, and in one sense little
27 has changed in terms of release plan. Mr. Koe is, as

1 the affidavit says, proposing to go and live in Inuvik
2 where there is a geographical separation from the
3 complainant.

4 What I would point out to the Court is the
5 circumstances that he found himself in were very
6 difficult for him. It was his first time away from home.
7 He has very close family ties. There are some
8 cognitive challenges, and it is difficult for him where it's
9 not a voluntary absence from home.

10 He was on conditions to live in Inuvik and
11 not the easiest situation because he was living there
12 with an ex-partner under the same roof. So that
13 became challenging for him at times and as stated in
14 the affidavit, he simply found himself very homesick.

15 The delay was lengthened by the public
16 health emergency, and so a matter that might have
17 been resolved by now instead stretched out, and so by
18 the end of April he'd been for some months away from
19 his community, away from his family and supports, and
20 he was finding that very difficult. And that led to the
21 breaches that he ultimately took responsibility for. But
22 I'm making these submissions just on the moral
23 culpability for the situation that he was in.

24 There are no fresh allegations with
25 respect to the complainant of the original allegations,
26 which is what is left outstanding. He has the trial that is
27 upcoming. It is scheduled for later this month in Fort

1 McPherson. In theory that could go ahead on
2 September 23rd and he could have a resolution one
3 way or the other, so it may not be a big gap between
4 today and the ultimate resolution, but that's if it goes
5 ahead.

6 I don't know -- obviously I can't say if it
7 will go ahead on September 23rd. It -- there's nothing to
8 indicate to me that it won't, but courts have been
9 backed up because of the public health emergency. I
10 understand there's a reluctant complainant in this
11 matter. And if for some reason the matter didn't go
12 ahead on September 23rd, it could be a much longer
13 wait for Mr. Koe.

14 So he is seeking release and reaffirms
15 that he will abide by the conditions of release and
16 reside in Inuvik geographically separated from the
17 complainant. Thank you.

18 THE COURT: Mr. Falvo, I just want to make sure I have
19 details of the release plan, that I understand the release
20 plan correctly. In his affidavit, it says at paragraph 10
21 "he proposes to reside in Inuvik with friends." So that
22 gives an address; it does not really name the friends.

23 You say this is the same plan as the one
24 that was proposed to Justice of the Peace Wharton
25 effectively?

26 P. FALVO: Essentially.

27 THE COURT: And is there -- I read the transcript after it

1 came to my attention yesterday, but were there any
2 more details than that in the description of the release
3 plan before Justice of the Peace Wharton? I mean,
4 there were the series of questions of what he was
5 prepared to -- conditions he was prepared to comply
6 with. But I just ...

7 What I am getting at is, I guess, were
8 there specific individuals referred to as being these
9 people he would live with? Because, I mean, I read
10 about the earlier situation, which was the common-law,
11 and maybe I misunderstood, but I thought the
12 suggestion was that that is where he would go back
13 and stay. And so if that is the case, the release plan
14 proposed today is not the same as the one that was
15 before Justice of the Peace Wharton.

16 So I just want to make sure I am clear on
17 that. I thought that when he was before JP Wharton
18 the suggestion was that he return to the same
19 conditions that he had been on before, which is the
20 situation you have described, the ex-common-law, the
21 spouse.

22 P. FALVO: Yes. And that is what is being proposed
23 here today.

24 THE COURT: All right. So it is the same housing?

25 P. FALVO: Yes. Same housing, yes.

26 THE COURT: Oh, okay. Because it says "friends."
27 Okay. So it is the same house.

1 P. FALVO: Yes.

2 THE COURT: I understand. And the circumstances
3 you have described as somewhat difficult or
4 challenging for him.

5 P. FALVO: Yes. And I said that only in referring to his
6 moral culpability for the subsequent offences against
7 the administration of justice. But he was finding it a
8 challenge, and so I suppose it is ironic to then ask to go
9 back to it, but he doesn't have other options.

10 THE COURT: I see. Now, my other question that I
11 wanted to ask you is, so since the 29th of April, since he
12 was ordered detained, is it the case that when he was
13 sentenced in June, the time he had already spent in
14 custody plus whatever was left of the conditional
15 sentence, that all went into the sentence that was
16 imposed on the 10th of June such that the remand, the
17 pre-trial custody attributable to this remaining charge, is
18 the pre-trial custody since June the 10th? Am I
19 understanding that correctly?

20 P. FALVO: Yes. Subject to Mr. Wun correcting me, it
21 was a time-served situation on June the 10th.

22 THE COURT: Well, it says "45 days consecutive,
23 30 days concurrent." But what I mean is was there --
24 because often on these CPIC printouts we see the
25 bracket, "(credit given for x-number of days)". And in
26 fact, it is the law that it should be reflected on the
27 Information, and I do not have those Informations here

1 before me.

2 But I guess what I am getting at is I
3 imagine if he was being sentenced, there must have
4 been a request or there must have been consideration
5 of the time between April 29th and June the 10th. That
6 must have been taken into account in arriving at that
7 sentence.

8 P. FALVO: Yes. That was my recollection, that it was
9 used up.

10 THE COURT: Okay.

11 P. FALVO: 'Til the June 10th point and so that he has
12 been earning pre-trial custody since.

13 THE COURT: So since June 10th, the only pre-trial
14 custody between -- since his original detention and
15 between then and today is since June the 10th.

16 P. FALVO: Yes.

17 B. WUN: I'm sorry, Your Honour. Perhaps I can jump in
18 here.

19 THE COURT: Sure.

20 B. WUN: About the remand time. On June 10th the
21 Territorial Court determined that the CSO that was
22 outstanding, the time was deemed "time served" using
23 a portion of the remand time accumulated since that
24 point. And on that day an additional 75 days of custody
25 was imposed for the various breaches that Your
26 Honour sees on the criminal record.

27 THE COURT: But how do you get to 75 days? I see

1 45 days consecutive, 30 days concurrent.

2 B. WUN: Yes. So --

3 THE COURT: So that's --

4 B. WUN: On the last page on the PROS.

5 THE COURT: Yes.

6 B. WUN: There are additional offences.

7 THE COURT: Oh, and the disposition -- okay. I always

8 get confused because the disposition shows after. So

9 on that I see 30 days concurrent, so we are still

10 concurrent. And I see 30 days custody in bigger font.

11 It does not say "consecutive." You are telling me that

12 was consecutive?

13 B. WUN: That's consecutive. And I know that because

14 I have the warrant of committal.

15 THE COURT: Okay. So then, that means that 75 days

16 -- so he is actually serving; he has been serving since

17 June the 10th that sentence?

18 B. WUN: June -- yes. So on June the 10th it was a total

19 sentence of 75 days custody less 1.5 days of credit

20 because 1.5 days was what was remaining after his

21 CSO was deemed served.

22 THE COURT: So 73 and a half days starting in June.

23 B. WUN: Starting June 10th. So I think by my

24 calculation he should have been out end of July. So he

25 would have been on remand for this charge end of July

26 beginning of August.

27 THE COURT: All right. That is helpful. It is just that

1 there is a lot of files. So thank you for chiming in. Is
2 there anything else you wanted to say, Mr. Falvo?

3 P. FALVO: No, and I'm sorry if my understanding of the
4 sentence was incorrect.

5 THE COURT: That is all right. I mean, there were a lot
6 of different charges and a lot of different things
7 happening. So that is why I am asking the question; I
8 want to make sure I had it straight.

9 All right. Mr. Wun, submissions?

10 B. WUN: Your Honour, I just want to make sure the
11 Court is clear. With respect to the allegations, I think at
12 the bail hearing my colleague said it was suspected
13 that the complainant Ms. Koe had a fractured jaw or
14 they thought maybe she did. So since that time, she
15 does.

16 THE COURT: I think that I saw that.

17 B. WUN: Yes, it's --

18 THE COURT: At page 7 it says at lines 14, 15
19 "ultimately it was determined" --

20 B. WUN: Yes.

21 THE COURT: -- "that her jaw was fractured."

22 B. WUN: Perfect. Yes.

23 THE COURT: So that is what I thought the allegation
24 was.

25 B. WUN: Yes. Yes. Those are the allegations.
26 Perfect. Okay.

27

1 **SUBMISSIONS BY B. WUN:**

2 Your Honour, I think perhaps -- this was
3 canvassed during the transcript, but I think it might be
4 helpful to actually set out what the procedural history is
5 on the bail. That's how I'd like to begin my
6 submissions.

7 And this is from page 25 to 27 of the
8 transcript. Mr. Koe was initially released on a
9 recognizance as it then existed on August 1, 2019. It is
10 now called a "release order," but at that time he was
11 sent to live in Yellowknife. And then nothing happened
12 for awhile until April 6th of 2020, when he found in
13 breach of that recognizance by being in Fort
14 McPherson, and that was one of the conditions, that he
15 not be in Fort McPherson.

16 So at that point he was released. So he
17 was arrested on the same day and then released on
18 essentially the same conditions, not to be in Fort
19 McPherson. And then on the 24th there is another
20 breach for the same condition not to be in Fort
21 McPherson. And then he was arrested on the same
22 day and then released on the 25th on a release order.

23 So now we're at April 25, 2020. And then
24 this is the part where it might be a little bit confusing.
25 There is another breach and the flight from police on
26 the same day. That's because the release happened
27 some time, I believe, in the morning or early afternoon,

1 and then the offence of breach and -- breach of a
2 curfew and flight from police happened at night or
3 leading into April 26. So that's how that happened.

4 And then he was arrested, of course, in --
5 immediately in the early morning hours of the 26th and
6 then had his bail hearing before JP Wharton on the 29th
7 where he was detained on secondary ground.

8 So that's the history. The -- Mr. Koe's
9 affidavit gives some explanation of what happened
10 there. The explanation he gave is that he felt
11 homesick, that was the first time he was away from
12 home and that's echoed in my friend's submissions as
13 well. But I think that explanation needs to be weighed
14 against the procedural history here. Perhaps that might
15 make sense to explain -- not to excuse, but to explain
16 what happened on April 6th.

17 But he was released on the same day,
18 likely because he -- there had been no breach for a
19 long time. So he was released on the same day with
20 the same conditions, but then he breached shortly after
21 the same condition not to be in Fort McPherson. And
22 then he was released again on the 25th.

23 So when we weigh that history together
24 with that explanation it starts to not make sense. The
25 warning was April 6th when he was arrested in breach
26 and then obviously, he would have been told, you're in
27 breach; don't do this; you need to leave. And then --

1 but then he was released. So he was given a chance.
2 So at that point it should have been clear to Mr. Koe
3 that even though he might feel homesick, it's not
4 acceptable to be in breach of his conditions, and that
5 was the warning, that should have triggered something
6 to say, you need to obey these orders.

7 But unfortunately, what we see
8 afterwards is a continued pattern of breach, and I think
9 it's helpful to look at JP Wharton's decision found on
10 page 29 to 30. The rationale that His Worship gave is
11 very simple. His Worship looked at the criminal record
12 for violence and particularly for many offences against
13 the administration of justice, including at the time what
14 was an allegation of new breaches but also flight from
15 police, which His Worship characterized as an offence
16 against the administration of justice. It showed a lack of
17 respect for authority, I believe were JP Wharton's
18 words.

19 And so the Court's conclusion at that time
20 was that this is not -- the Court can't have confidence in
21 Mr. Koe to abide by conditions, and that finding was
22 based on that criminal record and the allegations at the
23 time.

24 On the 525 review it's not a *de novo*
25 hearing. The question, as Your Honour rightly pointed
26 out, is whether detention continues to be justified. And
27 in guiding the Court's analysis, there are a couple

1 things to look at. First is whether there has been any
2 unreasonable delay.

3 Now, Mr. Koe's affidavit talks about how
4 the proceedings have been delayed because of the
5 pandemic. That is partially true. But I think we need to
6 actually look at the various trial dates that were set on
7 this matter. Now, I'm not sure what the Court actually
8 has on one of these 525 reviews.

9 THE COURT: Well, as I say, I have the Territorial Court
10 Information, so there is a long series of endorsements
11 but even at the bail hearing, there was reference and I
12 think it was the Crown that set out the procedural
13 history of one adjournment because of the late
14 disclosure of an alibi defence and the second
15 adjournment because of, through no fault of Mr. Koe,
16 the new defence lawyer –

17 B. WUN: Yes.

18 THE COURT: -- was not prepared to proceed. But -- so
19 I am aware that there were two times where the Crown
20 was ready to go with the witness there and matters
21 were adjourned.

22 B. WUN: Yes.

23 THE COURT: Not because of the Crown.

24 B. WUN: Yes. So there were prior trial dates that had
25 nothing to do with the pandemic. Those were
26 adjourned for the reasons that Your Honour indicated
27 and, in my friend's submissions, my friend talked about

1 the possibility of a reluctant complainant, but I would
2 note that on the first two trial dates, September 11,
3 2019, and January 22, 2020 -- this is contained in the
4 transcript -- the Crown witnesses were there and ready
5 to go. The March 19 trial date was adjourned because
6 of the pandemic, and then upcoming is the fourth trial
7 date on September 23rd.

8 So I don't think anyone can say whether
9 the complainant is absolutely going to show up or not
10 going to show up; we don't know that. We can only
11 look at past history to see her compliance with the
12 subpoenas to make an inference in the circumstances.
13 And the past history shows that she does show up in
14 response to a subpoena when the trial date is set.

15 Another factor to look at, Your Honour, is
16 whether there is any material change in circumstances
17 and, in the Crown's view, there is no material change in
18 circumstances. The only thing that has changed
19 actually weighs in the Crown's favour. At the time of
20 the bail hearing on April 29, JP Wharton, His Worship,
21 was dealing with the substantive allegation and then
22 allegations of breach. And of course, Mr. Koe at the
23 time was presumed innocent of those charges.

24 But since that time what's happened is
25 Mr. Koe has pled guilty to those breaches, so he's no
26 longer presumed innocent of those. So in terms of the
27 risk assessment under the secondary ground, and to

1 understand JP Wharton's finding of whether or not
2 Mr. Koe would comply with court orders and the risk he
3 presents under the secondary ground, that risk has only
4 intensified. Because those allegations are now
5 convictions.

6 In terms of the release plan that has been
7 proposed, it's the same -- very much the same plan.
8 And so if the rationale behind why Mr. Koe breached in
9 the first place was because he was homesick, it was
10 the first time he was away from home, nothing really
11 has changed. There's nothing in the plan that would
12 increase the confidence of this Court that he is now
13 prepared to comply with these conditions.

14 And of course, that has to be weighed
15 against his criminal record, which as the bail court
16 observed and the Crown also observes, it's lengthy with
17 many entries for breaches, offences against the
18 administration of justice and for violent offences similar
19 to what Mr. Koe is being charged with now.

20 One of the factors in *Myers* that the Court
21 talks about is the proportionality of detention. And Your
22 Honour asked questions I think that's related to this
23 point. It's -- the question is whether the certain loss of
24 Mr. Koe's liberty is proportionate when weighed against
25 the factors justifying his detention.

26 Now, because of what happened on
27 June 10th, his remand time has since been depleted to

1 satisfy other sentences or to satisfy his CSO breach
2 that was outstanding at the time and is no longer
3 pending. So he's only been accumulating remand time
4 since the beginning of August, possibly the end of July,
5 around that time. So he's actually been in remand for a
6 relatively short period of time for these charges.

7 Looking at what the allegations are in
8 their totality, looking at his criminal record, Mr. Koe is
9 not in a situation where he would be in a time-served
10 position, and so there might be a risk of inducing a
11 guilty plea. That's something that *Myers* discusses.
12 That's not the situation that Mr. Koe faces now.

13 And in *Myers*, Your Honour, when the
14 Court discusses the nature of a 525 review there is
15 discussion that a review is not a *de novo* hearing, so
16 the reviewing court should have some deference for the
17 findings of fact of the initial first level decision major.
18 And in this case there's no change here; there --
19 nothing has happened that might cause the Court to
20 reconsider the weighing of the factors that the first level
21 decision-maker has made. There's no unreasonable
22 delay; there's no change in circumstances; there's no
23 change in the nature of the case. And if anything, it's --
24 there's more breaches now appearing on Mr. Koe's
25 record.

26 So for all of those reasons, Your Honour,
27 I would suggest that detention continues to be justified,

1 as it was justified on April 29th and continues to be
2 justified today on September 1st. His trial is upcoming
3 September 23rd in Fort McPherson. It's three weeks
4 away. There's no unreasonable delay. This is not a
5 situation where he's languishing in custody without
6 hope of a trial date. That's not the situation here.

7 So subject to the Court's questions, that's
8 what the Crown's position is.

9 THE COURT: I just want to look at something here.
10 Just because it is important sometimes -- in some case
11 it would make a difference. Because you are talking
12 about detention being justified, and I am just looking ...
13 Yes, so section 515, paragraph 10, paragraph B, which
14 deals with the secondary ground talks about the
15 detention being "necessary."

16 So, I mean, "necessary" is -- to my mind,
17 it is stronger than "justified." So I just want to be clear
18 on that. You are not -- we agree on that.

19 B. WUN: Oh, yes. Absolutely. Yes, yes, yes.

20 THE COURT: Yes? Okay. Because you have used
21 the -- sometimes the test is justified and "justified" is a
22 different thing than "necessary," I think, so I do not have
23 any more questions. Mr. Falvo, is there anything else
24 you want to say in reply or otherwise?

25 **REPLY BY. P. FALVO:**

26 Your Honour, the prosecutor is correct; it
27 changed since the previous appearance that

1 allegations have now become convictions. But it could
2 also be argued that that lessens the risk in the sense
3 that he's no longer a flight risk on those allegations.

4 But in any event, the prosecutor is
5 academically correct on many points. It's just a difficult
6 personal situation that Mr. Koe was in; for somebody
7 with his aptitudes and experiences and background, it's
8 being asked to be outside of Fort McPherson was
9 perhaps like being asked to be outside the planet earth;
10 it was just very difficult for him on a personal level, and
11 that's what he was struggling with. Thank you.

12 THE COURT: Thank you. Well, Mr. Koe is before this
13 Court by operation of section 525 of the *Criminal Code*,
14 which mandates that detention be reviewed within
15 certain time frames. And the legal framework that
16 applies to a hearing under section 525 of the *Criminal*
17 *Code* is the legal framework that was laid out in *R. v.*
18 *Myers* by the Supreme Court of Canada.

19 And without quoting at length from it, I
20 think there were some important aspects of the case
21 that have to be borne in mind, including some that were
22 mentioned during the submissions.

23 One of the things that has to be
24 considered, and it is the reason for section 525 existing,
25 is delay in the proceedings. The purpose of this
26 provision is to ensure that people do not linger in
27 custody for inappropriate periods of time while awaiting

1 trial. So the impact of the passage of time and delay is
2 a consideration in a hearing like this. And this is talked
3 about in *Myers* at paragraphs 50 and following.

4 But the Supreme Court also warns
5 reviewing judges to be careful about two things: one,
6 not to simply rubberstamp what happened at the first
7 hearing but also show some deference and some
8 consideration to the decision made at the earlier
9 hearing, especially if nothing has changed.

10 It seems fairly clear from the decision of
11 Justice of the Peace Wharton that -- and this is how I
12 read his decision; he was receptive to the position that
13 is being advanced today, which is that it was difficult for
14 Mr. Koe to be away from Fort McPherson and all these
15 subsequent charges about not complying with the
16 condition to stay away from Fort McPherson were not
17 in and of themselves a reason to detain him.

18 But Justice of the Peace Wharton said in
19 his decision that he was concerned about the extensive
20 criminal record for violence that Mr. Koe has, which is
21 of concern on the secondary ground when the present
22 allegations are quite serious. He is alleged to have
23 punched his niece twice and broken her jaw. That is
24 not a minor assault.

25 In his decision Justice of the Peace
26 Wharton said:

27 The crux of the previous release that you must

1 leave the said community within 24 hours of
2 your court appearance has nothing to do with
3 the charge of failing to stop for a vehicle that is
4 being pursued by a police officer. To me, that
5 shows a lack of respect to the administration of
6 justice. If that charge was not there, this would
7 be a harder decision for me, and I would lean
8 towards release. But that charge with the
9 charges I have in front of me and with the
10 criminal record convictions draws me to the
11 conclusion that I found the accused failed to
12 show cause.

13 And I am in a similar situation. First, I think it needs to
14 be said -- and Mr. Falvo is not arguing otherwise --
15 there is no error, misapprehension of evidence or error
16 in law in Justice of the Peace Wharton's decision. So
17 there is nothing really there for me to say, well, this is
18 something that was overemphasized or not treated
19 properly.

20 There is also no change in circumstances
21 as far as the release plan. Whatever difficulties that
22 presented in the past would still be present.

23 There has been passage of time but most
24 of the time Mr. Koe spent in custody since April 2020
25 has now been taken into account in sentencing and
26 time served on other charges. So the only real change
27 in circumstances is that various things that were merely

1 allegations at the time of the show cause hearing are
2 now convictions, including the one charge that caused
3 Justice of the Peace Wharton the most concern.

4 I understand that there is never certainty
5 as to when a trial will proceed, but this one is scheduled
6 to proceed later this month. If it does proceed and if
7 there were to be a conviction, I do not think the
8 proportionality concern that is discussed in *Myers*
9 would arise. Obviously, if the trial proceeds and Mr.
10 Koe is found not guilty, then it is a fact that he will have
11 spent time in custody for something that he ultimately is
12 not convicted of. That is always unfortunate, but it is
13 always a possibility when someone is detained pending
14 trial.

15 If the trial does not proceed for whatever
16 reason and is delayed further, then it would be open to
17 him to bring a review application based on that as a
18 change in circumstances.

19 I do not think I can speculate about the
20 Crown's case at this point. The facts are simply that
21 this has been set for trial three times. The first time it
22 did not proceed because of a late disclosure of an alibi.
23 The second time it did not proceed because defence
24 counsel was not prepared to proceed. And the third
25 time the trial was cancelled because of the COVID
26 pandemic, which is an exceptional situation that has
27 had to be contended with not just here but all over the

1 world.

2 In summary for now, I do not think it can
3 be said that the delay is unreasonable. I do not think it
4 can be said that the period of time that Mr. Koe will
5 have spent on remand is disproportionate to the
6 sentence he could receive if convicted. There is no
7 change in his proposed release plan.

8 And so really, looking at all these factors
9 together, I simply do not think there is a basis to
10 exercise my discretion under section 525 to release
11 him.

12 That does not mean, of course, that
13 Mr. Koe will be without recourse if his trial does not
14 proceed. He will be at liberty to apply to this Court for
15 review, pursuant to section 520 and make the case
16 then that the passage of time is becoming a larger
17 concern.

18 Mr. Koe, despite his extensive criminal
19 record, was released initially on this charge. That is
20 important to remember. He has a very lengthy criminal
21 record and yet he was released on a further allegation
22 of crime of violence on certain conditions. And he was
23 released again and again despite several breaches.

24 So his constitutional right to reasonable
25 bail and the presumption of innocence on this charge
26 were honoured and taken into account very seriously,
27 evidently, because he was granted release several

1 times.

2 There comes a point where it becomes
3 difficult to be satisfied that the public can be protected
4 on the terms of release if he continually breaches them.
5 And I must say I agree with Justice of the Peace
6 Wharton that if the reason he kept breaching was his
7 difficulty staying away from Fort McPherson, that does
8 not explain his behaviour trying to evade police the last
9 time he was found in breach. And it suggests that there
10 is an issue here with respect for court orders and the
11 administration of justice in general.

12 The reason why that is relevant in this
13 context is that when someone is released on their
14 promise to the Court, it has to be based on some level
15 of confidence that they will do what they promised.

16 For those reasons I am denying the
17 application.

18 In accordance with our usual procedure, I
19 will order a transcript of my reasons. I will have to edit
20 it because I gave this decision immediately after
21 submissions, but it will be filed and it will be available if
22 and when another judge is asked to reconsider this if
23 the trial does not actually proceed.

24 So I would ask that this transcript be
25 ordered on an expedited basis, Mr. Clerk, because if,
26 as I say, the trial does not proceed, it may well be that
27 Mr. Koe has a stronger case depending on when it is

1 rescheduled for and depending on the reasons why it
2 does not proceed. But I would trust that the Crown
3 would do its utmost to ensure that it proceeds. Is it
4 peremptory on the Crown?

5 B. WUN: No.

6 THE COURT: It is not? Well, it is not for me to decide,
7 but I think this is one that really should proceed next
8 time barring very exceptional circumstances.

9 It is not for me to issue a remand warrant
10 on a Territorial Court file so presumably that has
11 already been looked after, but you might want to look
12 into that Mr. Wun.

13 B. WUN: Yes.

14 THE COURT: Thank you for your submissions,
15 counsel. We will close court.

16 THE CLERK: All rise. I declare the Supreme Court
17 closed.

18 **(VIDEOCONFERENCE CONCLUDES)**

19

20 **(PROCEEDINGS ADJOURNED TO SEPTEMBER 23, 2020,**
21 **YELLOWKNIFE)**

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1 **CERTIFICATE OF TRANSCRIPT**

2 Neesons, the undersigned, hereby certify that the foregoing
3 pages are a complete and accurate transcript of the
4 proceedings transcribed from the audio recording to the best
5 of our skill and ability. Judicial amendments have been
6 applied to this transcript.

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9 Dated at the City of Toronto, in the Province of Ontario, this
10 8th day of September, 2020.

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Kim Neeson

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Principal

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